

**UNILATERAL IMPLEMENTATION OF DUTIES
ARISING FROM COLLECTIVE NORMS BY STATES:
THEORY, PRACTICE, & RECONSTRUCTION**

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Gemmo Bautista Fernandez

*For Nemo,
May you grow up in a kinder world.*

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ABSTRACT

The question of whether states, without being directly affected, may implement duties imposed by collective norms has long persisted in international law. The ‘traditional’ or synallagmatic view of legal relations posits that there is an ‘exact correlation’ between a right one holds and a duty borne by another. Under this view, only ‘injured’ states, those whose rights are infringed, may implement responsibility. Yet, contemporary scholarship considers this problematic as states even if not ‘directly affected’ have an interest in these duties’ fulfilment.

The International Court of Justice, in the 1970 *Barcelona Traction* decision, recognised the existence of duties owed *erga omnes* or those that ‘concern all states’ and in which all states ‘have a legal interest’. Most view this as an endorsement of the non-synallagmatic view of legal relations which submits that duties imposed by collective norms are fulfilled towards an international community. This view influenced the International Law Commission’s work on the 2001 Draft Articles of State Responsibility. The Commission, in a ‘progressive measure’, recognised the existence of ‘states other than an injured state’. These states do not possess rights that correlate to duties owed *erga omnes* as it is the community which is the duty’s beneficiary. What they have is a ‘legal interest’ as a member of the community in these duties’ observance. This interest permits all states, even those not ‘directly affected’, to implement responsibility on behalf of the community should a duty owed *erga omnes* be breached. Such measures of implementation include those of a ‘relatively formal character’ like the resort to judicial dispute resolution. However, due to states’ divergent views, their competence to enforce duties owed *erga omnes* via countermeasures was left to international law’s ‘further development’.

This thesis examines if states have accepted the rules under the 2001 Draft Article on the implementation of duties owed *erga omnes* by ‘states other than an injured state’ whether through judicial dispute resolution or unilateral measures. Given the instances in which states have claimed or objected to this prerogative, determining whether international law recognises this competence sheds light on the lawfulness of these instances of implementation. This thesis also analyses the premises of these rules and determines if they reflect present the international order’s realities and limitations. As a normative system, international law is deeply influenced by the structures of the order that it seeks to govern. Thus, rules develop only insofar as the order’s structures can accommodate them. If they are to ‘serve social needs’, not only must they be responsive to the demands of the group that they serve, they must also reflect the legal systems’ ‘sociological reality’.

Part I, through doctrinal analysis and historical tracing, examines the rules as articulated under the 2001 Draft Articles and their premises. Next, *Part II*, via an empirical and qualitative examination, determines if state practice and *opinio juris* support the ILC’s conclusions under the 2001 Draft Articles on the implementation of duties owed *erga omnes* and if states have accepted as law the competence of ‘states other than an injured state’ to implement these duties. Finally, *Part III* through fundamental and theoretical examination, determines if the present rules’ premises reflect the international order’s realities and limitations. It offers an alternative framework based on the synallagmatic approach. This posits that duties owed *erga omnes* correlate to every state’s individual right. In case of breach, every state may be deemed ‘injured’ and may implement responsibility. This approach does not require the recourse to the existence of an ‘international community’ to whom duties may be owed and on whose behalf states may act. Nor does it require the international legal system’s public law construction.

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TABLE OF ABBREVIATIONS

§ / §§	Section / Sections
¶ / ¶¶	Paragraph / Paragraphs
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and People's Rights
ADB	Asian Development Bank
AfCtHR	African Court on Human and People's Rights
art / arts	Article / Articles
ASEAN	Association of Southeast Asian Nations
AU	African Union
BRICS	Brazil, Russia, India, China, & South Africa
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CELAC	Community of Latin American & Caribbean States
<i>cf</i>	<i>confer</i>
CFSP	EU Common Foreign & Security Policy
CHR / UNCHR	UN Commission on Human Rights
CITES	Convention on International Trade in Endangered Species of Wild Fauna & Flora
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COSIS	Commission on Small Island States
CRC	Convention on the Rights of the Child
CTS	Consolidated Treaty Series
Doc	Document
<i>e.g.</i>	<i>exempli gratia</i>
EC	European Community
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECmHR	European Commission on Human Rights
EcoSoc	UN Economic and Social Council
ECOWAS	Economic Community of West African States

ECtHR	European Court of Human Rights
ed / eds	Editor / Editors
edn	Edition
EEC	European Economic Community
EU	European Union
ff	<i>folio / et seq</i>
G20	Group of 20
G77	Group of 77
G8	Group of 8
GA / UNGA	United Nations General Assembly
GATS	General Agreement of Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	General System of Preferences
HRC / UN HRC	Human Rights Council
HRComm	Human Rights Committee
<i>i.e.</i>	<i>id est</i>
IACmHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
<i>ibid</i>	<i>ibidem</i>
ICC	International Criminal Court
ICCPR	International Covenant on Civil & Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social & Cultural Rights
ICJ	International Court of Justice
ICRW	International Convention on the Regulation of Whalin
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDL	Institut de Droit International
IGAD	Intergovernmental Authority on Development
ILC / CDI	International Law Commission / Commission du Droit international
ILO	International Labour Organisation
ILR	International Law Reports
IMF	International Monetary Fund

ITLOS	International Tribunal for the Law of the Sea
IWC	International Whaling Commission
LNTS	League of Nations Treaty Series
MERCOSUR	Southern Common Market
MFN	Most-Favoured Nation
n	Note
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organisation
NGO	Non-Government Organisation
no / nos	Number / Numbers
NPT	Non-Proliferation Treaty
NSGT	Non-Self-Governing Territories
OAPEC	Organisation of Arab Petroleum Exporting Countries
OAS	Organisation of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OIC	Organisation of Islamic Conference
OSCE	Organisation for Security & Cooperation in Europe
PCIJ	Permanent Court of International Justice
PLO	Palestinian Liberation Organisation
Rep	Report
Res	Resolution
RIAA	Reports of International Arbitral Awards
SC / UNSC	United Nations Security Council
Ser	Series
SG / UNSG	United Nations Security General
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
tran / trans	Translator / Translators
UDHR	Universal Declaration of Human Rights
UNASUR	Union of South American Nations
UNCLOS	UN Convention on the Law of the Sea
UNFCCC	UN Framework Convention on Climate Change
UNTS	United Nations Treaty Series

VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WHO	World Health Organisation
WTO	World Trade Organisation
YbILC	Yearbook of the International Law Commission

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PL 108-61, *Burmese Freedom & Democracy Act* (2003) (US)

PL 112-208, *Magnitsky Act* (2012) (US)

PL 112-82, *Belarus Democracy & Human Rights Act* (2012) (US)

PL 114-122, *North Korea Sanctions and Policy Enhancement Act* (2016) (US)

PL 114-328, *Global Magnitsky Human Rights Accountability Act* (2016) (US)

PL 116-145, *Uyghur Human Rights Policy Act* (2020) (US)

PL 117-110, *Suspending Normal Trade Relations with Russia and Belarus Act* (2022) (US)

PL 71-361, *Tariff Act* (1930) (US)

PL 92-522, *Marine Mammal Protection Act* (1972) (US)

PL 92-219, *Pelly Amendment to the 1967 Fishermen's Protective Act* (1971) (US)

PL 93-205, *Endangered Species Act* (1973) (US)

PL 95-223, *International Emergency Economic Powers Act* (1977) (US)

PL 99-440, *Comprehensive Anti-Apartheid Act* (1986) (US)

PL 65-91, *Trading with the Enemy Act* (1917) (US)

RSC 1985, c F-7, *Federal Courts Act* (1985) (CAN)

SC 1992 c 17, *Special Economic Measures Act* (1992) (CAN)

SC 2017 c 21, *Justice for Victims of Corrupt Foreign Officials Act* (2017) (CAN)

INTRODUCTION

The question of whether states, without being ‘directly affected’ by breaches of international duties, may implement the wrongful states’ responsibility, has long persisted in international law. Scholars like Grotius claimed that states may implement certain duties ‘not only on account of [harm] committed against themselves’ but also for those that ‘do not directly affect them but excessively violate the law of nature or of nations’.¹ Yet, others like Vattel argued that to allow states to take reprisals for the benefit of third states would mean ‘playing the role of the judge [...] [which] no sovereign had the [competence] to do so’.²

In 1970, the International Court of Justice (‘ICJ’) in an *obiter dictum* in the *Barcelona Traction* decision, posited the existence of duties owed *erga omnes*. The Court distinguished between norms that impose duties owed *inter se*—those owed by states ‘vis-à-vis another state’, and duties owed *erga omnes*—those owed to ‘the international community as a whole’.³ The latter pertains to duties imposed by collective norms such as those on ‘aggression and [...] genocide’ and those that concern ‘basic [human] rights’ including those on ‘slavery and racial discrimination’.⁴ For the Court, these norms, ‘by their very nature [...] are the concern of all states’.⁵ Thus, ‘in view of [their] importance’, all states ‘have a legal interest in their protection’ and impose duties owed *erga omnes*.⁶ This suggests that states, although not ‘directly affected’ by the wrongful act, may implement these duties.

The *Barcelona Traction dictum* influenced the formation of the rules on the implementation of duties arising from collective norms. It informed the International Law Commission’s (‘ILC’ or ‘Commission’) work on state responsibility,⁷ and its 2001 Draft Articles on State Responsibility (‘2001 Draft Articles’).⁸ The ILC, under 2001 Draft Article 42, adopted the

¹ Grotius Hugo, *De jure belli ac pacis*, vol book II, Kelsey Francis (tr) (Clarendon 1625), 504–6. See Heffter August Wilhelm, *Das Europäische Völkerrecht der Gegenwart* (1882), 222; Bluntschli Johann Caspar, *Das moderne Völkerrecht der civilisirten Staaten* (Beck 1878), 265; Hall William Edward, *Treatise of International Law* (Clarendon 1895), 57; Root Elihu, ‘Outlook for International Law’ (1916) 10 *American Journal of International Law* 2, 9; Jessup Philip, *The Modern Law of Nations* (Macmillan 1948), 11.

² De Vattel Emer, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, vol I (1758), ¶348. See Anzilotti Dionisio, *Teoria Generale della Responsabilità dello Stato nel diritto Internazionale*, Lumachi Florence (ed) (Firenze 1902), 88; Halleck Henry, *International Law* (D. Van Nostrand 1861), 309; Strupp Karl, *Das völkerrechtliche delikt* (Kohlhammer 1920), 16.

³ *Barcelona Traction, Light, & Power Company* (Belgium v Spain) (Judgment) [1970] ICJ 1, 32.

⁴ *Ibid*, 32, 47.

⁵ *Ibid*, 32.

⁶ *Ibid*,.

⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) II(2) YbILC 20, 117, 127.

⁸ Note that this thesis uses the term ‘2001 Draft Articles’ in view of its legal status. It recognises that these articles have had a significant impact on international law (Arcari Maurizio, ‘Future of the Articles on State

‘traditional’ view of responsibility which posits that only the state whose rights had been infringed may implement responsibility.⁹ This defines an ‘injured state’ as the state to whom the duty breached is owed, the state ‘specially affected’ by the breach, and every state under an interdependent obligation.¹⁰ These states may invoke the wrongful state’s responsibility which includes the resort to judicial dispute resolution,¹¹ or enforce such responsibility via unilateral measures including countermeasures.¹² However, in a ‘progressive measure’,¹³ the Commission also acknowledged, under 2001 Draft Article 48, the existence of ‘states other than an injured state’.¹⁴ It submitted that while these states’ rights have not been ‘injured’, they nevertheless have a legal interest in the performance or observance of duties owed *erga omnes* or *erga omnes partes*.¹⁵ This interest permits them to implement responsibility as a member of the collective to whom the duty is owed,¹⁶ and on behalf of a group of states or the international community.¹⁷ However, due to states’ divergent views, the ILC, under 2001 Draft Article 54, left the question concerning these states’ competence to enforce duties owed *erga omnes* via countermeasures to international law’s ‘further development’.¹⁸

This thesis examines whether states have accepted the competence of ‘states other than an injured state’ to implement duties owed *erga omnes*. It focuses on two particular means of implementation—invocation through judicial dispute resolution,¹⁹ and enforcement via

Responsibility’ (2022) 93 *Questions of International Law* 3, 10; Olleson Simon, ‘Virtue of Pragmatism: Reflections on the Future of the Articles of State Responsibility’ (2022) 93 *Questions of International Law* 23, 32). Yet, they arguably remain a ‘doctrinal product’ (Focarelli Carlo, ‘International Law & Third-Party Countermeasures in the Age of Global Instant Communication’ (2016) 29 *Questions of International Law* 18, 19) and are not independent source of law despite their influence (Sartipi Hossein & Hojatzadeh Ali Reza, ‘Erga-Omnisation of International Law’ (2018) 2 *International Journal of Humanities & Social Science Studies* 189, 207). Indeed, the provisions which are the subject of this thesis were deemed by the ILC as measures of ‘progressive development’ (ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 7), 114, 127).

⁹ Ago Roberto, ‘Second Report on State Responsibility’ (1970) II(1) YbILC 177, 192.

¹⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 7), 117–9.

¹¹ Ibid, 117

¹² Ibid, 129–30.

¹³ Ibid, 126–7.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.; Crawford James, ‘Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 227.

¹⁸ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 7), 139.

¹⁹ Ibid, 117; Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 541; de Wet Erika, ‘Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction’ (2013) 38 *South African Yearbook of International Law* 1, 9–10; Tams Christian, ‘Individual

unilateral measures.²⁰ This examination is important. Given the instances in which states have claimed or objected to this prerogative, determining if international law recognises this competence sheds light on the lawfulness of the implementation of duties owed *erga omnes* by ‘states other than an injured state’. This thesis also analyses these rules’ premises and determines if they reflect the present legal order’s realities and limitations. This is equally important. As a normative system, international law is a product of processes that cannot be separated from their context.²¹ As a body of rules, it is deeply influenced by the structures of the order that it seeks to govern.²² Thus, it would not be too far to claim that the rules develop only insofar as the system’s structures can accommodate them.²³ If rules are to ‘serve social needs’,²⁴ not only must they be responsive to the demands of the group that they serve,²⁵ they must also reflect the legal system’s ‘sociological reality’.²⁶

This thesis does not claim a lack of scholarship on the subject. Many have examined the concept of duties owed *erga omnes* and how it allows ‘states other than an injured state’ to

States as Guardians of Community Interests’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 383; Allain Jean, ‘Slavery & Obligations Erga Omnes’ (2019) 36 *Australian Yearbook of International Law* 85, 112; Massimiliano Montini, ‘Improving Compliance with Multilateral Environmental Agreements through Positive Measures: Kyoto Protocol’ in Kiss Alexander, *et al.* (eds), *Economic Globalisation & Compliance with International Environmental Agreements* (Kluwer 2005), 158; Weiss Edith Brown, ‘Invoking State Responsibility in the Twenty-First Century’ (2002) 96 *American Journal of International Law* 798, 800; Wellens Karel, ‘General Observations’ in Komori Teruo & Wellens Karel (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge 2016), 25.

²⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 7), 128 ff; Crawford, *State Responsibility* (n 19), 675; Hillgruber Christian, ‘Right of Third States to Take Countermeasures’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 265; Hutchinson D, ‘Solidarity & Breaches of Multilateral Treaties’ (1988) 59 *British Yearbook of International Law* 151, 157; Proulx Vincent-Joël, ‘Marshall Islands Judgements & Multilateral Disputes at the World Court’ (2017) 111 *American Journal of International Law (Unbound)* 96, 98. See Hakimi Monica, ‘Unfriendly Unilateralism’ (2014) 55 *Harvard International Law Journal* 105, 107–8, 111–5, 142.

²¹ Higgins Rosalyn, *Problems & Process: International Law & How We Use It* (Clarendon 1995), 3.

²² Crawford James, ‘Multilateral Rights & Obligations in International Law’ (2006) 319 *Recueil des Cours de l’Académie de Droit International* 325, 345. See Weil Prosper, ‘Towards Relative Normativity in International Law?’ (1983) 77(3) *American Journal of International Law* 413, 413; Lauterpacht Hersh, *Private Law Sources and Analogies of International Law* (Longmans 1927), 33, 81.

²³ Weil, ‘Towards Relative Normativity’ (n 22), 442.

²⁴ *Southwest Africa* (Ethiopia & Liberia v South Africa) (Judgment) [1966] ICJ 6, 34.

²⁵ Friedmann Wolfgang, *Changing Structure of International Law* (Columbia University Press 1964), 3. See Jouannet Emmanuelle, ‘Universalism & Imperialism: True-False Paradox of International Law?’ (2007) 18 *European Journal of International Law* 379, 387.

²⁶ Villalpando Santiago, *L’émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 200, 390. See Abi-Saab Georges, ‘Whither the International Community’ (1998) 9 *European Journal of International Law* 248, 256; Weil, ‘Towards Relative Normativity’ (n 22), 442; Higgins, *Problems & Process* (n 21), 3. See Slaughter Anne-Marie, ‘International Law & International Relations Theory: A Prospectus’ in Benvenisti Eyal & Hirsch Moshe (eds), *Impact of International Law on International Cooperation* (Cambridge University Press 2004), 17.

implement responsibility.²⁷ Several have also analysed the practice and *opinio juris* on the invocation of responsibility via judicial dispute resolution,²⁸ and enforcement through unilateral measures.²⁹ Some have also examined whether the rules on implementation reflect the international legal system's realities and limitations. This thesis contributes to the growing literature by updating the survey of practice and *opinio juris* on implementation by 'states other than an injured state', revisiting the conclusions drawn from these surveys, and re-examining whether these conclusions are in accord with the legal system's 'sociological reality'.³⁰

This thesis is divided into three parts and employs different analytical methodologies. *Part I* uses both doctrinal analysis and historical tracing. It examines the concepts related to the rules on implementation under the 2001 Draft Articles to understand its theoretical framework.³¹ Equally, it recognises that these concepts' development occurred within a historical context that

²⁷ See e.g. Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997); Annacker Claudia, 'Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131; De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996); Linderfalk Ulf, 'International Legal Hierarchy Revisited—Status of Obligations Erga Omnes' (2011) 80 *Nordic Journal of International Law* 1; Hillgruber, 'Third States & Countermeasures' (n 20); Barboza Julio, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?' in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martnus Nijhoff 2005); Linderfalk Ulf, 'International Legal Hierarchy Revisited—Status of Obligations Erga Omnes' (2011) 80 *Nordic Journal of International Law* 1; Nedeski Nataša, *Shared Obligations in International Law* (Cambridge University Press 2022); De Jesús Jose, 'Obligations Erga Omnes as Multilateral Obligations' (DPhil, University of Oxford 2012).

²⁸ See e.g. Ruys Tom, 'Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?' (2021) 20 *Chinese Journal of International Law* 457; Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1; Longobardo Marco, 'Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: the Gambia v Myanmar & Beyond' (2021) *International Community Law Review* 1.

²⁹ See e.g. Sicilianos Linos-Alexander, *Les réactions décentralisées à l'illicite: des contre-mesures la légitime défense* (Librairie générale de droit et de jurisprudence 1990); Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005); Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017); Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010); Focarelli, 'International Law & Third-Party Countermeasures' (n 8), 18, 20; Hofer Alexandra, 'The "Curiouser & Curiouser" Legal Nature of Non-UN Sanctions: US Sanctions against Russia' (2018) 23 *Journal of Conflict & Security Law* 76, 97; Subedi Surya, 'Status of Unilateral Sanctions in International Law' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 38.

³⁰ See e.g. Stern Brigitte, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005); Villalpando, *La communauté internationale* (n 26); Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014); Duff RA, 'State Responsibility: An Outsider's View' in Besson Samantha (ed), *Theories of International Responsibility Law* (Cambridge University Press 2022).

³¹ Hutchinson Terry & Duncan Nigel, 'Defining & Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 101 citing Pearce Dennis, Campbell Enid, & Harding Don, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education* (Australian Government Publishing Service 1987). Deplano Rossana & Tsagourias Nicholas (eds), *Research Methods in International Law: A Handbook* (Elgar 2021), 2; Chynoweth Paul, 'Legal Research' in Knight A & Ruddock L (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2006), 4.

cannot be ignored.³² *Chapter 1* discusses the concept of collective norms—those established for all states’ benefit such that the breach of duties they impose affects every state.³³ It also highlights the effects other than implementation afforded to collective norms for their protection—objective regimes, integral obligations, and peremptory norms—thereby showing that distinguishing collective norms from other norms is not a new phenomenon in international law.

Chapter 2 deals with the concept of implementation. It discusses how the competence to implement is a function of the legal relations that norms create. Under the ‘traditional’ view, these relations are always synallagmatic—a right one holds implies a duty that another bears to adopt a certain behaviour. The duty’s breach results in the right’s infringement which entitles the right-holder to implement the duty-bearer’s responsibility.³⁴ Yet, the majority of scholarship deemed this approach as incapable of providing an effective system for the enforcement of duties owed *erga omnes* as it only allows states whose rights have been infringed or directly affected by a wrongful act to implement duties.³⁵ Thus, most favour the non-synallagmatic approach which in its communitarian conception posits that all states have a ‘legal interest’, not a right, as a member of the international community in the observance of duties owed *erga omnes*.³⁶ This grants states the competence to implement responsibility on behalf of the community should a duty owed *erga omnes* be breached.³⁷

The ILC, as *Chapter 3* will show, adopted the non-synallagmatic approach for its rules on the implementation by ‘states other than an injured state’. It saw a need to distinguish between ‘directly’ and ‘indirectly affected’ states in relation to the wrongful acts’ consequences,³⁸ and the competence to implement responsibility.³⁹ Likewise, it deemed problematic the

³² Davidson Natalie, ‘Process-Tracing the Meaning of International Human Rights Law’ in Deplano Rossana & Tsagourias Nicholas (eds), *Research Methods in International Law: A Handbook* (Elgar 2021), 228 citing Bennett Andrew & Checkel Jeffrey, *Process-Tracing: From Metaphor to Analytic Tool* (Cambridge University Press 2014), 8.

³³ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 7), 126–7.

³⁴ Hohfeld Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning & Other Legal Essays*, Cook Walter (ed) (Yale University Press 1919), 50–1, 59, 101; Postema Gerald, *Legal Philosophy in the Twentieth Century: Common Law World* (Springer 2011), 100.

³⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 7), 127.

³⁶ *Ibid.*

³⁷ Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 37), 227.

³⁸ Crawford, ‘Multilateral Rights & Obligations’ (n 22), 343

³⁹ *Ibid.*, 343. See Stern Brigitte, ‘Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l’occasion de la fin des travaux de la C.D.I. sur la responsabilité des États’ (2001) 47 *Annuaire français de droit international* 3, 21.

synallagmatic premise that ‘all [...] relations [may be represented as] right-duty relations’.⁴⁰ This led to the previously mentioned split among ‘injured states’, ‘specially injured states’, and ‘states other than an injured state’.

Part II complements the doctrinal analysis in *Part I* and ‘grounds [these] to trends in [...] practice’.⁴¹ It examines, through qualitative empirical analysis, if state practice and *opinio juris* support the ILC’s conclusions under the 2001 Draft Articles on the implementation of duties owed *erga omnes* and if, after their adoption, states have accepted as law the competence of ‘states other than an injured state’ to implement these duties. In this regard, *Chapter 4* discusses this thesis’s approach to custom. It adheres to the ‘traditional’ view which requires the concurrence of practice and *opinio juris*.⁴²

Chapters 5A to 8 examine the state practice and *opinio juris* on the implementation of duties considered owed *erga omnes* by ‘states other than an injured state’ both before and after the 2001 Draft Articles’ adoption under different fields of international law. These norms were selected because they correspond to norms widely considered to impose duties owed *erga omnes* or *erga omnes partes*. *Chapters 5A* and *5B* deal with the norm against force (*duty not to threaten or use force*). *Chapters 6A* and *6B* deal with certain norms human rights norms—genocide (customary *duty not to commit genocide* and conventional *duty to prevent and punish genocide*); torture (customary *duty not to commit torture* and conventional *duty to prevent and punish torture and provide remedies to victims*); racial discrimination (customary and conventional *duty not to engage in racial discrimination*); and slavery (customary and conventional *duty to prohibit and abolish slavery*). *Chapter 7* deals with the norm on self-determination (*duty to respect a people’s right to external and internal right to self-determination*). Lastly, *Chapter 8* deals with certain environmental norms some of which are customary (*duty not to cause transboundary harm* and *duty to prevent transboundary harm*) and conventional.

The survey in *Part II* will show that between 1970 and 2001, only in a few instances did ‘states other than an injured state’ invoke the wrongful states’ responsibility through judicial dispute resolution. Likewise, only a few states, mostly Western ones, enforced duties owed *erga*

⁴⁰ Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 33; ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 7), 126.

⁴¹ Deplano & Tsagourias (eds), *Research Methods in International Law: A Handbook* (n 31), 3 noting Eisenberg T, ‘Origins, Nature, & Promise of Empirical Legal Studies & Response to Concerns’ (2015) 11 *University of Illinois Law Review* 1713, 1715–20.

⁴² *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (Judgment) [1969] ICJ 3, 43–4.

omnes via unilateral measures including countermeasures. Most states objected to these measures for, among others, being unilateral. Thus, this thesis submits that the ILC correctly deemed 2001 Draft Article 48 a ‘progressive measure’,⁴³ and appropriately left the question regarding countermeasures, under 2001 Draft Article 54 to international law’s ‘further development’.⁴⁴

The survey in *Part II* will also show that up to the present, the status of the rules under the 2001 Draft Articles on the implementation of duties owed *erga omnes* by ‘states other than an injured state’ remains uncertain. There may be a trend towards the acceptance of these states’ competence to invoke responsibility via judicial dispute resolution as to breaches of certain human rights duties. However, the same cannot be said as to the norms against force, on self-determination, and those that protect the environment. As for the enforcement of duties owed *erga omnes*, the imposition of unilateral measures remains a predominantly Western practice and has been repeatedly condemned by most states for, among others, being taken on behalf of other states without collective decisions.

Part III uses fundamental and theoretical analysis to explain the uncertain status of the rules on the implementation of duties by ‘states other than an injured state’ and to explore possible remedies.⁴⁵ Part of the problem, this thesis submits, lies in the rules’ premises which may not reflect the current legal system’s sociological reality. Indeed, as *Chapter 9* observes, states have also resorted to alternative responses to breaches of duties owed *erga omnes*—advisory opinions, interventions in contentious proceedings, and imposition of targeted unilateral measures. These are not implementation actions and thus avoid the issue of the competence of ‘states other than an injured state’ to implement these duties.

Chapter 10 re-examines the premises of the rules on the implementation of duties owed *erga omnes* under the non-synallagmatic view. Its communitarian conception posits the existence of a community to whom duties may be owed and on whose behalf states may act. However, whether such a community exists, given the lack of cohesion and solidarity among states, remains to be seen.⁴⁶ If anything the present international community arguably remains ‘ill-defined’.⁴⁷ The same may be said regarding the ‘public law’ conception based on the

⁴³ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 7), 117, 126–7.

⁴⁴ *Ibid*, 117, 126–7.

⁴⁵ See Hutchinson & Duncan, ‘Doctrinal Legal Research’ (n 31), 101–2 *citing* Pearce, Campbell, & Harding, *Pearce Committee* (n 31).

⁴⁶ Kolb Robert, *Theory of International Law* (Hart 2016), 271.

⁴⁷ *Arrest Warrant* (DRC v Belgium) (Judgment) [2002] ICJ 3 (Guillaume, separate opinion), 44.

concept of *actio popularis*.⁴⁸ Whether *actio popularis* may be transposed to the international legal system remains suspect given that it lacks the ‘key hallmarks of [...] domestic legal orders’ that *actio popularis* requires.⁴⁹

Finally, *Chapter 11* submits that the synallagmatic approach could properly accommodate the implementation of duties owed *erga omnes*. By clarifying the concepts of ‘rights’, ‘duties’, ‘injury’, and ‘material damage’,⁵⁰ and by revisiting the concept of obligations,⁵¹ this thesis demonstrates that all legal relations may be represented synallagmatically.⁵² That is, duties owed *erga omnes* grant every state a correlative right.⁵³ If the duty is breached, then all states may be deemed ‘injured’ and may implement responsibility through ‘whatever means [...] available’,⁵⁴ including the resort to judicial dispute resolution or the imposition of unilateral measures. Crucially, the approach does not depend on concepts that may reflect the present order’s realities. It does not require states to owe duties to or act as a trustee of an ‘ill-defined’ community. Similarly, it does not require the concept of public interest standing which the present legal order may not accommodate. ■

⁴⁸ Crawford James, ‘Overview of Part Three of the Articles on State Responsibility’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 934

⁴⁹ See Mégret Frédéric, ‘International Law as Law’ in Crawford James (ed), *Cambridge Companion to International Law* (Cambridge University Press 2015), 67.

⁵⁰ See ⁵⁰ Kawasaki Kyoji, ‘“Injured State” in the Law of State Responsibility’ (2000) 28 *Hitobashi Journal of Law & Politics* 17, 2; Barboza, ‘Legal Injury’ (n 27), 21; Stern, ‘La notion de préjudice juridique’ (n 39), 31

⁵¹ See Hohfeld, *Fundamental Legal Conceptions* (n 34), 75; Pothier Robert Joseph, *Treaties on the Law of Obligations or Contracts*, vol I, Evans William David (tr) (Strahan 1806), 144, 174; Tolentino Arturo, *Commentaries & Jurisprudence on the Philippine Civil Code*, vol IV (Central 1991), 227, 252; Hunter William, *A Systematic & Historical Exposition of Roman Law* (Maxwell 1885), 561.

⁵² See Arangio-Ruiz Gaetano, ‘Fourth Report on State Responsibility’ (1992) II(1) YbILC 6, 34, 44–5; De Jesús, ‘Obligations Erga Omnes’ (n 27), 110, 174, 186; Nedeski, *Shared Obligations* (n 27), 100.

⁵³ See e.g. Ago, ‘Second Report on State Responsibility’ (1970) (n), 192; Riphagen Willem, ‘Fifth Report on State Responsibility’ (1984) II(1) YbILC 1, 3; Arangio-Ruiz Gaetano, ‘Second Report on State Responsibility’ (1989) II(1) YbILC 3, 6; De Hoogh, *Obligations Erga Omnes & International Crimes* (n), 44, 53; Stern, ‘La notion de préjudice juridique’ (n 39), 15–6; Villalpando, *La communauté internationale* (n 26), 237, 242, 254; 279, 397. See also *Prosecutor v Furundžija* (Judgment) (ICTY, Trial Chamber, 95-17/1, 10 December 1998), ¶151; *Application of the Genocide Convention* (Gambia v Myanmar) (Provisional Measures) [2019] (ICJ, 11 November 2019), ¶52

⁵⁴ See ILC, ‘Summary Records of the 16th Session’ (1967) I YbILC 1, 84 (Rosenne). Note Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n), 161 (‘The fact that [duties owed] *erga omnes* [...] create tertiary rights in all states bound by the norm does not say anything about the means of redress available [...] The availability of a particular remedy depends on the conditions formulated by [...] law’) citing Silagi M, ‘Die Popularklage als Fremdkörper im Völkerrecht’ (1978) 4 *South African Yearbook of International Law* 10, 16; Morelli Gaetano, ‘La théorie générale du procès international’ (1937) 61 *Recueil des Cours de l’Académie de Droit International* 253, 363; Scerni Mario, ‘La procédure de la cour permanente de justice internationale’ (1938) 65 *Recueil des Cours de l’Académie de Droit International* 561, 577

PART I: FORMATION OF THE RULES ON THE IMPLEMENTATION OF DUTIES ARISING FROM COLLECTIVE NORMS

CHAPTER 1: COLLECTIVE NORMS & THEIR EFFECTS OTHER THAN IMPLEMENTATION

This thesis begins by examining the concepts surrounding the implementation of duties imposed by collective norms or those owed *erga omnes*. This analysis is important. It contextualises the approach taken by the ILC towards collective norms under the 2001 Draft Articles. It also provides the background for the analysis in *Part II* of state practice and *opinio juris* concerning these rules. Finally, it reveals the theoretical premises of these rules which will be examined in *Part III*.

The examination in *Part I* employs both doctrinal analysis and historical tracing. It examines the concepts related to the rules on implementation by ‘states other than an injured state’ under the 2001 Draft Articles to understand its conceptual framework.¹ Equally, it recognises that these concepts’ development occurred within a historical context that cannot be ignored.² *Chapter 1* examines the concept of ‘collective norms’ or norms established for all states such that the breach of duties they impose affects every state,³ potentially allowing each state to demand their observance.⁴ Next, it observes how the decentralised legal system gradually attributed certain effects to these norms to protect the interests they represent. These may be seen, initially, under the Vienna Convention on the Law of Treaties (‘VCLT’) with the concepts of objective regimes, interdependent and absolute obligations, and peremptory or *jus cogens* norms. These effects have since been extended beyond the VCLT to include, among others, the aggravated consequences of serious breaches of duties imposed by peremptory norms under the 2001 Draft Articles.

¹ Hutchinson Terry & Duncan Nigel, 'Defining & Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 101 citing Pearce Dennis, Campbell Enid, & Harding Don, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education* (Australian Government Publishing Service 1987). Deplano Rossana & Tsagourias Nicholas (eds), *Research Methods in Interantional Law: A Handbook* (Elgar 2021), 2; Chynoweth Paul, 'Legal Research' in Knight A & Ruddock L (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2006), 4.

² Davidson Natalie, 'Process-Tracing the Meaning of International Human Rights Law' in Deplano Rossana & Tsagourias Nicholas (eds), *Research Methods in Interantional Law: A Handbook* (Elgar 2021), 228 citing Bennett Andrew & Checkel Jeffrey, *Process-Tracing: From Metaphor to Analytic Tool* (Cambridge University Press 2014), 8.

³ ILC, 'Report on the Work of the 53rd Session' (2001) II(2) YbILC 20, 126–7.

⁴ Crawford James, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 227; Annacker Claudia, 'Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 147.

Chapter 2 observes how the recognition of collective interests affected the view on the legal relations created by collective norms and the concept of duties owed *erga omnes*—the focus of this thesis.⁵ This suggests that the competence of states to implement duties that collective norms impose is no longer confined to states ‘directly affected’ by the breach. Rather, it extends to every state.⁶

Chapter 3 examines how these developments influenced the rules on the implementation under the 2001 Draft Articles. In a measure of progressive development, the ILC claimed that ‘states other than an injured state’ may implement duties owed *erga omnes*.⁷ Yet, because of states’ divergent views, it reserved its opinion on whether ‘states other than an injured state’ may enforce responsibility via countermeasures leaving the issue to the ‘development of international law’.⁸

I. COLLECTIVE INTERESTS & NORMS

Generally, norms or rules allow states to protect their interests.⁹ By creating norms, states specify standards of behaviour for states to follow.¹⁰ As will be discussed in *Chapter 2*, norms

⁵ See *Barcelona Traction, Light, & Power Company* (Belgium v Spain) (Judgment) [1970] ICJ 1, 32.

⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 117, 126–7; Crawford James, ‘Multilateral Rights & Obligations in International Law’ (2006) 319 *Recueil des Cours de l’Académie de Droit International* 325, 422–3

⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 117, 126–7.

⁸ *Ibid*, 139.

⁹ Note that in a non-legal sense, an ‘interest may simply refer to ‘being concerned or affected in respect of advantage or detriment’ (Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 28; Villalpando Santiago, *L’émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 245 citing *Southwest Africa* (Ethiopia & Liberia v South Africa) (Preliminary Objections) [1962] ICJ 319 (Morelli, separate opinion), 570). It may also pertain to an ‘advantage or benefit’ or ‘stake or involvement in an undertaking’ (Thin Sarah, ‘Community Interest & the International Public Legal Order’ (2021) 68 *Netherlands International Law Review* 35, 44). Still, it may be related to the concept of ‘utility’ and refer to the material possibility of satisfying one’s needs, obtaining advantages, or avoiding disadvantages (De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 9 citing Gervais André, ‘L’affaire du lac Lanoux, étude critique de la sentence arbitrale’ (1960) 6 *Annuaire français de droit international* 372, 42). The interest’s possessor, a state for the present purposes, naturally seeks to realise its interest (De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 10 citing Kraus Herbert, ‘Interesse und zwischenstaatliche Ordnung’ (1934) 49 *Niemeyers Zeitschrift für Internationales Recht* 22, 34; Arató Stefan, *Die Völkerrechtliche Haftung* (Nyomatott Taizs József 1936), 11–2; Union Académique Internationale, *Dictionnaire de la terminologie du droit international* (Sirey 1960), 342).

¹⁰ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 14–5 (‘The protection of interests has [...] taken place by means of the elaboration of primary rules of international law. Those may either prescribe a certain course of conduct, prohibit it, or, to the contrary, permit it’). See Birkas Géza, *Das Staatsinteresse als Grundlage des Völkerrechts* (Heymans 1993), 57 citing Nelson Leonard, *Die Rechtswissenschaft ohne Recht* (1917), 181. See also Hart HLA, *The Concept of Law* (2nd edn, Oxford University Press 1964), 97–107 cited in Dworkin Ronald, *Taking Rights Seriously* (Harvard University Press 1977), 20; Franck Thomas, *Fairness in International Law and Institutions* (Oxford University Press 1998), 968; Raz Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979), 167 ff; Austin John, *Province of Jurisprudence Determined*,

grant states rights that permit them to demand these standards' observance.¹¹ This distinguishes mere 'interests' from 'protected interests'.¹² Correlatively, 'duties' are imposed on other states that oblige them to perform a certain act or abstain from a particular conduct.¹³ As a result, a legal relation, an 'obligation',¹⁴ arises among those bound by the rule in which rights possessed by states correspond to duties borne by others.¹⁵

Collective norms differ from ordinary norms as they protect states' 'collective interests' and not purely individual ones.¹⁶ For scholars like Villalpando, collective interests may be found in goods or values that concern not only several states but every state.¹⁷ These 'common' or 'public' goods are deemed 'non-excludable' and 'non-rivalrous' such that their benefits are

Rumble Wilfred (ed) (Cambridge University Press 1995).

¹¹ Hohfeld Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning & Other Legal Essays*, Cook Walter (ed) (Yale University Press 1919), 7; Eleftheriadis Pavlos, *Legal Rights* (Oxford University Press 2008), 107, 120; Hart HLA, *Essays on Bentham: Jurisprudence & Political Philosophy* (Oxford University Press 1982), 183. See Ago Roberto, 'Eighth Report on State Responsibility: Addendum' (1980) II(1) YbILC 13, 18; Stern Brigitte, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone 1973), 89–90.

¹² Villalpando, *La communauté internationale* (n 9), 244 citing Morelli Gaetano, *Nozioni di diritto internazionale* (7th edn, CEDAM 1967), 1–2; Virally Michel, *La pensée juridique* (Librairie générale de droit et de jurisprudence 1960), 43; Gervais André, 'Quelques réflexions à propos de la distinction des "droits" et des "intérêts"', *Mélanges en l'honneur de Paul Roubier*, vol Tome I (Daloz-Sirey 1961), 241. But see De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 17.

¹³ Hohfeld, *Fundamental Legal Conceptions* (n 11), 7; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 18 citing Ago, 'Eighth Report on State Responsibility: Addendum' (1980) (n 11), 18. See *Right of Passage over the Indian Territory* (Portugal v India) (Merits) [1960] ICJ 6 (Wellington Koo, separate opinion), 63.

¹⁴ Zimmermann Reinhard, *Law of Obligations: Roman Foundations* (Clarendon 1996), 2–3 citing *Institutes of Justinian*, Moyle JB (ed) (Clarendon 1911), 3, 13; Hunter William, *A Systematic & Historical Exposition of Roman Law* (Maxwell 1885), 451; Hogg Martin, *Obligations: Law & Language* (Cambridge University Press 2017), 27. Note that while a 'norm' is considered objective, the obligation 'personifies' this norm and creates subjective legal relations (Annacker, 'Legal Regime of Erga Omnes Obligations' (n 4), 135 citing Ago Roberto, 'Fifth Report on State Responsibility' (1976) II(1) YbILC 3, 4; ILC, 'Summary Records of the 28th Session' (1976) I YbILC 1, 7). It is 'subjective' as it pertains to the situation where the subject, the state upon which the duty is imposed, operates (Ago Roberto, 'Second Report on State Responsibility' (1970) II(1) YbILC 177, 192). Those upon whom a duty is imposed do not 'violate' a rule nor would another to whom a right is granted 'exercise' it. Instead, one fails to carry out its duty and correlatively, another may exercise its right (ibid, 192. See *Southwest Africa* [1962] (n 9) (Winiarski, dissenting opinion), 455–6; *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90 (Weeramantry, dissenting opinion), 209).

¹⁵ Ago, 'Second Report on State Responsibility' (1970) (n 14), 192. See Stern Brigitte, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des États' (2001) 47 *Annuaire français de droit international* 3, 24.

¹⁶ Thin, 'Community Interest & International Public Order' (n 9), 44; Villalpando Santiago, 'Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21 *European Journal of International Law* 387, 390–2.

¹⁷ Villalpando, 'Community Interests' (n 16), 390–1; Morgera Elisa, 'Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Global Environmental Law' (2012) 23(3) *European Journal of International Law* 743, 748; Tams Christian, 'Individual States as Guardians of Community Interests' in Fastenrath Ulrich, et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 380; Thin, 'Community Interest & International Public Order' (n 9), 36, 49.

enjoyed by all and that any infringement on these goods and values affects every state.¹⁸ Thus, each state has an interest in their protection.¹⁹ According to authors such as Klein, Alexidze, and Cassinelli, the coincidence of interests in these goods ‘inspires efforts to see them realised’ and leads to ‘collective norms or ’norms established for all states.²⁰

Note however that the account based on the coincidence of interests is only one way of viewing collective interests and norms. Others like Simma, de Visscher, and Allot, submit that collective interests are not merely the ‘aggregation’ of states’ interests in common goods.²¹ Rather, the interests in these goods are shared by all states and ‘transcend individual interests’.²² They are not the ‘lowest common denominator of individual interests’.²³ They are ‘greater than the sum of [states’] individual interests’ and possess a ‘quality of commonality’ beyond the mere coincidence of interests.²⁴

¹⁸ Villalpando, ‘Community Interests’ (n 16), 392 citing Samuelson Paul, ‘Pure Theory of Public Expenditure’ (1954) 36(4) *Review of Economics and Statistics* 387, 387. De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 33–5. Nollkaemper André, ‘International Adjudication of Global Public Goods: Substance & Procedure’ (2012) 23 *European Journal of International Law* 769, 776 citing Kaul Inge, Grunberg Isabelle, & Stern Mark (eds), *Global Public Goods* (Oxford University Press 1999), 3–4.

¹⁹ Villalpando, ‘Community Interests’ (n 16), 391, 393; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 4), 137 citing Simma Bruno, *Das Reziprozitäts Element beim Zustandekommen völkerrechtlicher Verträge, Gedanken zum Bauprinzip internationaler Rechtsbeziehungen* (Duncker & Humblot 1972), 196; Neuhold Hanspeter, ‘Abgrenzungen, Strukturmerkmale und Besonderheiten der Völkerrechtsordnung’ in Neuhold Hanspeter, et al. (eds), *Österreichisches Handbuch des Völkerrechts* (2nd edn, Manzsche 1991).

²⁰ Brunnée Jutta, ‘Common Interest—Echoes from an Empty Shell? Some Thoughts on Common Interest & International Environmental Law’ (1989) 49 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 791, 793 citing Klein Eckart, *Statusverträge im Völkerrecht* (Springer 1980), 53; Alexidze Levan, ‘Legal Nature of Jus Cogens in Contemporary International law’ (1981) 172 *Recueil des Cours de l’Académie de Droit International* 219, 245. Thin, ‘Community Interest & International Public Order’ (n 9), 40 citing Cassinelli C, ‘Some Reflections on the Concept of the Public Interest’ (1958) 69 *Ethics* 48, 54. See Villalpando, ‘Community Interests’ (n 16), 394; Focarelli Carlo, *International Law as Social Construct: Struggle for Global Justice* (Oxford University Press 2012), 108; Kolb Robert, *Theory of International Law* (Hart 2016), 368.

²¹ Simma Bruno, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours de l’Académie de Droit International* 217, 244; de Visscher Charles, *Théories et réalités en droit international public* (4th edn, Pedone 1970), 123; Allot Philip, ‘Concept of International Law’ (1999) 10 *European Journal of International Law* 31, 36.

²² Simma, ‘Bilateralism to Community Interest’ (n 21), 244; Verdoss Alfred & Simma Bruno, *Universelles Völkerrecht, Theorie und Praxis* (3rd edn, Duncker & Humblot 1984) cited in Kingsbury Benedict & Donaldson Megan, ‘From Bilateralism to Publicness in International Law’ in Fastenrath Ulrich, et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 81.

²³ Cassinelli, ‘Concept of the Public Interest’ (n 20), 50, 54.

²⁴ Thin, ‘Community Interest & International Public Order’ (n 9), 41 citing King Stephen, Chilton Bradley, & Roberts Gary, ‘Reflections on Defining the Public Interest’ (2010) 41 *Administration & Society* 954, 957. Allot, ‘Concept of International Law’ (n 21), 36. But see Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 4), 136–7 (‘The [concept of a] community interest differing in its nature from the sum of individual interests [...] remains fictitious [...] the term “community interest” [refers to the] situation where every [state] has an interest in the fulfilment of a [duty] by other [states in] the international community’); Focarelli Carlo, ‘International Law & Third-Party Countermeasures in the Age of Global Instant Communication’ (2016) 29 *Questions of International Law* 18, 22–3. (‘This view [...] of the “public good” of the entire “international community” is a hope much more than a reality, and conceptually highly ambiguous’).

The view further submits that states' recognition of collective interests leads to the formation of collective norms.²⁵ For Simma, Abi-Saab, and Friedman, this results in the states' realisation that these goods and values' protection requires concerted actions and cannot be left to states' free disposition.²⁶ It moves states' motivation beyond the procurement of advantages based on self-interest, accepts disadvantages that may be individually suffered to achieve a common objective, and refrains from taking actions that would interfere with the realisation of these goals.²⁷ Thus, states establish rules that impose duties upon states to protect these common concerns.²⁸

Finally, for scholars like Simma, states' recognition of collective interests and norms transforms the relations among states resulting in an 'international community'.²⁹ The importance that states attach to these goods is significant enough such that interactions among the states are 'imbued with a collective consciousness which subsumes individual awareness'.³⁰ This transforms inter-state relations from an 'egotistic rationale to a sense of togetherness and the pursuit of goals that benefit the group as a whole'.³¹

²⁵ Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 4), 229; Besson Samantha, 'Community Interests in International Law: Whose Interests are They & How Should We Best Identify Them?' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2017), 41; Nolte Georg, 'International Law Commission & Community Interests' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2017), 102. See Cafaggi Fabrizio & Caron David, 'Global Public Goods amidst a Plurality of Legal Orders' (2012) 23(3) *European Journal of International Law* 643.

²⁶ Simma, 'Bilateralism to Community Interest' (n 21), 233; Abi-Saab Georges, 'Whither the International Community' (1998) 9 *European Journal of International Law* 248, 251; Friedmann Wolfgang, *Changing Structure of International Law* (Columbia University Press 1964), 90; Shelton Dinah, 'Common Concern of Humanity' (2009) 1 *Iustum Aequum Salutare* 33, 34.

²⁷ Simma, 'Bilateralism to Community Interest' (n 21), 238 citing St John Macdonald Ronald, 'Principle of Solidarity in Public International Law' in Dominicé Christian, *et al.* (eds), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn 1993), 301. See Matz Nele, 'Common Interest in International Law: Reflections on Normative Content' (2002) 62 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 17, 18.

²⁸ Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 4), 229; Thin Sarah, 'In Search of Community: Towards a Definition of Community Interests' in Zyberi Gentian (ed), *Protecting Community Interests through International Law* (Intersentia 2021), 29.

²⁹ Simma, 'Bilateralism to Community Interest' (n 21), 217; Wellens Karel, 'Solidarity as a Constitutional Principle' in St John Macdonald Ronald & Johnston Douglas (eds), *Towards World Constitutionalism* (Nijhoff 2005), 804; Friedmann, *Changing Structure* (n 26), 367. See Thin, 'Community Interest & International Public Order' (n 9), 46–8. But see Kingsbury & Donaldson, 'From Bilateralism to Publicness' (n 22), 82; Hernandez Gleider, 'Reluctant Guardian: International Court of Justice & "International Community"' (2013) 83(1) *British Yearbook of International Law* 13, 19

³⁰ Durkheim Émile, *De la division du travail social* (Presse Universitaires de France 1893), 98–102 cited in Villalpando, 'Community Interests' (n 16), 392; Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 219–20.

³¹ Villalpando, 'Community Interests' (n 16), 392; Simma, 'Bilateralism to Community Interest' (n 21), 234. See Voigt Christina, 'Delineating the Common Interest' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 17; St John Macdonald, 'Principle of Solidarity' (n 27), 293.

These approaches to collective interests and norms lie at the heart of the question underlying this thesis. As will be seen in *Chapters 2 and 3*, they influenced the premises of the rules on the implementation by ‘states other than an injured state’. These premises will be further analysed in *Chapter 10*. For now, it is sufficient to note that collective interests and norms exist although views differ as to how they are formed.³² One is based on plurality and coincidence of interests and is sceptical of shared goods and values. The other insists on solidarity and emphasises the role of shared values in the formation of collective norms and the international community.

II. DEVELOPMENTS UNDER THE VCLT

Having discussed the concept of collective interests and norms, attention now turns towards how the decentralised international legal system,³³ attributed certain effects to these norms to protect the interests they represent. Some of these effects were developed alongside the VCLT—the concepts of objective regimes, absolute and interdependent obligations and peremptory or *jus cogens*. The first attempted, albeit unsuccessfully, to make certain agreements, due to their objects’ nature, opposable to non-party states.³⁴ The second provided guidance on states’ competence to respond to material breaches of certain agreements by enabling the suspension or termination of their relations with the defaulting state.³⁵ The last restricted states’ capacity to conclude treaties that derogate from norms that protect states’ vital interests.³⁶

Discussing these concepts is important. This thesis will make frequent references to these concepts and examining them aids later discussions. Furthermore, as will be seen in *Chapters 2 and 3* these concepts influenced the rules on the competence of ‘states other than an injured state’ to implement the wrongful state’s responsibility. The notion of objective regimes has been used to support states’ capacity to implement the duties imposed by collective norms even

³² See Schaumburge-Müller Sten, 'To What Extent does International Law Obstruct the Protection of Common Interests?' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 32.

³³ See Koh Harold, 'Why Do Nations Obey International Law?' (1996) 106 *Yale Law Journal* 2599, 2616 citing Kelsen Hans, *Principles of International Law* (Rinehart & Company 1952), 417–8; Hart, *The Concept of Law* (n 10), 214. Weil Prosper, 'Towards Relative Normativity in International Law?' (1983) 77(3) *American Journal of International Law* 413, 413–4, 418.

³⁴ Fitzmaurice Malgosia, 'Modifications to the Principles of Consent in Relation to Certain Treaty Obligations' (1997) 2 *Austrian Review of International & European Law* 275, 299–300; Subedi Surya, 'Doctrine of Objective Regimes in International Law & the Competence of the UN to Impose Territorial or Peace Settlements on States' (1994) 37 *German Yearbook of International Law* 162, 167.

³⁵ Crawford, 'Multilateral Rights & Obligations' (n 6), 447–9.

³⁶ Kadelbach Stefan, 'Jus Cogens, Obligations Erga Omnes, & other Rules—Identification of Fundamental Norms' in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2005), 34.

if they are not ‘directly affected’ by the breach.³⁷ Likewise, the concepts of absolute and interdependent norms have been employed to support the view that legal relations need not be synallagmatic and thus allow states whose rights have not been infringed to implement the duties that collective norms impose.³⁸ Furthermore, peremptory norms have advanced the distinction between ‘ordinary’ and ‘superior’ norms that justify states’ competence to implement the duties arising from collective norms.³⁹

A. Objective Regimes & the Binding Nature of Agreements

1. Concept

One of the general rules on treaty relations is that agreements only bind the parties to it (*res inter alios acta*).⁴⁰ This means that treaties do not create rights and duties for third states without their consent (*pacta tertiis nec nocent nec prosunt*).⁴¹ The concept of objective regimes was envisioned by its proponents like McNair,⁴² as an exception to this rule.⁴³ It posits that there are treaties which, ‘either by their [...] nature or by [their parties’] semi-legislative authority’, affect non-parties.⁴⁴ They create an ‘objective form of law’ that grants rights or imposes duties upon

³⁷ See e.g. Tams, *Enforcing Obligations Erga Omnes* (n 9), 77 ff; Weiss Edith Brown, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *American Journal of International Law* 798, 803; Crawford James, *International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002), 24–5.

³⁸ See e.g. Crawford, 'Multilateral Rights & Obligations' (n 6), 447–9; Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997), 201; Sachariw Kamen, 'State Responsibility for Multilateral Treaty Violations: Identifying the “Injured State” & Its Legal Status' (1988) 35 *Netherlands International Law Review* 273, 284; Sicilianos Linos-Alexander, 'Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility' (2002) 13(5) *European Journal of International Law* 1127, 1132.

³⁹ See e.g. Tladi Dire, 'Third Report on Peremptory Norms' (12 February 2018) UN Doc A/CN.4/714, 40 ff; Orakhelashvili Alexander, *Peremptory Norms in International Law* (Oxford University Press 2006), 9, 78, 245.

⁴⁰ Proelß Alexander, 'Article 34' in Dörr Oliver & Schmalenbach Kirsten (eds), *Vienna Convention on the Law of Treaties: Commentary* (Springer 2018), 655–6; Salerno Francesco, 'Treaties Establishing Objective Regimes' in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 233.

⁴¹ Fitzmaurice Gerald, 'Fifth Report on the Law of Treaties' (1960) II YbILC 68, 75 ff; Waldock Humphrey, 'Third Report on the Law of Treaties' (1964) II(2) YbILC 6, 18 ff citing *Island of Las Palmas/Miangas* (Netherlands/USA) (Arbitral Award) (1928) 2 RIAA 829, 842; *Free Zones of Upper Savoy & District of Gex* (France v Switzerland) (Judgment) [1932] PCIJ Series A/B No 46, 141; *Certain German Interests in Polish Upper Silesia* (Germany v Poland) (Merits) [1926] PCIJ Ser A No 7, 29. ILC, 'Reports on the Work of the 17th & 18th Sessions' (1966) II(2) YbILC 1, 226

⁴² *International Status of Southwest Africa* (Advisory Opinion) [1950] ICJ 128 (McNair, separate opinion), 153 ('From time to time, [...] a group of great Powers, or a number of states [...] assume a power to create by a multipartite treaty some new international regime or status, which acquires a degree of acceptance [...] extending beyond the limits of the [...] contracting parties, and giving it an objective existence'); McNair Arnold, *Law of Treaties* (Clarendon 1961), 259.

⁴³ Simma, 'Bilateralism to Community Interest' (n 21), 358; Verdoss & Simma, *Universelles Völkerrecht* (n 22), 769.

⁴⁴ Proelß, 'Article 34' (n 40), 675; Simma Bruno, "“Antarctic Treaty” as an “Objective Regime”" (1986) 19 *Cornell International Law Journal* 98, 192; Fitzmaurice, 'Modifications to the Principles of Consent' (n 34), 299.

non-parties.⁴⁵ Objective regimes ‘adapt the law-making process to accommodate changing social, political and environmental demands’,⁴⁶ and remedy the ‘structural deficiencies’ of a legal system that is rooted in ‘sovereignty, consent, and bilateralism’.⁴⁷

Three kinds of treaties are claimed to have such an effect: those that establish boundaries, confer rights upon certain areas or spaces, and create international legal regimes.⁴⁸ For some, boundary treaties possess an ‘objective character’ that requires states, even non-parties to the delimitation agreement, to respect the boundaries set.⁴⁹ There are also treaties that ‘permanently dedicate’ certain areas or spaces for the ‘use of the whole world’ like international waterways.⁵⁰ Several submit that these agreements grant states rights that they may invoke even if they are non-parties to the relevant treaty.⁵¹ Finally, there are ‘constitutive’ or ‘semi-legislative’ treaties that regulate the status of certain territories creating an ‘objective law’ effective ‘outside the [parties’] circle’.⁵² The agreement demilitarising the Åland Islands is often cited as an example of such a treaty. Due to the ‘general interest in political stability’, some submit that the agreement imposes rights and duties even on non-parties.⁵³ Other treaties claimed to have similar effects include the Antarctic Treaty,⁵⁴ Outer Space Treaty,⁵⁵ and the Law of the Sea

⁴⁵ Fitzmaurice, ‘Modifications to the Principles of Consent’ (n 34), 299.

⁴⁶ Barnes Richard, ‘Objective Regimes Revisited’ (2000) 9 *Asian Yearbook of International Law* 97, 130.

⁴⁷ Ibid, 99 citing McNair, *Law of Treaties* (n 42), 259; Klein, *Statusverträge im Völkerrecht* (n 20); Chinkin Christine, *Third Parties in International Law* (Oxford University Press 1993); Subedi Surya, *Land & Maritime Zones of Peace* (Oxford University Press 1986). Salerno, ‘Objective Regimes’ (n 40), 240 citing Tomuschat Christian, ‘Treaties under International Law & Third States’ (1990) 41 *Law & State* 7, 8.

⁴⁸ Fitzmaurice, ‘Fifth Report on the Law of Treaties’ (1960) (n 41), 92, 98; Subedi, ‘Objective Regimes’ (n 34), 167.

⁴⁹ Proelß, ‘Article 34’ (n 40), 681 citing Subedi, ‘Objective Regimes’ (n 34), 167; Boyle Alan & Chinkin Christine, *Making of International Law* (Oxford University Press 2007), 239.

⁵⁰ Waldock, ‘Third Report on the Law of Treaties’ (1964) (n 41), 29 citing *SS Wimbledon* (UK et al v Germany) (Judgment) [1923] PCIJ Ser A No 1, 28.

⁵¹ Boyle & Chinkin, *Making of International Law* (n 49), 240; Ragazzi, *Obligations Erga Omnes* (n 38), 26 citing McNair Arnold, ‘Treaties Producing Effects “Erga Omnes”’, *Seritti di diritto internazionale*, vol II (Giuffrè 1957), 27–30.

⁵² Proelß, ‘Article 34’ (n 40), 686 citing *Åland Islands Question* (Report of the Committee of Jurists) (1920) LNOJ Spec Supp 3, 17–8; *Southwest Africa* [1950] (n 42) (McNair, separate opinion), 154.

⁵³ *Åland Islands* (n 52), 17 cited in Barnes, ‘Objective Regimes Revisited’ (n 46), 142; Fitzmaurice Malgosia, ‘Third Parties & the Law of Treaties’ (2002) 6 *Max Planck Yearbook of UN Law* 37, 100.

⁵⁴ See *Antarctic Treaty* (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71; Birnie Patricia, ‘The Antarctic Regime & Third States’ in Wolfrum Rüdger (ed), *Antarctic Challenge* (Duncker & Humblot 1986), 255; Hayton Robert, ‘The Antarctic Settlement of 1959’ (2017) 2 *American Journal of International Law* 348. But see Simma, ‘Antarctic Treaty’ (n 44), 200–2, 209; Brownlie Ian, ‘Legal Status of Natural Resources’ (1979) 162 *Recueil des Cours de l’Académie de Droit International* 245, 293.

⁵⁵ See *Treaty on Principles Governing the Activities of States in the Exploration & Use of Outer Space* (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 cited in Subedi, ‘Objective Regimes’ (n 34), 184. But see Waldock, ‘Third Report on the Law of Treaties’ (1964) (n 41), 33.

Convention's provisions ('UNCLOS') on the Area.⁵⁶

2. *Development*

Special Rapporteur Fitzmaurice (1956–60), in his 1960 Report, stressed that treaties do not affect non-parties 'unless the system it establishes is one that third states can simply recognise and respect without [...] their active consent'.⁵⁷ Nonetheless, he recognised that there are treaties that appear to create objective effects as 'matter of practice and fact'.⁵⁸ Yet, he attributed such effects 'not on the esoteric basis of some mystique attaching to certain types of treaties' but on states' implied consent or the 'general duty [to] [...] respect, recognise, and [accept] the consequences of lawful [...] acts entered into between other states, which do not infringe [non-parties'] legal rights'.⁵⁹

Fitzmaurice's successor, Waldock (1962–6) agreed that 'states are [not] prepared to regard any treaty as being automatically binding upon them regardless of their opposition'.⁶⁰ However, he argued that there is a 'special category of treaties' which in the 'absence of timely opposition from other states' will be 'considered to have objective effects' on them.⁶¹ For Waldock, objective regimes are created by parties to a treaty, possessing a competence over a particular territory, acting in the general interest to establish rights and duties, and made effective upon non-parties upon their consent whether expressed or implied through acquiescence.⁶²

⁵⁶ See *UN Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, arts 89, 136–7 cited in Barnes, 'Objective Regimes Revisited' (n 46), 110–15. But see Waldock, 'Third Report on the Law of Treaties' (1964) (n 41), 33; Proelß, 'Article 34' (n 40), 689.

⁵⁷ Fitzmaurice, 'Fifth Report on the Law of Treaties' (1960) (n 41), 92.

⁵⁸ Ibid, 92, 79 ('[Draft] Article 14 [...] 1. Where use is made [the] of another state, and the conditions of use of that territory for that purpose are the subject of a treaty to which the third state concerned is not a party, [...] the state [...] must conform to the conditions in question. 2. The same [applies to] the use of territory placed by treaty [for] common use for purposes, and on conditions, specified in the treaty, and in circumstances causing the treaty to have, or to come to be regarded as having, effect *erga omnes*'), 80 ('Draft Article 18 [...] 1. States are under a duty to recognise and respect situations of law or of fact established by lawful and valid treaties tending by their nature to have effects *erga omnes*. [Examples of such treaties include]: (a) Peace treaties, and other treaties containing political or territorial settlements; (b) Treaties creating a general regime or status of neutralization, or demilitarisation, for particular territories or localities; (c) Treaties of a dispositive character, such as treaties of cession, frontier demarcation, or treaties creating a servitude').

⁵⁹ Ibid., 98

⁶⁰ Waldock, 'Third Report on the Law of Treaties' (1964) (n 41), 32.

⁶¹ Ibid.

⁶² Ibid, 26–7 ('[Draft] Article 63 [...] 1. A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the [parties'] intention is to create in the general interest general [duties] and rights relating to a particular region, state, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include [...] any state having territorial competence with reference to the [treaty's] subject-matter, or that any such state has consented to the provision in question [...] 2. (a) A [non-state party], which expressly or impliedly consents to the creation or to the application of an objective regime, shall be considered to have accepted it; (b) A [non-state party], which does not protest against or otherwise manifest its opposition to the regime within a period of X years of the [treaty's] registration [...] 3. A state which

The concept of objective regimes faced much opposition during the VCLT's drafting process.⁶³ Many within the ILC deemed the concept to be unacceptable to states.⁶⁴ From a practical perspective, since the proposals were based on consent, it was considered 'superfluous' and 'completely or partly covered' by the other draft provisions.⁶⁵ On a more substantive note, the Commission deemed that objective regimes would 'impose an intolerable burden on many states', 'boost the [Great Powers'] hegemonic position', and 'compromise the [...] [the international community's] structure'.⁶⁶ In 1966, the ILC decided 'to leave [the] question aside in drafting' the VCLT.⁶⁷ Ultimately, it decided 'not to propose any special provision on treaties creating so-called objective regimes'.⁶⁸

Nonetheless, claims on the need for objective regimes to protect common interests persist.⁶⁹ As may be observed in *Chapters 2 and 3*, the concept has often been used not only to make certain agreements opposable to non-parties but also to grant them the competence to demand that the duties the treaties impose be fulfilled.⁷⁰ Yet, scholars like Proelß submit that state practice 'does not provide any evidence for [these regimes]' existence'.⁷¹ If anything, the apparent instances of objective regimes may be attributed to reasons other than states' acceptance of the concept. For instance, the 'objective' nature of international boundaries may be explained not by the objective character of the agreement creating them but by the duty to

has accepted a regime of the kind referred to in paragraph 1 shall be: (a) bound by any general obligations which it contains; and (b) entitled to invoke the [regime's] provisions and to exercise any general right which it may confer, subject to the [treaty's] terms and conditions').

⁶³ Proelß, 'Article 34' (n 40), 678; Prezas Ioannis, 'Bilateral Treaty Developing Legal Effects Erga Omnes? Reflections on the Prespa Agreement' (2020) 65 *Questions of International Law* 21, 40.

⁶⁴ ILC, 'Summary Records of the 16th Session' (1967) I YbILC 1, 96 ff.

⁶⁵ Ibid, 99–108.

⁶⁶ Fitzmaurice, 'Modifications to the Principles of Consent' (n 34), 302; Salerno, 'Objective Regimes' (n 40), 227; Ragazzi, *Obligations Erga Omnes* (n 38), 39 citing ILC, 'Summary Records of the 16th Session' (1964) (n 64), 103–5.

⁶⁷ ILC, 'Reports on the Work of the 17th & 18th Sessions' (1966) (n 41), 231. See Gaja Giorgio, 'Article 38' in Corten Olivier & Klein Pierre (eds), *The Vienna Conventions on the Law of Treaties* (Oxford University Press 2011), 958.

⁶⁸ ILC, 'Reports on the Work of the 17th & 18th Sessions' (1966) (n 41), 231

⁶⁹ See Chinkin, *Third Parties* (n 47), 18, 35, 138; Salerno, 'Objective Regimes' (n 40), 241; Subedi, 'Objective Regimes' (n 34), 174.

⁷⁰ De Jesús Jose, 'Obligations Erga Omnes as Multilateral Obligations' (DPhil, University of Oxford 2012), 183–4 citing Delbrück Jost, 'Laws in the Public Interest—Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law' in Gotz Volkmar, *et al.* (eds), *Liber Amicorum Gunther Jaenicke* (Springer 1998), 19; Juste Ruiz J, *Las Obligaciones 'Erga Omnes' en Derecho Internacional Público* (Tecnos 1979). See Prezas, 'Bilateral Treaty Developing Legal Effects Erga Omnes' (n 63), 38. But see Proelß, 'Article 34' (n 40), 679–80

⁷¹ Proelß, 'Article 34' (n 40), 679, 681, 683, 688. See Simma, 'Antarctic Treaty' (n 44), 202–8; Fitzmaurice, 'Modifications to the Principles of Consent' (n 34), 309; Orakhelashvili, *Peremptory Norms* (n 39), 94.

respect the territorial integrity of other states.⁷² The same may be said about treaties that grant states rights concerning certain areas or spaces. The right exists only if the agreement grants the right to third states or if there exists a customary law—none of which constitutes an exception to the *pacta tertiis* rule.⁷³ Finally, as to ‘constitutive’ treaties, the claim that treaties may bind non-parties due to the importance of the interests they protect is yet to be established. In cases where treaties do affect non-parties, the ‘objective’ effect may be attributed to another rule or states’ explicit agreement.⁷⁴ For instance, the Åland Islands’ case may be explained by the fact that ‘Finland was the successor state of one of the parties to the treaty on demilitarisation’,⁷⁵ or that the Åland Islands’ situation may be ‘treated as a case of regional customary law’.⁷⁶ As for the other claimed examples like the Antarctic Treaty, Outer Space Treaty, and the UNCLOS’ provisions on the Area, their characterisation as objective regimes remains contested.⁷⁷

B. Absolute & Interdependent Obligations & the Competence to Respond to Material Breaches

1. Concept

The VCLT also dealt with states’ competence to respond to material breaches of treaties by suspending or terminating their treaty relations with the defaulting state.⁷⁸ The rule on material

⁷² Waldock, ‘Third Report on the Law of Treaties’ (1964) (n 41), 28; Gaja, ‘Article 38’ (n 67), 958.

⁷³ Proelß, ‘Article 34’ (n 40), 683–6.

⁷⁴ Orakhelashvili, *Peremptory Norms* (n 39), 94–5.

⁷⁵ Proelß, ‘Article 34’ (n 40), 686 citing Lauterpacht Hersh, *Development of International Law by the International Court* (Stevens 1958), 312; Cahier P, ‘Le problème des effets des traités à l’égard des États tiers’ (1974) 143 *Recueil des Cours de l’Académie de Droit International* 589, 666 ff

⁷⁶ Proelß, ‘Article 34’ (n 40), 686 citing Wengler W, *Völkerrecht*, Vol I (Springer 1964), 609–10. Fitzmaurice, ‘Third Parties & the Law of Treaties’ (n 53), 100.

⁷⁷ Simma, ‘Antarctic Treaty’ (n 44), 204 (claiming that the silence of third states cannot be considered an expression of consent); Proelß, ‘Article 34’ (n 40), 688–90 (arguing that the parties do not have the territorial competence over the object of these treaties which is a condition for establishing an objective regime if it exists).

⁷⁸ Note that this differs from the concept of countermeasures discussed in the next chapter. The treaty’s suspension or termination operates on the treaty itself and pauses or extinguishes the agreement among the parties (Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 87; Riphagen Willem, ‘State Responsibility: New Theories of Obligation in Interstate Relations’ in St John Macdonald Ronald & Johnston Douglas (eds), *Structure & Process of International Law* (Nijhoff 1989), 581, 601). In contrast, countermeasures are external to the treaty (Fitzmaurice Gerald, ‘Second Report on the Law of Treaties’ (1957) II YbILC 16, 30). These are ‘proportionate and temporary infringement’ of duties in response to a state’s wrongful act to ‘compel the [wrongful] state to cease its [breach] [...] and restore [legality]’ do not have such an effect (Simma Bruno & Tams Christian, ‘Article 60’ in Corten Olivier & Klein Pierre (eds), *The Vienna Conventions on the Law of Treaties* (Oxford University Press 2011), 1354 citing *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 55–7). The agreement continues to apply and the imposing state ‘must continue to justify its non-compliance by reference to the criteria for taking countermeasures for as long as its non-compliance lasts’ (Crawford, ‘Third Report on State Responsibility’ (2000) (n 78), 87. See Sicilianos Linos-Alexander, ‘Reprisals & Denunciation or Suspension of a Treaty’ (1993) 4 *European Journal of International Law* 354, 354–5; Fitzmaurice Malgosia & Elias Olufemi, *Contemporary Issues in the Law of Treaties* (Eleven International 2005), 134). Yet, like the

breaches of bilateral agreements was unproblematic.⁷⁹ These establish ‘simple reciprocal relations between two [...] parties’ and thus may ‘easily be [suspended or] dissolved’ if one fails to fulfil its duties.⁸⁰ In most cases, other states do not have any specific interest in the agreement’s operation except for their ‘general interest’ in seeing others observe the principle of *pacta sunt servanda*.⁸¹ Thus, the rule on the suspension or termination of bilateral agreements follows the maxim *inadimplenti non est adimplendum* (‘not required to respect a duty if the other party did not respect its own’).⁸² Should a party commit a material breach of the agreement, the other party may suspend or terminate the treaty relation subject to certain procedural requirements.⁸³

Multilateral agreements posed a greater challenge.⁸⁴ On the one hand, there are multilateral treaties that are deemed ‘bilateralisable’.⁸⁵ While these treaties bind several states, the duties they impose are owed individually.⁸⁶ As scholars like Crawford observe, they create ‘bundles’,⁸⁷ ‘sets’,⁸⁸ ‘aggregates’,⁸⁹ ‘clusters’,⁹⁰ ‘networks’,⁹¹ or ‘dyads’ of bilateral

invocation of responsibility examined later, the parties’ capacity to respond to material breaches of treaties is determined by the structure of the legal relations created by the treaty (See Crawford, ‘Multilateral Rights & Obligations’ (n 6), 426; Simma & Tams, ‘Article 60’ (n 78), 1354).

⁷⁹ Giegerich Thomas, ‘Article 60’ in Dörr Oliver & Schmalenbach Kirsten (eds), *Vienna Convention on the Law of Treaties: Commentary* (Springer 2012), 1109

⁸⁰ Ibid., 1098

⁸¹ Ibid.

⁸² Crawford James, ‘Second Report on State Responsibility’ (1999) II(2) YbILC 12, 78–82; Simma & Tams, ‘Article 60’ (n 78), 1355–7 citing *Tacna-Arica Question* (Chile/Peru) (1925) 19 American Journal of International Law 293, 398 ff; *Diversion of Water from the Meuse* (Netherlands v Belgium) (Judgment) [1937] PCIJ Ser A/B No 70, 25; *Legal Consequences of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1970] ICJ 16, 47.

⁸³ *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331, art 60(1).

⁸⁴ Simma & Tams, ‘Article 60’ (n 78), 1356.

⁸⁵ Crawford, ‘Multilateral Rights & Obligations’ (n 6), 343; Byers Michael, ‘Conceptualising the Relationship between Jus Cogens & Erga Omnes Rules’ (1997) 66 *Nordic Journal of International Law* 211, 232.

⁸⁶ Sicilianos, ‘Classification of Obligations’ (n 38), 1133.

⁸⁷ Ibid; Crawford, ‘Multilateral Rights & Obligations’ (n 6), 428; Huesa Vinaixa Rosario ‘Plurality of Injured States’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 950; Perrin Georges, ‘La Détermination de l’État Lésé’ in Makarczyk Jerzy (ed), *Theory of International Law* (Kluwer 1996), 243.

⁸⁸ Klabbers Jan, ‘Community Interest in the Law of Treaties: Ambivalent Conceptions’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 777.

⁸⁹ Provost René, ‘Reciprocity in Human Rights & Humanitarian Law’ (1994) 65(1) *British Yearbook of International Law* 383, 384 cited in De Jesús, ‘Obligations Erga Omnes’ (n 70), 260

⁹⁰ Seiderman Ian, *Hierarchy in International Law: Human Rights Dimension* (Intersentia 2001), 1163.

⁹¹ Hapbold Matthew, ‘“Injured State” in the Breach of a Non-Proliferation Treaty & the Legal Consequences of such a Breach’ in Joyner Daniel & Roscini Marco (eds), *Non-Proliferation Law as a Special Regime* (Cambridge University Press 2012), 175.

relations.⁹² It is as if each party is in a bilateral relation with every other party.⁹³ Thus, the position of the party ‘specially affected’ or has suffered ‘particularly adverse effects’ due to the material breach is similar to parties in bilateral treaties.⁹⁴ It may suspend its relations with the defaulting party. Yet, the remedy does not include termination.⁹⁵ This is because the ILC also sought to protect the security and stability of multilateral agreements. It believed that suspension was ‘sufficient to provide adequate protection even to a state specially affected by the breach’ while ‘safeguarding the [other parties’] interests’.⁹⁶

However, most authors like Simma and Crawford claim that not all relations are synallagmatic,⁹⁷ and that there are relations that are ‘genuinely multilateral in character’.⁹⁸ The claim’s accuracy will be further examined in *Chapter 11*.⁹⁹ For now, it suffices to note the assertion that some obligations ‘lack synallagma’ such that there is no correlation between the duty imposed on one and the right granted to another.¹⁰⁰ For instance, there are absolute obligations or those imposed by treaties that require states to adopt parallel conduct within their

⁹² Klabbers, ‘Community Interest in the Law of Treaties’ (n 83), 777; Sicilianos Linos-Alexander, *Les réactions décentralisées à l’illicite: des contre-mesures la légitime défense* (Librairie générale de droit et de jurisprudence 1990), 107; Annacker Claudia, *Die Durchsetzung von erga omnes-Verpflichtungen vor dem Internationalen Gerichtshof* (Kovač 1994), 30.

⁹³ Riphagen Willem, ‘Third Report on State Responsibility’ (1982) II(1) YbILC 22, 38; Simma Bruno, ‘Bilateralism & Community Interest in the Law of State Responsibility’ in Dinstein Yoram (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff 1989).

⁹⁴ Simma & Tams, ‘Article 60’ (n 78), 1363. Note that the VCLT does not define the party ‘specially affected’. Yet, its formulation similar to 2001 Draft Article 42(b)(i) which provides that the that a state must be ‘affected by the breach in a way which distinguishes it from the generality of other states to whom the duty is owed’ (ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 119).

⁹⁵ VCLT (n 83).

⁹⁶ Giegerich, ‘Article 60’ (n 79), 114 citing ILC, ‘Reports on the Work of the 17th & 18th Sessions’ (1966) (n 41), 255; Waldock Humphrey, ‘Fifth Report on the Law of Treaties’ (1966) II(2) YbILC 1, 35-6.

⁹⁷ See e.g. Simma, ‘Bilateralism to Community Interest’ (n 21), 233; Crawford, ‘Multilateral Rights & Obligations’ (n 6), 346; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 4), 147; Tams, *Enforcing Obligations Erga Omnes* (n 9), 50, 61, 130; Byers, ‘Jus Cogens & Erga Omnes’ (n 85), 232; Sachariew, ‘Identifying the “Injured State”’ (n 38), 288; Sicilianos, ‘Classification of Obligations’ (n 38), 1134; Scobbie Iain, ‘Invocation of Responsibility for the Breach of Obligations under Peremptory Norms of General International Law’ (2002) 13 *European Journal of International Law* 1201, 1205; Paulus Andreas, ‘Reciprocity Revisited’ in Fastenrath Ulrich, et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 123. See also *Reservations to the Genocide Convention* (Advisory Opinion) [1951] ICJ 15, 23; *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422, 449.

⁹⁸ Crawford, ‘Multilateral Rights & Obligations’ (n 6), 346.

⁹⁹ See Arangio-Ruiz Gaetano, ‘Second Report on State Responsibility’ (1989) II(1) YbILC 3, 6. De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 44, 53; De Jesús, ‘Obligations Erga Omnes’ (n 70), 2, 103, 186, 264; Villalpando, *La communauté internationale* (n 9), 237, 242, 279, 397; Nedeski Nataša, *Shared Obligations in International Law* (Cambridge University Press 2022), 65, 81, 87.

¹⁰⁰ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 4), 146 citing Zemanek Karl, ‘La responsabilité des Etats por faits internationalement illicites ainsi que pour faits internationalement licites’ in Zemanek Karl & Salmon Jean (eds), *Responsabilité internationale* (Pedone 1987), 79; Hafner Gerhard, ‘Bemerkungen zur Funktion und Bestimmung der Betroffenheit im Völkerrecht anhand des Binnenstaates’ (1988) 31 *German Yearbook of International Law* 187, 223, fn 191. Sicilianos, ‘Classification of Obligations’ (n 38), 1132.

own spheres.¹⁰¹ The performance of the duties arising from this kind of obligation is not ‘dependent on [...] [other’s] corresponding performance’ of their duties.¹⁰² ‘Expectations of reciprocity’ may have ‘played a role in the creation of the obligation’.¹⁰³ Yet, the multilateral obligation’s ‘actual application [...] is characterised by [the] absence of reciprocity’.¹⁰⁴ Commonly cited examples of treaties that give rise to these obligations are law-making, regime-creating, and standard-setting treaties.¹⁰⁵ These treaties, such as those found in the fields of human rights and environmental law, impose duties that are to be performed independently by the parties regardless of whether others fulfil their duties.¹⁰⁶

There are also interdependent obligations or those that impose duties that are ‘inextricably linked’ such that a party’s observance of its duty is dependent on that of others.¹⁰⁷ These obligations have some semblance of ‘global reciprocity’ as there is an ‘implied understanding that the [obligation’s] purpose can only be attained if each party complies with it’.¹⁰⁸ The performance of the duty by all parties ‘constitutes a condition *sine qua non* for [...] system they set up’.¹⁰⁹ Yet, interdependent obligations, for Fitzmaurice, differ from bilateral and bilateralisable ones as they ‘cannot be split up into pairs of legal relations’.¹¹⁰ They impose

¹⁰¹ Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) (n 78), 30 ([‘Draft] Article 18 [...] the performance of obligations which, by reason of the [treaty’s] character, are necessarily dependent on a corresponding performance by all the other parties, and which are not of a general public character requiring an absolute and integral performance’), 31 ([‘Draft] Article 19 [...] (iv) [...] the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions’), 54.

¹⁰² Ibid, 54.

¹⁰³ Tams, *Enforcing Obligations Erga Omnes* (n 9), 56.

¹⁰⁴ Ibid; Paulus, ‘Reciprocity Revisited’ (n 97), 117.

¹⁰⁵ Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) (n 78), 31 ([‘Draft] Article 19 [...] (iv) [...] In the case of law-making treaties (*traités-lois*), or of system or régime creating treaties (e.g., for some area, region or locality), or of treaties involving undertakings to conform to certain standards and conditions’); Haugen Hans, ‘The Nature of Social Human Rights Treaties & Standard-Setting WTO Treaties: A Question of Hierarchy’ (2007) 74 *Nordic Journal of International Law* 435, 455.

¹⁰⁶ Sicilianos, ‘Classification of Obligations’ (n 38), 1135; Simma, ‘Bilateralism to Community Interest’ (n 21), 337.

¹⁰⁷ Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) (n 78), 31 ([‘Draft] Article 19 [...] (ii)(b) [...] obligations of the treaty [...] which are of such a kind that, by reason of the character of the treaty, their performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties’), 54.

¹⁰⁸ Tams, *Enforcing Obligations Erga Omnes* (n 9), 57 citing Crawford, ‘Third Report on State Responsibility’ (2000) (n 78), 31; Crawford James, ‘Standing of States: Critique of Art 40 of the ILC’s Draft Articles on State Responsibility’ in Andenas Mads & Fairgrieve Duncan (eds), *Judicial Review in International Perspective*, vol II (Kluwer 2000), 29–31.

¹⁰⁹ Sicilianos, ‘Classification of Obligations’ (n 38), 1134; Pergantis Vassilis, *Paradigm of State Consent in the Law of Treaties* (Elgar 2017), 51; Pauwelyn Joost, ‘Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 *European Journal of International Law* 907, 912.

¹¹⁰ Tams, *Enforcing Obligations Erga Omnes* (n 9), 56; Fitzmaurice Gerald, ‘Third Report on the Law of

indivisible duties such that a state's non-observance of its duty affects all the other parties.¹¹¹ Disarmament treaties illustrate this non-divisibility. In these treaties, each party's duty 'to disarm, not to exceed a certain level of armaments, or not to manufacture or possess certain weapons' is 'dependent on [the other parties'] [...] observance of the same [duty]'.¹¹² In turn, a party's non-performance of its duty directly affects every party and radically changes 'the position of every party with respect to further performance of its [duties]'.¹¹³

2. Development

Fitzmaurice, in his 1957 Report, distinguished multilateral agreements from those that create bilateral and bilateralisable relations. He claimed that the latter gave rise to duties owed towards every party to the treaty and were reciprocal in nature.¹¹⁴ In contrast, the former gave rise to obligations of an 'integral' character where all parties have the same interest in seeing the duty imposed observed.¹¹⁵ These agreements, for Fitzmaurice, create multilateral obligations which are either 'absolute' (also known as 'self-existent' or 'objective') or 'interdependent' (also called 'indivisible').¹¹⁶

Fitzmaurice claimed that the material breach of duties under multilateral agreements entitles only the state 'directly affected' to suspend its relations with the defaulting party.¹¹⁷ Yet, for interdependent obligations, he proposed that a material breach entitles every party to

Treaties' (1958) II YbILC 20, 27–8, 41, 44; Fitzmaurice Gerald, 'Fourth Report on the Law of Treaties' (1959) II YbILC 39, 45.

¹¹¹ Sicilianos, 'Classification of Obligations' (n 38), 1135–6; Haugen, 'Social Human Rights Treaties & Standard-Setting WTO Treaties' (n 105), 454; Pergantis, *Paradigm of State Consent in the Law of Treaties* (n 109), 51.

¹¹² Fitzmaurice, 'Second Report on the Law of Treaties' (1957) (n 78), 54.

¹¹³ VCLT (n 83), Art 60(2)(c); Crawford James & Olleson Simon, 'Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility' (2000) 21 *Australian Yearbook of International Law* 55, 60.

¹¹⁴ Fitzmaurice, 'Second Report on the Law of Treaties' (1957) (n 78), 31.

¹¹⁵ Ibid, 31, 54; Fitzmaurice, 'Fourth Report on the Law of Treaties' (1959) (n 110), 70.

¹¹⁶ Tams, *Enforcing Obligations Erga Omnes* (n 9), 55 noting that both 'absolute' and 'interdependent' obligations have been deemed to require an 'integral performance' (Fitzmaurice, 'Second Report on the Law of Treaties' (1957) (n 78), 31). 'Absolute' obligations have also been referred to as 'integral' (Sachariew Kamen, *Die Rechtsstellung der betroffenen Staaten bei Verletzungen multilateraler Verträge* (Institut für Theorie des Staates und des Rechts 1986), 21–2). The same goes for 'interdependent' obligations (Crawford, 'Third Report on State Responsibility' (2000) (n 78), 31; Simma Bruno, 'Reflections on VCLT Article 60 & its Background in General International Law' (1970) 20 *Austrian Journal of Public International Law* 5, 76; Sicilianos, *Les réactions décentralisées à l'illicite* (n 92), 348). The ILC has also referred to a treaty [that gives rise to] multilateral relations as "[an] absolute type of obligation" [or] of an "integral" or "interdependent" character' (Fitzmaurice & Elias, *Contemporary Issues in the Law of Treaties* (n 78), 148).

¹¹⁷ Spinedi Marina, 'International Crimes of State: Legislative History' in Weiler Joseph, *et al.* (eds), *International Crimes of State: Critical Analysis of the ILC's Draft Article 19* (De Gruyter 1989), 1104.

suspend or terminate the treaty.¹¹⁸ The indivisibility of the duties they impose means that all parties are affected by the breach. Yet, the same is not true for absolute obligations. For Fitzmaurice, the breach of duties under absolute obligations ‘can never constitute a ground of termination or withdrawal by the other parties’ and ‘cannot even justify non-performance of the [duties under] treaty in respect of the defaulting party’.¹¹⁹ To recall, the duties in absolute obligations are ‘not to be performed between states but independently by each of them’.¹²⁰ Thus, one state’s breach of its duties generally leaves other parties unaffected and does not entitle them to respond individually.¹²¹

For his part, Waldock doubted the ‘decisive importance’ of Fitzmaurice’s classification of obligations.¹²² He proposed that material breaches of duties under multilateral treaties other than international organisations’ constituent instruments entitle parties to suspend or terminate the treaty or the provisions breached between them and the defaulting state.¹²³ For Waldock, parties in multilateral treaties have a common interest in the ‘observance of the [duties under] the treaty by every other party’.¹²⁴ As such, every party may be ‘seriously affected’ by the material breach.¹²⁵

In considering the proposals, there was a marked divide within the ILC between the synallagmatic and solidaristic approaches to the legal relations arising from multilateral treaties.¹²⁶ For some, only the party ‘directly affected’ by the breach may suspend its treaty relations with the defaulting state.¹²⁷ Yet, others claimed that every party to a multilateral treaty

¹¹⁸ Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) (n 78), 31, 54, 63.

¹¹⁹ Ibid, 31.

¹²⁰ Tams, *Enforcing Obligations Erga Omnes* (n 9), 61–2.

¹²¹ Ibid; Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) (n 78), 54.

¹²² Waldock Humphrey, ‘Second Report on the Law of Treaties’ (1963) II YbILC 36, 76–7.

¹²³ Ibid, 73 (‘[Draft] Article 20: [...] 4. In the case of a multilateral treaty other than [constituent instruments of international organisations] a material breach by one party constitutes a ground upon which: (a) any other party may, in the relations between itself and the defaulting state, either—(i) terminate or suspend the application of the treaty, subject to the reservation of its rights [...]; or (ii) terminate or suspend the application only of the provision of the treaty which has been broken, subject to the same reservation; [...] (b) the other parties to the treaty, by an agreement [...], may collectively either—(i) terminate the treaty or suspend its application; or (ii) terminate or suspend the application only of the particular provision which has been broken’).

¹²⁴ Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 36

¹²⁵ Ibid.

¹²⁶ See Hutchinson D, ‘Solidarity & Breaches of Multilateral Treaties’ (1988) 59 *British Yearbook of International Law* 151, 185–9; Spinedi, ‘International Crimes of State’ (n 117), 1105–6.

¹²⁷ See ILC, ‘Summary Records of the 15th Session’ (1963) I YbILC 1, 294 (Verdross); ILC, ‘Summary Records of the 17th Session’ (1966) I(I) YbILC 1, 63 (Tunkin); Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 34 (Netherlands); 34–5 (US).

has such a capacity as all have an interest in its observance of the duties it imposes.¹²⁸ Ultimately, the ILC adopted Fitzmaurice's proposal. For bilateralisable multilateral treaties, Article 60(2)(b) provides that only the party 'specially affected' may suspend its treaty relations with the defaulting state.¹²⁹ For interdependent obligations, Article 60(2)(c) states that all parties may suspend the 'operation of the treaty in whole or in part' if there is a breach of a duty that 'radically changes' the position of every party with respect to the further performance of their duties.¹³⁰ For absolute obligations, specifically those that protect human and humanitarian rights, Article 60(5) provides that no state may individually respond unless they are 'specially affected' by the breach of duty.¹³¹

Fitzmaurice's classification of obligations, as will be shown in the next chapters, influenced the rules on the competence to implement the wrongful state's responsibility.¹³² For obligations deemed bilateral or bilateralisable, 2001 Draft Article 42(a) grants the competence to implement to states to whom the duty breached is owed individually by the wrongful state.¹³³ For interdependent obligations, all states, under 2001 Draft Article 42(b)(ii) possess this capacity.¹³⁴ Finally, for non-synallagmatic obligations, including absolute ones, the state that has the competence to implement is the 'specially affected' state under 2001 Draft Article 42(b)(i),¹³⁵ or every state that has a legal interest in the observance of the duties owed *erga omnes* or *erga omnes partes* under 2001 Draft Article 48.¹³⁶

C. *Peremptory Norms & Non-Derogability*

1. *Concept*

Perhaps the most crucial effect that the VCLT affords to collective norms is that of *peremptory norms*. Also known as *jus cogens*,¹³⁷ or compelling law,¹³⁸ these norms are said to

¹²⁸ See ILC, 'Summary Records of the 17th Session' (1966) (n 127), 60 (Rosenne & Briggs); 61 (Castrén); 62 (Yassen & de Luna).

¹²⁹ VCLT (n 83), art 60(2)(b).

¹³⁰ Ibid, art 60(2)(c).

¹³¹ Ibid, art 60(5). Tams, *Enforcing Obligations Erga Omnes* (n 9), 62.

¹³² Crawford, 'Multilateral Rights & Obligations' (n 6), 346.

¹³³ ILC, 'Report on the Work of the 53rd Session' (2001) (n 3), 117–9.

¹³⁴ Ibid, 119.

¹³⁵ Ibid.

¹³⁶ Ibid, 126–8.

¹³⁷ Bassiouni M. Cherif, 'International Crimes: Jus Cogens & Obligations Erga Omnes' (1996) 59(4) *Law & Contemporary Problems* 63, 67, Hannikainen Lauri, *Peremptory Norms (Jus Cogens) in International Law: Development, Criteria, Present Status* (Finnish Laywer 1988), 21.

¹³⁸ Kolb Robert, *Peremptory International Law—Jus Cogens: A General Inventory* (Hart 2020), 1 ('[The term]

occupy the ‘highest hierarchical position among other norms’.¹³⁹ These include the norm against force,¹⁴⁰ several norms protecting human rights such as those against genocide,¹⁴¹ torture,¹⁴² racial discrimination,¹⁴³ and slavery,¹⁴⁴ and the norm on a people’s right to self-determination.¹⁴⁵ Some also argue that certain rules that safeguard the environment also possess this character.¹⁴⁶

“compelling law” [is] an imprecise expression, since all binding legal norms are compelling—not only *jus cogens* norms, but also their counterpart norms, *jus dispositivum*”).

¹³⁹ Bassiouni, ‘Jus Cogens & Obligations Erga Omnes’ (n 137), 67; Orakhelashvili, *Peremptory Norms* (n 39), 9; ILC, ‘Reports on the Work of the 17th & 18th Sessions’ (1966) (n 41), 247; Tladi Dire, ‘Fourth Report on Peremptory Norms’ (31 January 2019) UN Doc A/CN.4/727, 24 ff.

¹⁴⁰ See Corten Olivier, *Law Against War: Prohibition on the Use of Force in Contemporary International Law* (Hart 2010), 200 ff; De Hoogh André, ‘Jus Cogens & the Use of Armed Force’ in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 1164; Johnston Katie, ‘Identifying the Jus Cogens Norm in the Jus Ad Bellum’ (2020) 70 *International & Comparative Law Quarterly* 29; Helmersen Sondre, ‘Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations’ (2014) 56 *Netherlands International Law Review* 167, 173–4.

¹⁴¹ See *Armed Activities on the Territory of the Congo* (DRC v Rwanda) (Jurisdiction & Admissibility) [2006] ICJ 6, 31–2; Ago Roberto, ‘Droit des traités à la lumière de la Convention de Vienne’ (1971) 134 *Recueil des Cours de l’Académie de Droit International* 297, 324; Bianchi Andrea, ‘Human Rights & the Magic of Jus Cogens’ (2008) 19 *European Journal of International Law* 491, 491–2.

¹⁴² See *Obligation to Prosecute or Extradite* [2012] (n 97), 457; *Prosecutor v Delalić* (Judgment) (ICTY, Trial Chamber, 96-21-T, 16 November 1998), ¶454; *Prosecutor v Furundžija* (Judgment) (ICTY, Trial Chamber, 95-17/1, 10 December 1998), ¶¶153–6; *Cantoral Benavides v Peru* (Judgment) (IACtHR, Ser C No 88, 18 August 2001), ¶99; *Tibi v Ecuador* (Judgment) (IACtHR, Ser C No 144, 7 September 2004), 143; Tomuschat Christian, ‘Security Council & Jus Cogens’ in Cannizzaro Enzo (ed), *Present & Future of Jus Cogens* (Sapienza 2015), 36.

¹⁴³ See Schabas William, *The Customary International Law of Human Rights* (Oxford University Press 2021), 64–6, 167–8 citing *Georgia v Russia* (Merits) (ECtHR, 13255/07, 3 July 2014) (Tsotsoria, dissenting). de Wet Erika, ‘Emergence of International & Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’ (2006) 19 *Leiden Journal of International Law* 611, 616; Cassese Antonio, ‘Enhanced Role of Jus Cogens’ in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 162; Tladi, ‘Fourth Report on Peremptory Norms’ (2019) (n 139), 45–6; *Juridical Condition & Rights of Undocumented Migrants* (Advisory Opinion) (IACtHR, OC-18/03, 17 September 2003), ¶¶97–101, 110–1.

¹⁴⁴ See Schabas, *Customary Human Rights Law* (n 143), 56 citing Lauterpacht Hersch, ‘First Report on the Law of Treaties’ (1953) II(1) YbILC 90, 154–5. Tladi, ‘Fourth Report on Peremptory Norms’ (2019) (n 139), 46–8 citing *Aloeboetoe v Suriname* (Reparation & Costs) (IACtHR, Ser C No 15, 10 September 1993), ¶57; *Río Negro Massacres v Guatemala* (Judgment) (IACtHR, Series C No 250, 4 September 2012), ¶227; Verdross Alfred, ‘Jus Dispositivum & Jus Cogens in International Law’ (1966) 50 *American Journal of International Law* 55, 59; Mik Cezary, ‘Jus Cogens in Contemporary International Law’ (2013) 33 *Polish Yearbook of International Law* 27, 59.

¹⁴⁵ See Tladi, ‘Fourth Report on Peremptory Norms’ (2019) (n 139), 52 citing Kadelbach Stefan, ‘Genesis, Function, & Identification of Jus Cogens Norms’ (2016) 46 *Netherlands International Law Review* 147, 152; Alexidze, ‘Legal Nature of Jus Cogens’ (n 20), 229; Vargas Santalla, ‘In Quest of the Practical Value of Jus Cogens Norms’ (2016) 46 *Netherlands International Law Review* 211, 227.

¹⁴⁶ See Orakhelashvili, *Peremptory Norms* (n 39), 65; Byrne Mark, ‘Can Responsibility for Climate Change Damage Be Criminalised?’ (2010) 4 *Carbon & Climate Change Law Review* 278, 281; Brunnée, ‘Common Interest & International Environmental Law’ (n 20), 804 noting Whiteman Marjorie, ‘Jus Cogens in International Law, with a Projected List’ (1977) 7 *Georgia Journal of International & Comparative Law* 609, 626; Gómez Robledo Antonio, ‘Le jus cogens international: Sa genèse, sa nature, ses fonctions’ (1981) 172 *Recueil des Cours de l’Académie de Droit International* 9, 172; Alexidze, ‘Legal Nature of Jus Cogens’ (n 20), 245. *Contra* Oral Nilufer, ‘Environmental Protection as a Peremptory Norm’ in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 592; Dupuy Pierre-Marie, Le Moli Ginevra, & Viñuales Jorge, ‘Customary International Law & the Environment’ in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of*

Peremptory norms restrict states' capacity to 'develop, maintain or change' norms deemed vital by the international community.¹⁴⁷ Under the VCLT, they prohibit states from derogating from norms 'accepted and recognised' to be peremptory.¹⁴⁸ In a 'purely technical sense', these norms provide a 'technique for solving conflicts between rules of international law'.¹⁴⁹ As Kolb submits, they function as the opposite of the *lex specialis* principle.¹⁵⁰ Peremptory norms deny the derogating norm's operation 'to uphold the general legal regime' for every state and 'protect some collective interest'.¹⁵¹ Thus, under VCLT Article 53 a treaty that conflicts with an existing peremptory norm is considered wholly invalid due to the 'disregard of the [peremptory norm's] proscription'.¹⁵² Yet, the VCLT is 'much more forgiving' for agreements that conflict with a peremptory that subsequently emerges.¹⁵³ Under VCLT Article 64, only the derogating provision, if separable, is deemed void as it is 'merely refuted by subsequent legal developments'.¹⁵⁴

International Environmental Law (2nd edn, Oxford University Press 2021), 393; Birnie Patricia, Boyle Alan, & Redgewell Catherine, *International Law & the Environment* (3rd edn, Oxford University Press 2007), 109–10; Singleton-Cambage Krista, 'International Legal Sources & Global Environmental Crises: Inadequacy of Principles, Treaties & Custom' (1995) 2 *ILSA Journal of International & Comparative Law* 171, 185

¹⁴⁷ Byers, 'Jus Cogens & Erga Omnes' (n 85), 220; Hillgruber Christian, 'Right of Third States to Take Countermeasures' in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 270; Magallona Merlin, 'Jus Cogens in the Vienna Convention on the Law of the Treaties' (1976) 51 *Philippine Law Journal* 521, 529; Shelton Dinah, 'Hierarchy in International Law' (2006) 100(2) *American Journal of International Law* 291, 297.

¹⁴⁸ VCLT (n 83), art 53.

¹⁴⁹ Linderfalk Ulf, 'Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 *European Journal of International Law* 853, 854. See Zemanek Karl, 'Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?' in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 400. *Contra* Simma, 'Bilateralism to Community Interest' (n 21), 287 ('Jus cogens distinguishes itself from systems that merely regulate the conflict of norms')

¹⁵⁰ Kolb, *Peremptory International Law* (n 138), 35.

¹⁵¹ *Ibid.*

¹⁵² VCLT (n 83), art 53; Schmalenbach Kirsten, 'Article 53' in Dörr Oliver & Schmalenbach Kirsten (eds), *Vienna Convention on the Law of Treaties: Commentary* (Springer 2018), 983; Tladi, 'Third Report on Peremptory Norms' (2018) (n 39), 16; Orakhelashvili, *Peremptory Norms* (n 39), 139 ('The nullity under Article 53 is a special case of nullity [...] it is not simply the illegality subsumable within the bilateral relations of the parties, but the objective illegality requiring objective elimination.'). Note that 'a reading of articles 65 and 66 of the [VCLT] together leads to the conclusion that only a state which is a party to a treaty conflicting with a peremptory norm can challenge the validity of such a treaty' (De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 41; Cannizzaro Enzo, 'A Higher Law for Treaties?' in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 431; Tomuschat Christian, 'Obligations arising for States Without or Against Their Will' (1993) 241 *Recueil des Cours de l'Académie de Droit International* 195, 363; Magallona, 'Jus Cogens' (n 152), 536. *Contra* De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 42; Tladi, 'Third Report on Peremptory Norms' (2018) (n 39), 22; Orakhelashvili, *Peremptory Norms* (n 39), 141–2; Zemanek, 'Metamorphosis of Jus Cogens' (n 149), 392)

¹⁵³ VCLT (n 83), art 64; Schmalenbach Kirsten, 'Article 64' in Dörr Oliver & Schmalenbach Kirsten (eds), *Vienna Convention on the Law of Treaties: Commentary* (Springer 2018).

¹⁵⁴ Schmalenbach, 'Article 64' (n 153). See Lagerwall Anne, 'Article 64' in Corten Olivier & Klein Pierre (eds), *The Vienna Conventions on the Law of Treaties* (Oxford University Press 2011), 1457.

Peremptory norms are also characterised by their ‘rigidity’ and ‘resistance to change’.¹⁵⁵ The VCLT does not prescribe ‘legal stagnation’.¹⁵⁶ As Waldock remarked, ‘it would [...] be wrong to consider rules now accepted’ as peremptory to be ‘immutable and incapable of abrogation or amendment’.¹⁵⁷ Yet, peremptory norms make modification difficult thereby placing an additional protection for the interests they safeguard. As in many domestic systems in which the ‘only protection from abrogation for entrenched rights is a more onerous process of change’,¹⁵⁸ peremptory norms may only be modified through the acceptance and recognition by an overwhelming majority of states. Until such time, ‘groups of states that fall short of a “very large majority” will neither be able to derogate from nor modify the contours of an existing [peremptory] norm’.¹⁵⁹

Finally, the norm’s peremptory character applies to states even if they have not accepted and recognised its status or have objected to its emergence. While the VCLT is silent on the matter, some scholars and states hold this view.¹⁶⁰ For scholars like Ragazzi, this is due to the ‘very concept’ of peremptory norms which ‘would be frustrated’ if some states were ‘allowed to escape [its] application [...] on the ground of persistent objection’.¹⁶¹ Others like Tladi argue that peremptory norms are characterised by their ‘universal application’ and the persistent objector rule would contradict this as it in effect permits derogation.¹⁶² Still, authors like Byers and Schmalenbach posit that states, ‘by participating in the international legal system’ consent to the possibility that there are norms to which they would not be able to derogate even in the absence of their consent.¹⁶³

¹⁵⁵ Hillgruber, ‘Third States & Countermeasures’ (n 147), 270.

¹⁵⁶ Schmalenbach, ‘Article 53’ (n 152), 984.

¹⁵⁷ Waldock, ‘Second Report on the Law of Treaties’ (1963) (n 122), 53.

¹⁵⁸ Johnston, ‘Jus Cogens Norm in Jus Ad Bellum’ (n 140), 51.

¹⁵⁹ Ibid.

¹⁶⁰ See Tladi, ‘Third Report on Peremptory Norms’ (2018) (n 39), 58–9 citing *Juridical Condition & Rights of Undocumented Migrants* (n 143), ¶¶4–5; *Domingues v US* (Decision) (IACmHR, Report 62/02, 22 October 2000), ¶49; Kolb, *Peremptory International Law* (n 138), 96. Schmalenbach, ‘Article 53’ (n 152), 989 citing Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (n 137), 214; Ragazzi, *Obligations Erga Omnes* (n 38), 67; Shelton, ‘Hierarchy in International Law’ (n 147), 304. See also ILC, ‘Peremptory Norms: Comments & Observations of Governments’ (9 March 2022) UN Doc A/CN.4/748 39 (Japan), 67 (Cyprus), 71 (Spain), 73 (US). But see Magallona, ‘Jus Cogens’ (n 152), 528–9; Linderfalk Ulf, ‘Source of Jus Cogens Obligations: How Legal Positivism Copes with Peremptory Norms’ (2013) 82 *Nordic Journal of International Law* 369, 385; Bos Maarten, *Methodology of International Law* (Elsevier 1984), 246, 250; van Hoof Godefridness *Rethinking the Sources of International Law* (Kluwer 1983), 160–2; Rozakis Christos, *Concept of Jus Cogens* (North Holland 1976), 76–80. But see also ILC, ‘Comments & Observations of Governments’ (2022) (n 160), 69 (The Netherlands), 72 (UK), 68 (Israel), 70 (Russia), 72 (UK).

¹⁶¹ Ragazzi, *Obligations Erga Omnes* (n 38), 66; Helmersen, ‘Prohibition of the Use of Force’ (n 140), 172.

¹⁶² Tladi, ‘Third Report on Peremptory Norms’ (2018) (n 39), 58.

¹⁶³ Johnston, ‘Jus Cogens Norm in Jus Ad Bellum’ (n 140), 39 citing Byers, ‘Jus Cogens & Erga Omnes’ (n 85), 228.

2. Development

Limitations on contractual abilities have been present in municipal systems. Roman law distinguished between *jus dispositivum* and *jus strictum*. While ‘parties may disregard *jus dispositivum* in their contractual relations, their [normative] acts must comply with *jus strictum*’, otherwise they are void.¹⁶⁴ It also distinguished between *jus publicum* and *jus privatum*. The former is ‘based on public interests and is thus non-derogable’ while the latter is ‘based on private interests and can [...] be altered by the parties’.¹⁶⁵ Other municipal orders also provided for the nullity of contracts as in the case of English law with *acts contra bones mores*, French law with *ordre public*, and German law with *öffentliche Ordnung*.¹⁶⁶

International law scholars, like Grotius, Vattel, Verdoss, Mossler, and Oppenheim, also ‘explored the possibility of curbing [states’] power through [...] mandatory norms’.¹⁶⁷ Yet, it was through the VCLT that peremptory norms eventually ‘found its way into positive law’.¹⁶⁸ Special Rapporteur Lauterpacht (1953–5), in his 1953 Report, proposed that a treaty is void if ‘its performance involves an [unlawful] act’.¹⁶⁹ The voidness, he submitted, derives not from their ‘inconsistency with customary law’ but with ‘[public policy’s] overriding principles’.¹⁷⁰

¹⁶⁴ Frowein Jochen, ‘Reactions by Not Directly Affected States to Breaches of Public International Law’ (1994) 248 *Recueil des Cours de l’Académie de Droit International* 345, 363.

¹⁶⁵ Kolb Robert, ‘Peremptory Norms as a Legal Technique rather than Substantive Super-Norms’ in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 40.

¹⁶⁶ Villegier Mark, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009), 665.

¹⁶⁷ Uhlmann Eva, ‘Community Interests, Jus Cogens, & Protection of the Global Environment: Developing Criteria for Peremptory Norms’ (1998) 11 *Georgetown International Environmental Law Review* 101, 101. Note Grotius posited, based on natural law, that there existed norms to which states’ ‘powers [did] not extend’ (Grotius Hugo, *De jure belli ac pacis*, vol book II, Kelsey Francis (tr) (Clarendon 1625), 40). Vattel argued that there are laws which are ‘necessary and indispensable’ that ‘nations cannot alter it by agreement, nor [...] release themselves from it’ (De Vattel Emer, *The Law of Nations*, Fenwick Hudson (tr) (Clarendon 1758), 4). Later, Verdoss also asserted that the international community’s interests required norms that ‘cannot be derogated from by the will of the contracting parties’ (Verdross Alfred, ‘Forbidden Treaties in International Law’ (1937) 31 *American Journal of International Law* 571, 571–2). Mosler further posited a public order consisting of principles and rules of vital importance that agreements to the contrary have no legal force (Mosler Hermann, ‘International Society as a Legal Community’ (1974) 140 *Recueil des Cours de l’Académie de Droit International* 1, 18). Still, others, such as Oppenheim, argued based on positivism, that there are ‘universally recognised principles’ that render any conflicting treaty void (Oppenheim Lassa, *International Law* (Longmans 1905), 528).

¹⁶⁸ de Wet Erika, ‘Entrenching International Values through Positive Law: The (Limited) Effect of Peremptory Norms’ (KFG Working Paper, Series No 25, January 2018), 7; Dupuy Pierre-Marie, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations & Codification of the Law of Responsibility’ (2002) 13(5) *European Journal of International Law* 1053, 1055.

¹⁶⁹ Lauterpacht, ‘First Report on the Law of Treaties’ (1953) (n 144), 154 (‘[Draft] Article 15 [...] A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the [ICJ]’). See also ILC, ‘Documents of the 5th Session’ II YbILC 163, 165 (Yepes).

¹⁷⁰ Lauterpacht, ‘First Report on the Law of Treaties’ (1953) (n 144), 155 (‘These principles need not necessarily have crystallised in [an] accepted rule of law [...] They may be expressive of rules of international morality so cogent that [any] tribunal would consider them as forming part of those principles of law generally recognised by civilised nations’).

Fitzmaurice further refined Lauterpacht's proposal. He submitted that a treaty, to be effective, must have 'essential validity', meaning that it must be formally, temporarily, and substantially valid.¹⁷¹ He posited that a treaty lacks substantial validity if it contravenes or involves in its execution an infraction of 'principles and rules [...] which are [...] *jus cogens*'.¹⁷² Finally, Waldock submitted that *jus cogens* 'means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law' and 'which may be modified or annulled only by a subsequent norm of general international law'.¹⁷³ He also cited examples that included the use of threat or force, any conduct characterised as an 'international crime', and any act or omission that international law requires every state to cooperate to suppress or punish.¹⁷⁴

The ILC accepted the concept of peremptory norms. Yet, views regarding its nature diverged.¹⁷⁵ Some submitted that these norms are based on public order.¹⁷⁶ Others argued that they are derived from positive law 'explicitly or implicitly recognised by states'.¹⁷⁷ The debate was not settled and the ILC merely noted the divergent opinions but 'justified the [adoption of the] proposed draft article [on peremptory norms] as an attempt to seize a comparatively recent development in international law'.¹⁷⁸ As for states, many considered the concept as an

¹⁷¹ Fitzmaurice, 'Third Report on the Law of Treaties' (1958) (n 110), 30–1

¹⁷² Ibid, 23 ('[Draft] Article 16 [...] (2) It is essential to the validity of a treaty that it should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are [...] *jus cogens*'), 27 ('Draft Article 17 [...] Only if the treaty involves a departure from or conflict with absolute and imperative rules or prohibitions of [...] law in the nature of *jus cogens* that a cause of invalidity can arise'), 40–1.

¹⁷³ Waldock, 'Second Report on the Law of Treaties' (1963) (n 122), 38–9 ('[Draft] Article 1 [...] (3) [...] (c) "Jus cogens" means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law'), 39 ('It is a term which is well enough understood, but it is not so easily defined with precision [...] a *jus cogens* rule is a rule embodying a norm of general international law from which no derogation is permitted and which can only be modified or set aside by the creation of a further norm of general international law').

¹⁷⁴ Ibid, 40 ('Imperfect though the international legal order may be, the view that [...] there is no international public order—no rule from which states cannot at their own free will contract out—has become increasingly difficult to sustain.');

¹⁷⁵ 52 ('Draft Article 13 [...] 4. The provisions of this article do not apply, however, to a general multilateral treaty which abrogates or modifies a rule having the character of *jus cogens*.'). See ILC, 'Report on the Work of the 15th Session' (1963) II YbILC 187, 198.

¹⁷⁶ Villeger, *Vienna Convention on the Law of Treaties* (n 166), 666–7.

¹⁷⁷ Schmalenbach, 'Article 53' (n 152), 970 citing ILC, 'Summary Records of the 15th Session' (1963) (n 127), 64.

¹⁷⁸ Schmalenbach, 'Article 53' (n 152), 970 citing ILC, 'Summary Records of the 15th Session' (1963) (n 127), 63, 69; Kolb, 'Peremptory Norms as a Legal Technique' (n 165), 24 ('What is essential [...] is that the rule is recognised in its peremptory quality [...] by [...] states'); Kolb, *Peremptory International Law* (n 138), 35 ('[The concept of peremptory norms] is hierarchically neutral'); Magallona, 'Jus Cogens' (n 152), 528.

¹⁷⁹ Schmalenbach, 'Article 53' (n 152), 970 citing ILC, 'Report on the Work of the 15th Session' (1963) (n

important step for international law.¹⁷⁹ While some deemed peremptory norms to be a ‘fairly new concept’,¹⁸⁰ others considered it to be a ‘long-standing principle’.¹⁸¹ However, there were also concerns regarding the basis for peremptory norms,¹⁸² and the criteria for their identification.¹⁸³ Nevertheless, most accepted the concept and states adopted VCLT Article 53 with only a few votes against or abstentions.¹⁸⁴

174), 198 (‘Whatever imperfections [the] law may still have [...] [the view that] there is no rule from which states cannot at their own free will contract out has become [...] difficult to sustain [...] In codifying the law of treaties [the ILC] must take the position that there are rules and principles from which states are not competent to derogate by a treaty arrangement’).

¹⁷⁹ Schmalenbach, ‘Article 53’ (n 152), 972; Lagerwall, ‘Article 64’ (n 154), 1461.

¹⁸⁰ Schmalenbach, ‘Article 53’ (n 152), 972. See Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 21 (Brazil), 21–2 (Cyprus), 22 (Czechoslovakia, Ecuador), 23 (Thailand, United Arab Republic); UN Conference on the Law of Treaties, ‘Summary Records of the First Session’ (1968) 26 March–24 May 1968, 296 (Kenya), 296–7 (Cuba), 298 (Chile), 300 (Sierra Leone), 303 (Uruguay), 305 (Cyprus), 311 (Hungary), 322 (Ukraine), 324 (Monaco, Norway), 325 (Thailand), 326 (Trinidad & Tobago); UN Conference on the Law of Treaties, ‘Summary Records of the Second Session’ (9 April–22 May 1969) UN Doc A/CONF.39/11/Add.1, 95 (Philippines, Germany FR), 97 (Cuba), 98 (Cameroon), 100 (Ukraine) 101 (Romania), 102 (Bulgaria), 103 (Cyprus), 105 (Belarus), 106 (Libya).

¹⁸¹ Schmalenbach, ‘Article 53’ (n 152), 972. See Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 22 (Guatemala, Italy, Philippines, Poland, Syria), 23 (Venezuela, Yugoslavia); UN Conference on the Law of Treaties, ‘Summary Records, First Session’ (1968) (n 180), 294 (Mexico), 295 (Iraq), 297 (Lebanon), 294 (USSR), 298 (Nigeria), 301 (Madagascar, Colombia), 308 (Argentina), 310 (Israel), 311 (Italy), 312 (Romania), 315 (Spain), 317 (Brazil), 320 (Ivory Coast), 321 (Tanzania), 327 (Mali); UN Conference on the Law of Treaties, ‘Summary Records, Second Session’ (1969) (n 180), 96 (Ecuador), 97 (Romania), 103 (Iraq), 104 (Italy), 106 (Libya).

¹⁸² Schmalenbach, ‘Article 53’ (n 152), 972. Note that some adopted the natural (Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 21 (Algeria), 22 (Panama); UN Conference on the Law of Treaties, ‘Summary Records, First Session’ (1968) (n 180), 294 (Mexico), 295 (Iraq), 296 (Kenya), 297 (Lebanon), 298 (Nigeria), 301 (Ghana, Colombia), 302 (Poland), 305 (Cyprus), 312 (Romania), 324 (Monaco); UN Conference on the Law of Treaties, ‘Summary Records, Second Session’ (1969) (n 180), 95 (Philippines), 99 (Poland), 104 (Italy), 105 (Costa Rica, Uruguay)) and public order theories (Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 21 (Algeria, Brazil), 22 (Panama), 23 (Uruguay); UN Conference on the Law of Treaties, ‘Summary Records, First Session’ (1968) (n 180), 294 (Mexico), 295 (Greece), 296 (Iraq), 302 (Poland), 303 (Uruguay), 304 (UK), 307 (Belarus), 311 (Italy), 313 (Bulgaria), 316 (Pakistan), 317 (Brazil), 318 (Czechoslovakia), 320 (Ivory Coast), 325 (Thailand, Malaysia); UN Conference on the Law of Treaties, ‘Summary Records, Second Session’ (1969) (n 180), 95 (Philippines), 96 (Ecuador), 97 (Romania, UK), 103 (Cyprus), 106 (Libya)). Others adopted the positivist view (Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 21 (Algeria), 22 (Iraq); UN Conference on the Law of Treaties, ‘Summary Records, First Session’ (1968) (n 180), 295 (US), 296 (Kenya), 298 (Nigeria), 302 (Poland), 306 (Sweden), 311 (Hungary), 317 (Brazil), 322–3 (Philippines), 327 (Mali); UN Conference on the Law of Treaties, ‘Summary Records, Second Session’ (1969) (n 180), 95 (Germany FR).

¹⁸³ See Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 21 (UK & Brazil), 22 (Indonesia, Iraq); UN Conference on the Law of Treaties, ‘Summary Records, First Session’ (1968) (n 180), 294 (Mexico), 295 (Greece), 300, (Turkey), 304 (UK), 306 (Sweden), 309 (France), 316 (Australia), 318 (Japan, Germany FR), 320 (Belgium), 323 (Switzerland), 325 (Malaysia), 326 (Trinidad & Tobago); UN Conference on the Law of Treaties, ‘Summary Records, Second Session’ (1969) (n 180), 93 (France), 95 (Germany FR), 97 (Cuba, UK), 100 (US), 101 (Japan), 103 (Switzerland), 104 (Malaysia), 105 (Netherlands).

¹⁸⁴ Schmalenbach, ‘Article 53’ (n 152), 975. See Waldock, ‘Fifth Report on the Law of Treaties’ (1966) (n 96), 20 (Luxembourg), 21 (Turkey); UN Conference on the Law of Treaties, ‘Summary Records, First Session’ (1968) (n 180), 300 (Turkey), 309 (France), 316 (Australia); UN Conference on the Law of Treaties, ‘Summary Records, Second Session’ (1969) (n 180), 93–5 (France: ‘Some submit [...] that *jus cogens* was [based on] notions of internal law such as public policy [and] law. But [...] there [are] substantial differences between [the] international [and] national societies’); 95 (Australia: ‘Shared the difficulties [...] in agreeing to become bound by

3. Basis for Peremptory Norms

The VCLT's concept of peremptory norms is arguably 'now well-established'.¹⁸⁵ However, there remains a 'doctrinal controversy' regarding its foundations.¹⁸⁶ Understandably, the complexity of this issue requires a separate examination. Indeed, a vast amount of literature has been dedicated to the examination of the concept's roots.¹⁸⁷ The analysis below provides an overview of these debates which would also aid the next chapter's examination of the nature of duties owed *erga omnes*.

Broadly, there are three views on the basis of peremptory norms—the natural, public order, and positive law theories.¹⁸⁸ The naturalist theory, through scholars like Grotius and Vattel,¹⁸⁹ arguably provided the impetus for the development of peremptory norms.¹⁹⁰ Under this, peremptory norms are founded on 'principles of morality' which are 'inherent' in legal systems.¹⁹¹ The norm's peremptory character derives not from states' will.¹⁹² Instead, it is rooted in the norm's nature and the significance of the interest that it protects.¹⁹³ As the norm

a doctrine so imprecisely formulated'); 99 (Turkey: '[Peremptory norms relate to the] hierarchy of norms [...] But such a presupposed a hierarchy [...] [is] not to be found in the international [legal order which differs from] internal law'); 106 (Belgium: 'The international legal order [...] was as yet unorganised and to incorporate [...] *jus cogens* into it would therefore be premature').

¹⁸⁵ Crawford, 'Multilateral Rights & Obligations' (n 6), 417; Suy Eric, 'Article 53' in Corten Olivier & Klein Eckart (eds), *The Vienna Conventions on the Law of Treaties* (Oxford University Press 2011), 1226. See *Armed Activities* [2006] (n 141), 32; *Jurisdictional Immunities of the State* (Germany v Italy; Greece intervening) (Judgment) [2012] ICJ 99, 140–2; *Furundžija* (n 142), ¶¶153–4; *Juridical Condition & Rights of Undocumented Migrants* (n 143), 310.

¹⁸⁶ Lagerwall, 'Article 64' (n 154), 1457; Tladi Dire, 'First Report on Peremptory Norms' (8 March 2016) UN Doc A/CN.4/693, 29.

¹⁸⁷ See the selected bibliography in Kolb, *Peremptory International Law* (n 138), 130–7.

¹⁸⁸ Lagerwall, 'Article 64' (n 154), 1457, 1466; Tladi, 'First Report on Peremptory Norms' (2016) (n 186), 30.

¹⁸⁹ See Grotius, *De jure belli ac pacis* (n 167), 40; De Vattel, *The Law of Nations* (n 167), 4.

¹⁹⁰ Suy, 'Article 53' (n 185), 1225.

¹⁹¹ Tladi, 'First Report on Peremptory Norms' (2016) (n 186), 31 citing Janis Mark, 'Nature of Jus Cogens' (1987) 3 *Connecticut Journal of International Law* 359, 361; Dubois Dan, 'Authority of Peremptory Norms: State Consent or Natural Law?' (2009) 78 *Nordic Journal of International Law* 133, 134; O'Connell Mary, 'Jus Cogens: International Law's Higher Ethical Norms' in Childress Donald (ed), *Role of Ethics in International Law* (Cambridge University Press 2012), 97. Villalpando, *La communauté internationale* (n 9), 77 ('La fonction du *jus cogens* dans le système juridique—et notamment l'impossibilité pour les Etats d'y déroger au moyen d'un traité—a rappelé à d'aucuns le "fantôme" du "vieux droit naturel" qui se présenterait "sous un déguisement nouveau"') citing Marek Krystyna, 'Contribution à l'étude du jus cogens en droit international', *Recueil d'études de droit international en hommage à Paul Guggenheim* (Graduate Institute 1968), 445; de Visscher Charles, 'Positivism et "jus cogens"' (1971) 71 *Revue générale de droit international public* 7, 9–10; Gómez Robledo, 'Le jus cogens international' (n 146), 24.

¹⁹² Frowein, 'Reactions by Not Directly Affected States' (n 164), 365; Trindade Antônio, *International Law for Humankind: Towards a New Jus Gentium* (Nijhoff 2013), 294–5.

¹⁹³ Crawford, 'Multilateral Rights & Obligations' (n 6), 412; Orakhelashvili, *Peremptory Norms* (n 39), 10;

reflects the international community's 'fundamental values', it is 'placed in a hierarchically superior position in relation to all other norms'.¹⁹⁴ From this 'higher position flows' the conflicting inferior norms 'nullity or inapplicability'.¹⁹⁵

A related view is the public order theory. For some like Mossler, McNair, Cassese, and Orakhelashvili the peremptory effect is based on *ordre public* or the body of 'rules embedded in the international legal system and indispensable for its existence and the operation'.¹⁹⁶ This forms the 'minimum core of norms and principles safeguarding [every state's] higher interests' and 'binds them all equally'.¹⁹⁷ In general, the view submits that because peremptory norms encompass the 'international value system's [...] minimum threshold' or constitute the legal system's 'apex',¹⁹⁸ derogations from these norms 'can have no legal force'.¹⁹⁹ In other words, the norm's peremptory effect is due to the fact that derogations contravene rules which are of vital importance to the international community and are 'intrinsically superior'.²⁰⁰ Thus, they must override the 'tenets of a consensus-based international law-making'.²⁰¹

The natural law and public order theories have 'historical links' to the development of peremptory norms and enjoy significant support. Yet, they are not without criticisms.²⁰²

Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 26 citing Fitzmaurice, 'Third Report on the Law of Treaties' (1958) (n 110), 20, 40–1. See Trindade, *International Law for Humankind* (n 192), 291.

¹⁹⁴ Kolb, 'Peremptory Norms as a Legal Technique' (n 165), 22 citing Galvão Teles Patrícia, 'Peremptory Norms of General International Law (Jus Cogens) & the Fundamental Values of the International Community' in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 45 ff.

¹⁹⁵ Kolb, 'Peremptory Norms as a Legal Technique' (n 165), 22.

¹⁹⁶ Orakhelashvili, *Peremptory Norms* (n 39), 28–9 cited in Schmalenbach, 'Article 53' (n 152), 967; Mosler, 'International Society as a Legal Community' (n 167), 18; McNair, *Law of Treaties* (n 42), 213–4; Cassese, 'Enhanced Role of Jus Cogens' (n 143), 160 cited in Galvão Teles, 'Fundamental Values of the International Community' (n 194), 46; Weatherall Thomas, *Jus Cogens: International Law & Social Contract* (Cambridge University Press 2017), 16, 99–100. See Brunnée, 'Common Interest & International Environmental Law' (n 20), 800; Criddle Evan & Fox-Decent Evan, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331, 344.

¹⁹⁷ Orakhelashvili, *Peremptory Norms* (n 39), 28; Byers, 'Jus Cogens & Erga Omnes' (n 85), 228.

¹⁹⁸ See Kleinlein Thomas, 'Jus Cogens Re-examined: Value Formalism in International Law' (2017) 28 *European Journal of International Law* 295, 300; Allot Philip, 'Reconstituting Humanity—New International Law' (1992) 3 *European Journal of International Law* 219, 250.

¹⁹⁹ Mosler, 'International Society as a Legal Community' (n 167), 382.

²⁰⁰ Orakhelashvili, *Peremptory Norms* (n 39), 8; Statement Discussion, 'Remarks' in Cassese Antonio & Weiler Joseph (eds), *Change & Stability in International Law* (De Gruyter 1988), 97

²⁰¹ Vidmar Jure, 'Protecting the Community Interest in a State Centric Legal System: UN Charter & Certain Norms of "Special Standing"' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 115; Schmalenbach, 'Article 53' (n 152), 966, 983; Mosler, 'International Society as a Legal Community' (n 167), 34; Tomuschat, 'Obligations arising for States Without or Against Their Will' (n 152), 307; de Wet Erika, 'Sources & the Hierarchy of International Law' in Besson Samantha & d'Aspremont Jean (eds), *Oxford Handbook of the Sources of International Law* (2017), 632.

²⁰² Tladi, 'First Report on Peremptory Norms' (2016) (n 186), 31 noting Weil Prosper, 'Le droit international

Primarily, these pertain to the theories' 'technical insufficiency' as to the norms' identification and content.²⁰³ For Kolb, the naturalist reliance on the norm's importance is 'too weak a criterion'.²⁰⁴ Peremptory norms may represent the international community's core values. Yet, identifying these norms 'independently from [states] will' leads to 'arbitrary conclusions' that depend 'on one's perception of fundamental values'.²⁰⁵ The same goes for the public order theory. According to Zemanek, the analogy with municipal law is questionable as the international system lacks the 'development and differentiation' of municipal orders.²⁰⁶ As such, the identification of peremptory norms becomes largely left to '[one's] opinion on what the essential and indispensable'.²⁰⁷ This subjective criterion leads to 'unverifiable assertions' and possibly undue expansion of norms deemed peremptory.²⁰⁸ The standard becomes unnecessarily subjective,²⁰⁹ and creates uncertainty as to what norms 'graduate from the status of an ordinary norm' to a 'higher grade'.²¹⁰

There is also the question of who determines the peremptory norms' content. The naturalist and public order theories submit that peremptory norms exist independently of states' will.²¹¹ Yet, both still require some sort of 'legislator' and more often than not rely on 'subjective opinions of scholars, judges, or officials' or the views of a few states.²¹² This makes the process 'bluntly and excessively ideological in nature'.²¹³ It opens the possibility for some states or

en quête de son identité' (1992) 237 *Recueil des Cours de l'Académie de Droit International* 11, 274; Kamto Maurice, 'La volonté de l'Etat en droit international' (2004) 310 *Recueil des Cours de l'Académie de Droit International* 133, 353.

²⁰³ Kolb, *Peremptory International Law* (n 138), 31.

²⁰⁴ Ibid.

²⁰⁵ de Wet Erika, 'Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction' (2013) 38 *South African Yearbook of International Law* 1, 7; Mik, 'Jus Cogens in Contemporary International Law' (n 144), 52.

²⁰⁶ Zemanek, 'Metamorphosis of Jus Cogens' (n 149), 385. See Weil, 'Towards Relative Normativity' (n 33), 413

²⁰⁷ Zemanek, 'Metamorphosis of Jus Cogens' (n 149), 384, 386 citing Virally Michel, 'Réflexions sur le jus cogens' (1966) 12 *Annuaire français de droit international* 5, 29.

²⁰⁸ Zemanek, 'Metamorphosis of Jus Cogens' (n 149), 385.

²⁰⁹ Kolb, *Peremptory International Law* (n 138), 31. See Johnston, 'Jus Cogens Norm in Jus Ad Bellum' (n 140), 30.

²¹⁰ Weil, 'Towards Relative Normativity' (n 33), 425; Hakimi Monica, 'Constructing an International Community' (2017) 111 *American Journal of International Law* 317, 333.

²¹¹ Hernandez, 'ICJ & the "International Community"' (n 29), 38.

²¹² O'Connell, 'International Law's Higher Ethical Norms' (n 191), 86–7; Mik, 'Jus Cogens in Contemporary International Law' (n 144), 52–3; Zemanek, 'Metamorphosis of Jus Cogens' (n 149), 384.

²¹³ Kolb, *Peremptory International Law* (n 138), v. See also Hofer Alexandra, 'Negotiating International Public Policy through Adoption & Contestation of Sanctions' (2017) 50 *Revue Belge de Droit International* 440, 442; Hoffmann Florian, 'International Legalism & International Politics' in Orford Anne & Hoffmann Florian (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 960.

scholars to arrogate to ‘themselves the role of law-giver’ and possibly ‘erasing any distinction between *lex lata* and *lex ferenda* in the name of progress and values’.²¹⁴ Worse, it allows for the imposition by a minority of their ‘values and aspirations to all on a global scale’ thereby ‘fostering parochial interests’.²¹⁵

For these reasons, scholars, like Oppenheim and Green, argue that peremptory norms, despite their ‘natural law gloss’, are ‘primarily premised on state consent’.²¹⁶ This in no way makes the norm’s importance and the interests that it protects irrelevant.²¹⁷ However, positivists submit that these *per se* do not dictate the norm’s status.²¹⁸ They may be the reason why states ‘in [their] legal policy [decide] to reinforce that norm’ to ‘make it particularly effective’.²¹⁹ Nonetheless, it is the states’ recognition that affords the norm its peremptory effect.²²⁰

Arguably, this is the view that remains faithful to VCLT Article 53 which provides that a peremptory norm is a ‘norm accepted and recognised by [states] as a norm from which no derogation is permitted [and] can be modified only by a subsequent norm [...] having the same character’.²²¹ For Linderfalk and Tladi, the provision does not define peremptory norms.²²²

²¹⁴ Kolb, *Peremptory International Law* (n 138), v; Kolb, ‘Peremptory Norms as a Legal Technique’ (n 165), 26. See Focarelli, *International Law as Social Construct* (n 20), 470.

²¹⁵ Bianchi, ‘Human Rights & the Magic of Jus Cogens’ (n 141), 495–6. See Schaumburge-Müller, ‘Protection of Common Interests’ (n 32), 41 ([In] emphasising common values and shared interests [...] they are more prone to the risk of making the mistake of conceiving particular interests as universal interests’); —, ‘Symposium: McDougal’s Jurisprudence—Utility, Influence, Controversy’ (1985) 79 *American Society of International Law Proceedings* 266, 267 (Schacter: ‘By subordinating law to policy, the [...] approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law’).

²¹⁶ Green James, ‘Questioning the Peremptory Status of the Prohibition of the Use of Force,’ (2011) 32 *Michigan Journal of International Law* 215, 257; Oppenheim, *International Law* (n 167), 528. See Magallona, ‘Jus Cogens’ (n 152), 522; Czapliński Władysław, ‘Concepts of Jus Cogens & Erga Omnes in International Law’ (1997) *Polish Yearbook of International Law* 87, 87; Dupuy Pierre-Marie, *Droit International Public* (Dalloz 1995), 14–6. *Contra* Rivier Raphaële, *Droit international public* (2nd edn, Presses universitaires de France 2013), 565; Orakhelashvili, *Peremptory Norms* (n 39), 107; Tomuschat, ‘Obligations arising for States Without or Against Their Will’ (n 152), 306–7.

²¹⁷ Kolb, ‘Peremptory Norms as a Legal Technique’ (n 165), 24; Ragazzi, *Obligations Erga Omnes* (n 38), 54 (‘The “intrinsic value” of a certain rule and the fact that it is “rooted in the international conscience” [...] is reflected in the acceptance and recognition of that rule as a rule of *jus cogens*’). See Crawford James, ‘Responsibility to the International Community as a Whole’ (2001) 8 *Indiana Journal of Global Legal Studies* 303, 314 (‘A formulation [...] which appears to exclude that moral element does not seem appropriate’).

²¹⁸ See Hillgruber, ‘Third States & Countermeasures’ (n 147), 271.

²¹⁹ See *ibid*.

²²⁰ Kolb, ‘Peremptory Norms as a Legal Technique’ (n 165), 24; Magallona, ‘Jus Cogens’ (n 152), 528.

²²¹ Schmalenbach, ‘Article 53’ (n 152), 986 (‘The phrase [...] is commonly regarded as an indication that the VCLT follows a positivist [...] approach’) citing Gómez Robledo, ‘Le jus cogens international’ (n 146), 105; van Hoof, *Rethinking the Sources of International Law* (n 160), 158; Rozakis, *Concept of Jus Cogens* (n 160), 75.

²²² Linderfalk Ulf, ‘Creation of Jus Cogens—Making Sense of Article 53 of the Vienna Convention’ (2011) 71 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 360, 370; Tladi Dire, ‘Second Report on Peremptory Norms’ (16 March 2017) UN Doc UN Doc A/CN.4/706, 17.

Otherwise, Article 53 becomes tautological as it assumes what remains to be established.²²³ Instead, it describes the peremptory norms' formation process.²²⁴ Some, like Linderfalk and Kolb, submit that the process in which an ordinary norm becomes peremptory is akin to custom's formation.²²⁵ In the same way that custom, in its traditional conception, is formed by the concurrence of state practice and *opinio juris*,²²⁶ an existing norm becomes peremptory because states decide that it should be peremptory and act accordingly.²²⁷ That is, states consider an existing norm to be fundamentally important.²²⁸ Because of this, they deem it 'desirable' and 'appropriate' that no derogations from the norm be permitted and that no modification of the norm by 'ordinary means' be allowed.²²⁹ If this is supported by broad, representative, and consistent state practice and *opinio juris*, then the norm has become peremptory.²³⁰ Thus, a norm's peremptory status is not determined by its nature or character but by states' acceptance and recognition.²³¹

III. BEYOND THE VCLT: SERIOUS BREACHES OF PEREMPTORY NORMS

As will be seen in the next chapters, the concepts of objective regimes, absolute and

²²³ Linderfalk, 'Creation of Jus Cogens' (n 222), 362; Czapliński, 'Jus Cogens & Erga Omnes' (n 85), 87; Johnston, 'Jus Cogens Norm in Jus Ad Bellum' (n 140), 41 *citing* Gómez Robledo, 'Le jus cogens international' (n 146), 112; Costelloe Daniel, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017), 15; Minagawa T, 'Essentiality & Reality of International Jus Cogens' (1984) 2 *Hitobashi Journal of Law & Politics* 1, 4.

²²⁴ Linderfalk, 'Creation of Jus Cogens' (n 222), 371; Ragazzi, *Obligations Erga Omnes* (n 38), 51; Tladi, 'Second Report on Peremptory Norms' (2017) (n 222), 17, 32.

²²⁵ Linderfalk, 'Creation of Jus Cogens' (n 222), 370–1; Kolb, *Peremptory International Law* (n 138), 67; Villalpando, *La communauté internationale* (n 9), 77; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 39; Green, 'Peremptory Status of the Prohibition of the Use of Force' (n 216), 243–4; Sur Serge, 'Remarks' in Cassese Antonio & Weiler Joseph (eds), *Change & Stability in International Law* (De Gruyter 1988), 128; Byers, 'Jus Cogens & Erga Omnes' (n 85), 226; Lagerwall, 'Article 64' (n 154), 1467. *Contra* Orakhelashvili, *Peremptory Norms* (n 39), 107 ('[The view is] incompatible with the moral basis of *jus cogens* and its necessity as public order'); Tladi, 'First Report on Peremptory Norms' (2016) (n 186), 32 ('*Jus cogens* has [...] been [...] a revolution against "le froid cynisme positiviste"').

²²⁶ See Kolb Robert, 'Selected Problems in the Theory of Customary International Law' (2003) 50(2) *Netherlands International Law Review* 119, 120; Linderfalk, 'Creation of Jus Cogens' (n 222), 364 *citing* Finnis John, *Natural Law & Natural Rights* (Oxford University Press 1980), 238.

²²⁷ Helmersen, 'Prohibition of the Use of Force' (n 140), 170 *citing* Thirlway Hugh, *The Sources of International Law* (Oxford University Press 2014), 119; Kolb Robert, 'Formal Source of Jus Cogens in Public International Law' (1998) 53 *Zeitschrift für öffentliches Recht* 69, 103. Byers, 'Jus Cogens & Erga Omnes' (n 85), 222; Johnston, 'Jus Cogens Norm in Jus Ad Bellum' (n 140), 46–7.

²²⁸ Kolb, 'Peremptory Norms as a Legal Technique' (n 165), 41.

²²⁹ Linderfalk, 'Creation of Jus Cogens' (n 222), 373.

²³⁰ *Ibid*, 374; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 39; Green, 'Peremptory Status of the Prohibition of the Use of Force' (n 216), 244.

²³¹ Weil, 'Towards Relative Normativity' (n 33), 427 ('A rule acquires superior normative density once its pre-eminence is accepted and recognised'); ILC, 'Report on the Work of the 71st Session' (2019) UN Doc A/74/10, 167

interdependent obligations, and peremptory norms influenced the rules on the implementation of state responsibility. Yet, at this point, it is also worth noting the consequences attributed to serious breaches of duties imposed by peremptory norms under the 2001 Draft Articles. The ILC did not examine these during the VCLT's drafting as its mandate was limited to the regulation of international agreements. Thus, it only dealt with the non-derogability and nullifying effect of peremptory norms.²³² It did not, however, intend to pre-empt issues arising from other fields of international law.²³³ For this reason, some like Simma, Trindade, and Tladi, submit that the VCLT only partially codified the effects of peremptory norms and that these norms may have effects beyond VCLT Articles 53 and 64.²³⁴ Indeed, since the VCLT's adoption, attempts have been made to broaden the peremptory norms' effects,²³⁵ including the consequences for 'third states' or states not directly affected by the wrongful act should states commit serious breaches of duties imposed by peremptory norms.²³⁶

The wrongful acts' 'consequences', under Part II of the 2001 Draft Articles, pertain to the duties imposed upon states should a wrongful act be committed.²³⁷ These are distinct from 'implementation', under Part III of the Draft Articles, further discussed in *Chapters 2 and 3*, which deals with states' competence to invoke or enforce another's responsibility.²³⁸ For the wrongful state, the wrongful act's 'core legal consequences',²³⁹ are the duty to cease the wrongful act,²⁴⁰ and to make full reparation for the injury caused.²⁴¹ Yet, should the wrongful

²³² de Wet Erika, 'Prohibition of Torture as Jus Cogens & its Implications for National & Customary Law' (2004) 15 *European Journal of International Law* 97, 99.

²³³ VCLT (n 83), art 73 ('The [...] Convention shall not prejudice any question that may arise [...] from [...] the responsibility of a state'); Tladi, 'Second Report on Peremptory Norms' (2017) (n 222), 17; Linderfalk, 'Effect of Jus Cogens Norms' (n 149), 867–9. See Vidmar Jure, 'Rethinking Jus Cogens after Germany v Italy' (2013) 55 *Netherlands International Law Review* 1, 2–3; Bianchi, 'Human Rights & the Magic of Jus Cogens' (n 141), 495.

²³⁴ Tladi, 'Third Report on Peremptory Norms' (2018) (n 39), 30; Simma, 'Bilateralism to Community Interest' (n 21), 288; Trindade, *International Law for Humankind* (n 192), 295.

²³⁵ Vidmar, 'Jus Cogens' (n 233), 17; Kolb, *Peremptory International Law* (n 138), 106; Gaja Giorgio, 'Protection of General Interests in the International Community' (2011) 364 *Recueil des Cours de l'Académie de Droit International* 9, 52; Shelton, 'Hierarchy in International Law' (n 147), 305; Johnston, 'Jus Cogens Norm in Jus Ad Bellum' (n 140), 44. See De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 41

²³⁶ Crawford, 'Multilateral Rights & Obligations' (n 6), 465; Kolb, *Peremptory International Law* (n 138), 106.

²³⁷ ILC, 'Report on the Work of the 53rd Session' (2001) (n 3), 86–7 ('Part Two [focuses] on the new legal relationship which arises upon the commission by a state of an internationally wrongful act').

²³⁸ *Ibid*, 116–7.

²³⁹ *Ibid*, 87.

²⁴⁰ *Rainbow Warrior* (New Zealand v France) (Award) (1990) 20 RIAA 215, 270; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136, 197; *Jurisdictional Immunities* [2012] (n 185), 153; Corten Olivier, 'Obligation of Cessation' in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 545

²⁴¹ *Chorzów Factory* (Germany v Poland) (Merits) [1928] PCIJ Ser A No 17, 21; *Gabčíkovo-Nagymaros*

act involve a serious breach of a duty imposed by a peremptory norm, the ILC saw it fit, as a progressive measure, to impose certain duties on third states. These are the duties of *cooperation, non-recognition, and non-assistance*.²⁴²

A. *From International Crimes to Serious Breaches of Peremptory Norms*

The VCLT's concept of peremptory norms influenced the ILC's work on state responsibility.²⁴³ In 1976, Special Rapporteur Ago (1969–80) posited that like the VCLT which distinguished between 'ordinary' and 'fundamental' norms, the law on state responsibility must also differentiate between 'ordinary' and 'serious' breaches of international duties.²⁴⁴ In his 1976 Draft Article 18 (1996 Draft Article 19), Ago proposed the concept of an 'international crime' or the breach of a duty 'so essential for the protection of the [international community's] fundamental interests' accepted and recognised 'by that community as a whole'.²⁴⁵ It must be stressed that Ago, in using the term 'crime', did not refer to the municipal concept of crime nor intend to impose criminal responsibility upon states.²⁴⁶ Rather, its purpose was to create an 'aggravated regime' for breaches of certain fundamental duties.²⁴⁷ For Ago, these include the breach of the duty not to threaten or use force; the duty to protect fundamental human rights such as those on genocide, racial discrimination, and slavery; and the duty to safeguard the environment.²⁴⁸

[1997] (n 78), 80; *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Judgement) [2007] ICJ 43, 232; *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (Compensation) [2018] (ICJ, General List 150, 2 February 2018), 26.

²⁴² ILC, 'Report on the Work of the 53rd Session' (2001) (n 3), 114.

²⁴³ Wyler Eric, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms' (2002) 13(5) *European Journal of International Law* 1147, 1150 citing Ago, 'Fifth Report on State Responsibility' (1976) (n 14), 28–9. Spinedi Marina, 'From One Codification to Another: Bilateralism & Multilateralism in the Codification of the Law of Treaties & the Law of State Responsibility' (2002) 13(5) *European Journal of International Law* 1099, 1125. See ILC, 'Report on the Work of the 28th Session' (1976) II(2) YbILC 3, 96, 102.

²⁴⁴ Ago, 'Fifth Report on State Responsibility' (1976) (n 14), 26, 28–9, 33–4, 53–4. See Ago, 'Second Report on State Responsibility' (1970) (n 14), 184; Trindade, *International Law for Humankind* (n 192), 377; Stern, 'La notion de préjudice juridique' (n 15), 5 ('Une différenciation de ce genre, basée sur l'idée qu'il y a des règles [...] importantes et donc une hiérarchie objective dans les violations du droit international qui peuvent être commises par les États')

²⁴⁵ Ago, 'Fifth Report on State Responsibility' (1976) (n 14), 26; ILC, 'Report on the Work of the 28th Session' (1976) II(2) YbILC 3, 96 ff; ILC, 'Report on the Work of the 29th Session' (1977) II(2) YbILC 4, 11; ILC, 'Report on the Work of the 48th Session' (1996) II(2) YbILC 57, 60.

²⁴⁶ ILC, 'Report on the Work of its 28th Session' (1976) (n 245), 104, fn 473. See ILC, 'Report on the Work of the 47th Session' (1995) II(2) YbILC 43, 48.

²⁴⁷ Abi-Saab George, 'The Uses of Article 19' (1999) 10 *European Journal of International Law* 339, 342, 346 citing Weiler Joseph, Cassese Antonio, & Spinedi Marina (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter 1989), 52; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 49.

²⁴⁸ Ago, 'Fifth Report on State Responsibility' (1976) (n 14), 54 ('[Draft] Article 18 [...] 2. The breach by a

Ago's departure from the ILC prevented him from developing the consequences of international crimes.²⁴⁹ This task fell on Special Rapporteurs Riphagen (1980–6) and Arangio-Ruiz (1988–96). Riphagen proposed three distinct duties imposed on third states (1984 Draft Article 14/1996 Draft Article 53) should an international crime be committed.²⁵⁰ First, states have a *duty not to recognise* the legal situation created by the wrongful act.²⁵¹ Second, states also have a *duty not to aid or assist* the wrongful state in maintaining the situation that resulted from the breach of duty.²⁵² Third, states have a *duty to cooperate* with other states in carrying out these two duties.²⁵³ Riphagen and Arangio-Ruiz also proposed mechanisms for dealing with state crimes in line with Ago's work.²⁵⁴ Riphagen allotted a central role to the UN to respond to these wrongful acts.²⁵⁵ For his part, Arangio-Ruiz developed a 'complex machinery' involving the UN and the ICJ.²⁵⁶

state of an international [duty against] [...] the threat or use of force [...] is an "international crime" [...] 3. The serious breach by a state of an international [duty] established by a norm of general international law accepted and recognised as essential by the international community [...] (a) respect for the [...] right of self-determination; or (b) respect for human rights [...] or (c) the conservation [...] of a resource common to all mankind is also an "international crime"").

²⁴⁹ Klein Pierre, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law' (2002) 13 *European Journal of International Law* 1241, 1244.

²⁵⁰ Riphagen, 'Third Report on State Responsibility' (1982) (n 93), 48–9 ('[Draft] Article 6: An internationally wrongful act of a state, which constitutes an international crime, entails a [duty] for every other state: (a) not to recognise as legal the situation created by such act; (b) not to render aid or assistance to the author state in maintaining the situation created by such act; and (c) to join other states in affording mutual assistance in carrying out the [duties] under (a) and (b)'); Arangio-Ruiz Gaetano, 'Fifth Report on State Responsibility' (1995) II(1) YbILC 3, 35, 38; Arangio-Ruiz Gaetano, 'Seventh Report on State Responsibility' (1995) II(1) YbILC 6, 16–7; ILC, 'Report on the Work of the 37th Session' (1985) II(2) YbILC 19, 22; ILC, 'Report on the Work of the 48th Session' (1996) (n 245), 22–31, 178–80, 182–4, 191.

²⁵¹ Riphagen Willem, 'First Report on State Responsibility' (1980) II(1) YbILC 107, 115–20; Riphagen, 'Third Report on State Responsibility' (1982) (n 93), 48–50. *See* Namibia [1970] (n 82), 56; Wall [2004] (n 240), 200–1; Lagerwall Anne, *Le principe ex injuria jus non oritur en droit international* (Bruylant 2016), 141–59.

²⁵² Riphagen, 'Third Report on State Responsibility' (1982) (n 83), 49. *See* Riphagen Willem, 'Fourth Report on State Responsibility' (1983) II(1) YbILC 1, 12, 21; Riphagen Willem, 'Sixth Report on State Responsibility' (1986) II(1) YbILC 1, 14.

²⁵³ Riphagen, 'Third Report on State Responsibility' (1982) (n 93), 48. *See* Riphagen Willem, 'Fifth Report on State Responsibility' (1984) II(1) YbILC 1, 3–4.

²⁵⁴ *See* Ago Roberto, 'Eighth Report on State Responsibility' (1979) II(1) YbILC 3, 43–4.

²⁵⁵ Riphagen, 'Third Report on State Responsibility' (1982) (n 93), 48. *See* Klein, 'Responsibility for Serious Breaches of Obligations' (n 249), 1244–5 *citing* Dupuy Pierre-Marie, 'Sécurité collective et organisation de la paix' (1993) 97 *Revue générale de droit international public* 617, 619, 623.

²⁵⁶ Arangio-Ruiz Gaetano, 'Fourth Report on State Responsibility' (1992) II(1) YbILC 6, 22; Arangio-Ruiz, 'Fifth Report on State Responsibility' (1993) (n 250), 38; ILC, 'Report on the Work of the 47th Session' (1995) (n 246), 117 ('[Draft] Article 19 [...] 1. Any state [...] claiming that an international crime has been or is being committed [...] shall bring the matter to the [GA] or [SC]'s [attention] [...] 2. If the [GA] or [SC] resolves [...] that the allegation is sufficiently substantiated to justify the grave concern of the international community, any state [...], may bring the matter to [ICJ] by unilateral application for [...] a judgment whether the alleged international crime has been or is being committed [...] 5. A decision of the [ICJ] that an international crime has

Yet, the notion of international crimes was a contentious subject.²⁵⁷ The ILC included the concept in the provisionally adopted 1996 Draft Articles but doubts remained as to the concept.²⁵⁸ There were concerns as to the implications of the term ‘crime’.²⁵⁹ Although, as mentioned above, the term was ‘merely intended to designate’ a ‘serious violation of international law and involved no criminal connotation’,²⁶⁰ much reluctance remained within the ILC and among states due to its punitive implications.²⁶¹ There were also questions concerning the consequences attributed to international crimes.²⁶² Indeed, for some, the duties of *cooperation*, *non-recognition*, and *non-assistance* were not limited to international crimes but extended to other wrongful acts.²⁶³ Finally, some ILC members and states questioned Riphagen and Arangio-Ruiz’s proposal concerning the institutionalisation of responses to international crimes. This was due to the view that the proposed mechanisms were ‘too broad to be realistic’ and did not ‘fit the states’ sense of international law’.²⁶⁴

Faced with these issues the ILC had five options.²⁶⁵ First, it could have kept 1996 Draft

been or is being committed shall fulfil the condition for the implementation, by any state [...] of the special or supplementary legal consequences of international crimes of states’).

²⁵⁷ Stern, ‘La notion de préjudice juridique’ (n 15), 6; Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 85; Sicilianos, ‘Classification of Obligations’ (n 38), 1130. See Marek Krystyna, ‘Criminalising State Responsibility’ (1978) 14 *Revue Belge de Droit International* 460, 462 ff.

²⁵⁸ Crawford James, ‘First Report on State Responsibility’ (1998) II(1) YbILC 1, 17–8; ILC, ‘Report on the Work of the 50th Session’ (1998) II(2) YbILC 60, 65, 77. See Rao Pemmaraju Sreenivasa, ‘International Crimes & State Responsibility’ in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 67. See also Abi-Saab, ‘Uses of Article 19’ (n 247), 344–6.

²⁵⁹ ILC, ‘Report on the Work of the 50th Session’ (1998) (n 258), 66.

²⁶⁰ ILC, ‘Report on the Work of the 47th Session’ (1995) (n 246), 48; ILC, ‘Report on the Work of the 48th Session’ (1996) (n 245), 63; Duff RA, ‘State Responsibility: An Outsider’s View’ in Besson Samantha (ed), *Theories of International Responsibility Law* (Cambridge University Press 2022), 76.

²⁶¹ ILC, ‘Report on the Work of the 50th Session’ (1998) (n 258), 66; Voeffray Francois, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 270–1. See ILC, ‘State Responsibility: Comments & Observations of Governments, 53rd Session’ (19 March 2001) UN Doc A/CN.4/515, 64 (France), 65 (Mexico); 65 (Netherlands), 65–6 (Slovakia).

²⁶² ILC, ‘Report on the Work of the 50th Session’ (1998) (n 258), 72; Dupuy, ‘Multilateral Dimension of Obligations’ (n 168), 1063.

²⁶³ ILC, ‘Report on the Work of the 50th Session’ (1998) (n 258), 72–3; Crawford, ‘First Report on State Responsibility’ (1998) (n 258), 11, 19–22. Sicilianos, ‘Classification of Obligations’ (n 38), 1128; See ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 261), 64 (France), 65 (Mexico), 66 (UK), 67 (Japan).

²⁶⁴ ILC, ‘Report on the Work of the 47th Session’ (1995) (n 246), 55 cited in Klein, ‘Responsibility for Serious Breaches of Obligations’ (n 249), 1252; ILC, ‘Report on the Work of the 50th Session’ (1998) (n 258), 71. Dawidowicz, *Third Party Countermeasures* (n 257), 83 citing UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 50th Session’ (16 February 1996) UN Doc A/CN.4/472/Add.1, 25–7. Dupuy, ‘Multilateral Dimension of Obligations’ (n 168), 1063; Treves Tullio, ‘Articles on State Responsibility and the Settlement of Disputes’ in Ragazzi Maurizio (ed), *International Responsibility Today Essays in Memory of Oscar Schachter* (Nijhoff 2005), 231–2.

²⁶⁵ Crawford, ‘First Report on State Responsibility’ (1998) (n 258), 18–23.

Article 19 despite its contentious status.²⁶⁶ Second, it was suggested that the term ‘crime’ be replaced with an ‘exceptionally serious wrongful act’ which avoided the confusion that the term ‘crime’ entailed.²⁶⁷ However, this change in wording did little to alleviate concerns regarding international crimes. Third, there was the possibility of a ‘genuine criminalisation of state responsibility’ by establishing a ‘full-scale regime for state crimes’ including punitive damages, sanctions, and the necessary collective procedure.²⁶⁸ Yet, some ILC members and states already rejected this option.²⁶⁹ Fourth, there was the option of removing the concept entirely to avoid its problematic formulation.²⁷⁰ However, some states supported some version of 1996 Draft Article 19 which militated against its removal.²⁷¹

Ultimately, the ILC chose to ‘disaggregate the notion of “crime” into its various components’ and integrate them with the other concepts under the 2001 Draft Articles.²⁷² It removed the term ‘international crime’ from the 2001 Draft Articles.²⁷³ However, it retained the ‘aggravated regime’ that distinguished between breaches of duties arising from ordinary and peremptory norms.²⁷⁴ This was reformulated under 2001 Draft Article 40 as ‘serious breaches by a state of a [duty] arising under a peremptory norm’.²⁷⁵ Under 2001 Draft Article

²⁶⁶ ILC, ‘Report on the Work of the 50th Session’ (1998) (n 258), 66, 71–2.

²⁶⁷ Ibid, 65, 73. See ILC, ‘Report on the Work of the 48th Session’ (1996) (n 245), 63; ILC, ‘State Responsibility: Comments & Observations of Governments, 50th Session’ (1998) UN Doc A/CN.4/488, 114 (Czech Republic); 115 (Denmark); 119 (Mexico)

²⁶⁸ ILC, ‘Report on the Work of the 50th Session’ (1998) (n 258), 66.

²⁶⁹ Ibid, 74–5.

²⁷⁰ Ibid, 66, 75. See ILC, ‘State Responsibility: Comments & Observations of Governments, 50th Session’ (1998) UN Doc A/CN.4/488 115 (France); 117 (Ireland); 120 (Switzerland); 120 (UK); 121 (US)

²⁷¹ Ibid, 75. See ILC, ‘State Responsibility: Comments & Observations of Governments, 50th Session’ (1998) UN Doc A/CN.4/488, 114 (Czech Republic); 119 (Italy); 119 (Mongolia)

²⁷² Crawford, ‘Multilateral Rights & Obligations’ (n 6), 470; ILC, ‘Report on the Work of the 50th Session’ (1998) (n 258), 77 (‘Systematic development in the draft articles’). See Kadelbach, ‘Identification of Fundamental Norms’ (n 36), 36 (‘Different concepts are found which relate to [this] category, but are only vaguely described and [are] insufficiently coordinated’). Note that peremptory norms also affect other provisions of the 2001 Draft Articles. 2001 Draft Article 26 provides that states’ acts ‘not in conformity with a [duty] arising from a peremptory norm’ may not preclude the wrongfulness of such wrongful acts. Likewise, 2001 Draft Article 50 provides that the taking of countermeasures shall not affect duties imposed by peremptory norms.

²⁷³ Sicilianos, ‘Classification of Obligations’ (n 38), 1128; Rao, ‘International Crimes & State Responsibility’ (n 258), 79 citing Pellet Alain, ‘New Draft Articles of the ILC on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States’ Crime?’ (2001) 32 *Netherlands Yearbook of International Law* 55, 58.

²⁷⁴ Tams Christian, ‘Do Serious Breaches Give Rise to Any Specific Obligations of the Responsibility State’ (2002) 13 *European Journal of International Law* 1161, 1162; Treves Tullio, ‘Settlement of Disputes & Non-Compliance Procedures’ in Treves Tullio, *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009), 232; Stern, ‘La notion de préjudice juridique’ (n 15), 7 (‘Ce qui était le crime international s’est dilué et a été remplacé par d’autres concepts relevant plus ou moins du même registre de préoccupations [...] ce que l’on pourrait appeler un fait illicite qualifié, au lieu et place du crime international’).

²⁷⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 112–3 (‘A “serious” breach is defined [...] as

41, should there be a ‘gross or systematic failure’ by a state to fulfil its duties under a peremptory norm, third states, in what the ILC deemed a ‘progressive measure’, must cooperate to bring to an end through lawful means such serious breach.²⁷⁶ Furthermore, they have the duty not to recognise as lawful any situation created by the breach and the duty not to aid or assist the wrongful state in maintaining the situation.²⁷⁷ The ILC reiterated these consequences in Draft Conclusion 19 of its 2022 Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms (‘2022 Draft Conclusions’).²⁷⁸ It also asserted that these three duties have become customary.²⁷⁹

B. Rationale for the Effects of Peremptory Norms under the Law of State Responsibility

The attribution of legal consequences to peremptory norms beyond the VCLT deserves comment. In contrast with the VCLT which became positive law due to states’ consent, the additional effects attributed to peremptory norms have generally been derived either by extending the concept of non-derogability to include material acts or by deduction based on the ‘higher rank’ of the norms.

Scholars like Orakhelashvili claim that the peremptory norms’ nullifying effect covers not only normative acts but also ‘any type’ of state action so long as they are ‘intended to produce effects on the national or the international plane’.²⁸⁰ This view is rooted in the need to ensure

one which involves “a gross or systematic failure by the responsible state to fulfil the obligation” in question. The word “serious” signifies that a certain order of magnitude of violation is necessary in order not to trivialise the breach [...] To be regarded as systematic, a violation would have to be carried out in an organised and deliberate way. In contrast, the term “gross” refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule’).

²⁷⁶ Ibid, 114. See Crawford, ‘Third Report on State Responsibility’ (2000) (n 78), 108 (‘The draft articles cannot hope to anticipate future developments, and it is [...] necessary to reserve to the future such additional consequences, penal and other, which may attach to internationally wrongful conduct by reason of its classification as [...] as a breach of [a duty] to the international community as a whole’).

²⁷⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 114–6.

²⁷⁸ ILC, ‘Report on the Work of the 73rd Session’ (2022) UN Doc A/77/10, 70 (‘Draft Conclusion 19: [...] 1. States shall cooperate to bring to an end through lawful means any serious breach by a state of [a duty] arising under a peremptory norm of general international law (*jus cogens*); 2. No State shall recognise as lawful a situation created by a serious breach by a state of [a duty] arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation [...]’)

²⁷⁹ Ibid, 71 (‘The [duty] to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law [...] is now recognised under international law’), 76 (‘Already in 2001, the Commission had recognised that the duties of non-recognition and non-assistance were part of customary international law’).

²⁸⁰ Orakhelashvili, *Peremptory Norms* (n 39), 216; Cannizzaro, ‘A Higher Law for Treaties?’ (n 152), 425 (‘*Jus cogens* [...] are not confined to the law of treaties [but] can also be offended by unilateral conduct.’); Mik, ‘*Jus Cogens* in Contemporary International Law’ (n 144), 45 (‘*Jus cogens* [applies] [...] to factual actions in the context of responsibility, as broadly understood, for a breach of international law’); Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (n 137), 7; Saladin P, ‘Völkerrechtliches Jus Cogens und

the peremptory norms' 'practical utility'.²⁸¹ It is claimed that limiting peremptory norms' nullifying effect to states' normative acts disregards the fact that material acts also produce detrimental consequences 'if allowed to be valid and to go unchallenged'.²⁸² Thus, in the same way that peremptory norms void conflicting norms, they must also deprive contrary material acts of their legality.²⁸³

However, scholars like Sztucki and Kolb submit that this view conflates derogations with breaches.²⁸⁴ When states 'derogate' from a norm, they replace a 'general legal regime' with another that is conflicting which in turn becomes applicable *inter se*.²⁸⁵ Derogations are concerned with normative or legal acts, including arguably unilateral ones,²⁸⁶ that create rules, give rise to rights, or impose duties upon other states.²⁸⁷ Simply, a derogation refers to a situation in which states create rules among themselves that are in 'direct conflict' with another norm.²⁸⁸ Should there be a derogation from a peremptory norm, the VCLT deems that conflicting normative act to be invalid.²⁸⁹

Schweizerisches Landesrecht' in Jenny G & Kalin W (eds), *Die Schweizerische Rechtsordnung in Ihren Internationalen Bezügen* (Bern 1988), 73; *Juridical Condition & Rights of Undocumented Migrants* (n 143) (Trindade, concurring), ¶70; Suy Eric, 'Concept of Jus Cogens in International Law', *Lagonissi Conference: Papers & Proceedings*, vol Vol II (Carnegie Endowment for International Peace 1967), 75; Jennings Robert, 'General Course on Principles of International Law' (1967) 121 *Recueil des Cours de l'Académie de Droit International* 323, 564.

²⁸¹ Mik, 'Jus Cogens in Contemporary International Law' (n 144), 36.

²⁸² Orakhelashvili, *Peremptory Norms* (n 39), 212 ('Acts of states consisting purely in their conduct'), 213. See Lauterpacht Hersch, 'Règles générales du droit de la paix' (1937) 62 *Recueil des Cours de l'Académie de Droit International* 5, 291 ('Unlawful acts or [their] consequences or immediate manifestations') cited in Lagerwall Anne, 'Non-Recognition of Jerusalem as Israel's Capital' (2018) 34 *Questions of International Law* 33, 34.

²⁸³ Orakhelashvili, *Peremptory Norms* (n 39), 206 ('Jus cogens has expanded to encompass [...] all legal acts') citing *Juridical Condition & Rights of Undocumented Migrants* (n 143), ¶99.

²⁸⁴ Sztucki Jerzy, *Jus Cogens & Vienna Convention on the Law of Treaties* (Springer 1974), 67–8; Kolb, *Peremptory International Law* (n 138), 37, 101. See Weil, 'Le droit international en quête de son identité' (n 202), 261; Marek, 'Contribution à l'étude du jus cogens' (n 191), 441; Tomuschat Christian, 'Reconceptualizing the Debate on Jus Cogens & Obligations Erga Omnes—Concluding Observations' in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2005), 430.

²⁸⁵ Kolb, *Peremptory International Law* (n 138), 2; Orakhelashvili, *Peremptory Norms* (n 39), 137.

²⁸⁶ Johnston, 'Jus Cogens Norm in Jus Ad Bellum' (n 140), 43 citing Sztucki, *Jus Cogens & the Vienna Convention on the Law of Treaties* (n 284), 68; Zemanek Karl, 'How to Identify Peremptory Norms of International Law' in Dupuy Pierre-Marie (ed), *Essays in Honour of Christian Tomuschat* (Engel 2006), 1116. Kawasaki Kyoji, 'A Brief Note on the Legal Effects of Jus Cogens in International Law' (2006) 34 *Hitobashi Journal of Law & Politics* 27, 32; Kolb, *Peremptory International Law* (n 138), 113; Rodriguez-Cedeño Victor, 'Fifth Report on the Unilateral Acts of States' (2002) II YbILC 93, 104.

²⁸⁷ Kolb Robert, *Théorie du Jus Cogens International: Essai de Relecture du Concept* (Graduate Institute 2001), 91 cited in Zemanek, 'Metamorphosis of Jus Cogens' (n 149), 394.

²⁸⁸ *Jurisdictional Immunities* [2012] (n 185), 141; Helmersen, 'Prohibition of the Use of Force' (n 140), 175.

²⁸⁹ Kolb, *Peremptory International Law* (n 138), 28; Johnston, 'Jus Cogens Norm in Jus Ad Bellum' (n 140), 46.

In contrast, breaches are material acts that pertain to the non-observance or non-performance of duties imposed by norms.²⁹⁰ While a state may breach a duty through a material act, it does not create a rule that constitutes a derogation.²⁹¹ For this reason, Kolb and Weil argue that extending the peremptory norms' nullifying effect under the VCLT to cover material acts is a logical impossibility since material acts involve no derogation.²⁹² Of course, it is recognised that VCLT Article 71 also affects 'acts performed in reliance on any provision which conflicts with the peremptory norm'. It requires states to 'eliminate [...] the consequences of [...] acts performed in reliance on any provision which conflicts with [a] peremptory norm' and to 'bring their mutual relations into conformity with the peremptory norm'.²⁹³ This may appear to deal with the consequence of responsibility. Yet, this is the effect of the provision's nullity and not an extension of peremptory effects to material acts.²⁹⁴

Others, including the ILC, suggest that peremptory norms' additional effects may be derived from the importance of the interests that they safeguard.²⁹⁵ These norms are deemed superior and 'carry more weight than others'.²⁹⁶ As a 'matter of hierarchy', they apply to inferior norms in the same way that they apply to treaties to 'guarantee the integrity' of the interest' they protect.²⁹⁷ Thus, the law of state responsibility must attach graver consequences to breaches of duties imposed by peremptory norms.²⁹⁸ To not do so, for scholars like

²⁹⁰ Hakimi, 'Constructing an International Community' (n 210), 334; Zemanek, 'Metamorphosis of Jus Cogens' (n 149), 393; Kolb, *Peremptory International Law* (n 138), 59. See Shelton, 'Hierarchy in International Law' (n 147), 297.

²⁹¹ Kolb, *Peremptory International Law* (n 138), 28; Marek, 'Contribution à l'étude du jus cogens' (n 191), 441 cited in Zemanek, 'Metamorphosis of Jus Cogens' (n 149), 393; Knuchel Séverine, *Jus Cogens: Identification & Enforcement of Peremptory Norms* (Schulthess 2015), 180; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (n 223), 185–6.

²⁹² Weil, 'Le droit international en quête de son identité' (n 202), 261 cited in Orakhelashvili, *Peremptory Norms* (n 39), 207; Alland Denis, 'Countermeasures of General Interest' (2002) 13 *European Journal of International Law* 1220, 1237 ('Saying that a wrongful action derogates from *jus cogens* or anything else has no meaning from a technical legal viewpoint'). Rozakis, *Concept of Jus Cogens* (n 160), 18.

²⁹³ VCLT (n 83), art 71(1). See Suy, 'Jus Cogens' (n 280), 75; Orakhelashvili, *Peremptory Norms* (n 39), 215.

²⁹⁴ Kolb, *Peremptory International Law* (n 138), 115; Wittich Stephan, 'Article 71' in Dörr Oliver & Schmalenbach Kirsten (eds), *Vienna Convention on the Law of Treaties: Commentary* (Springer 2018), 1303 ('Article 71 [does not] concern the lawful character of the relevant act as well as [its] specific legal consequences')

²⁹⁵ ILC, 'Report on the Work of the 53rd Session' (2001) (n 3), 110–2; Orakhelashvili, *Peremptory Norms* (n 39), 205; Gaja, 'Protection of General Interests' (n 235), 51. See Abi-Saab, 'Uses of Article 19' (n 247), 339, 341; Dugard John, *Recognition & the United Nations* (Cambridge University Press 1987), 142.

²⁹⁶ Linderfalk Ulf, 'International Legal Hierarchy Revisited—Status of Obligations Erga Omnes' (2011) 80 *Nordic Journal of International Law* 1, 9. See Trindade, *International Law for Humankind* (n 192), 298–309; *La Cantuta v Peru* (Judgement) (IACtHR, Ser C No 213, 26 May 2010), (Trindade, Separate Opinion), ¶¶58–60.

²⁹⁷ Orakhelashvili, *Peremptory Norms* (n 39), 207.

²⁹⁸ Abi-Saab, 'Uses of Article 19' (n 247), 339; Gaja, 'Protection of General Interests' (n 235), 51; Spinedi, 'From One Codification to Another' (n 243), 1110; Tladi, 'Third Report on Peremptory Norms' (2018) (n 39), 30 citing ILC, 'Report on the Work of the 53rd Session' (2001) (n 3), 56.

Orakhelashvili, risks the ‘legitimation of acts offending against’ peremptory norms and renders the concept devoid of ‘intelligible meaning’.²⁹⁹ These consequences include nullifying or invalidating a material act ‘whose object is unlawful’ and the effects of which are ‘contrary to international public policy’.³⁰⁰

It is recognised that the VCLT is not exhaustive as to the effects of peremptory norms.³⁰¹ Article 53 makes it clear that the provision applies only for the VCLT’s purposes.³⁰² Thus, there may be other effects that may be attributed to peremptory norms.³⁰³ Yet, it must equally be stressed that a norm’s peremptory status and the importance of the interests it safeguards are not ‘trump cards that can be played against all other’ norms.³⁰⁴ As discussed in the previous section, the importance of the interests that peremptory norms protect does not *per se* imply a ‘hierarchical superiority’ nor the attribution of additional consequences to these norms.³⁰⁵ This approach based on deduction risks the ‘over-extension of the role and purpose of the notion’ of peremptory norms.³⁰⁶

This apprehension is not unfounded. As Kolb and Kawasaki note, the ‘effects of *jus cogens* have exploded in all directions [...] like a seminal Big Bang’.³⁰⁷ Aside from the duties of

²⁹⁹ Orakhelashvili, *Peremptory Norms* (n 39), 205.

³⁰⁰ Suy, ‘Jus Cogens’ (n 280), 75; Orakhelashvili, *Peremptory Norms* (n 39), 205, 213 (‘Public policy is a factor which nullifies not just contract but legal acts of all kinds’).

³⁰¹ Tladi, ‘Second Report on Peremptory Norms’ (2017) (n 222), 17; Vidmar, ‘Jus Cogens’ (n 233), 2.

³⁰² Dubois, ‘Authority of Peremptory Norms’ (n 191), 144 *cited in* Linderfalk, ‘Creation of Jus Cogens’ (n 222), 362.

³⁰³ Tladi, ‘Third Report on Peremptory Norms’ (2018) (n 39), 30; Kolb, *Peremptory International Law* (n 138), 8.

³⁰⁴ Vidmar, ‘Jus Cogens’ (n 233), 19; Johnston, ‘Jus Cogens Norm in Jus Ad Bellum’ (n 140), 46. *See Arrest Warrant* (DRC v Belgium) (Judgment) [2002] ICJ 3, 25–6; *Jurisdictional Immunities* [2012] (n 185), 140 (‘This argument depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one state to accord immunity to another [...] [For the Court], however, no such conflict exists’); *Armed Activities* [2006] (n 141), 52 (‘The mere fact that [...] peremptory norms [...] are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the [parties’] consent’); (Dugard, separate opinion), 88 (‘The scope of *jus cogens* is not unlimited and that the concept is not to be used as an instrument to overthrow accepted doctrines of international law’); *Application of the Genocide Convention* [2007] (n 241), 104 (‘It has not power to rule on alleged breached of other [duties] of international law [...] that is so even if the alleged breaches are [duties imposed by] peremptory norms’).

³⁰⁵ Vidmar, ‘Community Interest in a State Centric Legal System’ (n 201), 116. *See* Hillgruber, ‘Third States & Countermeasures’ (n 147), 271; Picone Paolo, ‘Distinction between Jus Cogens & Obligations Erga Omnes’ in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 421,

³⁰⁶ de Wet, ‘Torture as us Cogens’ (n 232), 99; Johnston, ‘Jus Cogens Norm in Jus Ad Bellum’ (n 140), 46.

³⁰⁷ Kolb, *Peremptory International Law* (n 138), 108; Kawasaki, ‘Legal Effects of Jus Cogens’ (n 286), 28. *See* Knuchel, *Identification & Enforcement of Peremptory Norms* (n 291), 4 (‘It appears as a “do-it-all” kind of a norm’); Focarelli Carlo, ‘Promotional Jus Cogens: A Critical Appraisal of Jus Cogens’ “Legal Effects”’ (2008) 77 *Nordic Journal of International law* 429, 440; d’Aspremont Jean, ‘Jus Cogens as a Social Contract without a Pedigree’ (2015) 46 *Netherlands Yearbook of International Law* 85, 94.

cooperation, non-recognition, and non-assistance, other effects, whose status remains uncertain,³⁰⁸ have been attributed to peremptory norms. These include the inapplicability of jurisdictional immunities of states,³⁰⁹ the duty to exercise diplomatic protection,³¹⁰ the assumption of universal jurisdiction by municipal courts,³¹¹ and, as will be examined in *Chapters 2 and 3*, the competence of a ‘state other than an injured state’ to implement the wrongful state’s responsibility.³¹² These effects have often been ‘obtained by deductive reasoning’ by appealing to the ‘fundamental values at stake’.³¹³ Of course, it is ‘perfectly plausible’ that peremptory norms may have these effects given that they protect the international community’s fundamental interests.³¹⁴ Yet, as in the case of the identification of peremptory norms discussed in the previous section, the deductive approach is not without danger given its subjectivity.³¹⁵ It opens the concept to ‘varying standards and agendas’ making it the ‘epicentre of an unlimited series’ of effects regardless of actual state practice and *opinio juris*.³¹⁶

Arguably, the process of ascertaining the peremptory norms’ effects beyond the VCLT must be inductive not deductive. As Kolb submits, it must be shown that states have accepted these effects which may only be done through recourse to state practice and *opinio juris*.³¹⁷ This

³⁰⁸ Kolb, *Theory of International Law* (n 20), 326 (‘These [...] have often gone well beyond what is actually borne out by practice’); Kawasaki, ‘Legal Effects of Jus Cogens’ (n 286), 28 (‘They seem to proliferate without borders and without order and the entropy surrounding this notion appears to be increasing’).

³⁰⁹ Kolb, *Peremptory International Law* (n 138), 108 citing Bianchi Andrea, ‘Gazing at the Crystal Ball (Again): State Immunity & Jus Cogens Beyond Germany v Italy’ (2013) 4 *Journal of International Dispute Settlement* 457; Knuchel Séverine, ‘State Immunity & the Promise of Jus Cogens’ (2011) 9 *Northwestern University Journal of International Human Rights* 149. See Orakhelashvili, *Peremptory Norms* (n 39), 322 ff.

³¹⁰ Kolb, *Peremptory International Law* (n 138), 108 citing Verhoeven Joe, ‘Les “étirements” de la légitime défense’ (2002) 48 *Annuaire français de droit international* 49, 159.

³¹¹ Bassiouni, ‘Jus Cogens & Obligations Erga Omnes’ (n 137), 63 ff; Cassese Antonio, *International Law* (Oxford University Press 2005), 205–8; Trindade, *International Law for Humankind* (n 192), 383.

³¹² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 111; ILC, ‘Report on the Work of the 71st Session’ (2019) (n 231), 191–2; Tladi, ‘Third Report on Peremptory Norms’ (2018) (n 39), 40–3. See Bassiouni, ‘Jus Cogens & Obligations Erga Omnes’ (n 137), 73; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 59; Fitzmaurice Malgosia, ‘Liability for Environmental Damage Caused to the Global Commons’ (1996) 5 *Review of European, Comparative & International Environmental Law* 305, 307; Sicilianos, ‘Classification of Obligations’ (n 38), 1137; Orakhelashvili, *Peremptory Norms* (n 39), 245; Proukaki, *Problem of Enforcement* (n 193), 50.

³¹³ Kolb, *Peremptory International Law* (n 138), 108; Focarelli, ‘Promotional Jus Cogens’ (n 307), 444–5.

³¹⁴ Focarelli, ‘Promotional Jus Cogens’ (n 307), 442.

³¹⁵ Kolb, *Peremptory International Law* (n 138), 109 (‘A new effect can be ‘discovered’ in line with the apparent needs of the international society and the vision of the legal operator’), 114 (‘In a sort of ontogenetic process, any type of consequence could be drawn from the concept [...] as varyingly defined by several legal operators’).

³¹⁶ Ibid, 111; Picone, ‘Jus Cogens & Obligations Erga Omnes’ (n 305), 421.

³¹⁷ Kolb, *Peremptory International Law* (n 138), 113 citing Focarelli, ‘Promotional Jus Cogens’ (n 307), 439

does not minimise the importance of the interests that peremptory norms safeguard. Yet, it must also be stressed that the nature of these interests is not determinative *per se*.³¹⁸ While it may motivate states to afford certain effects to peremptory norms, it is their acceptance of these effects that makes these attributes law.³¹⁹

States' responses to the effects attributed to peremptory norms under the ILC's 2001 Draft Articles and 2022 Draft Conclusions suggest that *opinio juris* is divergent. Some welcomed 2001 Draft Articles 40 and 41.³²⁰ Several agreed with the view, espoused by some authors,³²¹ that these reflected custom.³²² Yet, others criticised 2001 Draft Articles 40 and 41,³²³ or the view that these are customary.³²⁴ The same is true for 2022 Draft Conclusion 19. While some supported the claim that the duties of *cooperation*, *non-assistance*, and *non-recognition* are

ff. See Bordin Fernando Lusa, 'Reflection of Customary International Law: Authority of Codifications & ILC Draft Articles' (2014) 63 *International & Comparative Law Quarterly* 535, 547.

³¹⁸ See Hillgruber, 'Third States & Countermeasures' (n 147), 271; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 39.

³¹⁹ Kolb, *Peremptory International Law* (n 138), 110, 113.

³²⁰ See UNGA, 'Topical Summary of the Discussion of the Sixth Committee, 55th Session' (15 February 2001) UN Doc A/CN.4/513, 20, 22–4; ILC, 'Comments & Observations of Governments, 53rd Session' (2001) (n 261), 65 (Argentina, Austria, & Nordic Countries), 65 (Netherlands, Poland, & Slovakia), 66 (Spain), 67 (Austria), 69 (South Korea); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 11th Meeting' (29 October 2001) UN Doc A/C.6/56/SR.11, 5 (Finland on behalf of Nordic countries), 7 (New Zealand); 9 (Belgium); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 12th Meeting' (31 October 2001) UN Doc A/C.6/56/SR.12, 4 (South Africa), 5 (Netherlands), 7 (Bahrain), 11 (Germany); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 13th Meeting' (31 October 2001) UN Doc A/C.6/56/SR.13, 4 (Italy), 5 (Mali); 7 (Poland); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 14th Meeting' (1 Nov 2001) UN Doc A/C.6/56/SR.14, 2 (Sierra Leone), 4 (Greece), 6 (India), 8 (Russia), 9 (Mongolia), 10 (Portugal); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 15th Meeting' (26 November 2001) UN Doc A/C.6/56/SR.15, 2 (Chile), 3 (Hungary), 4–5 (Jordan), 5 (Thailand), 8 (Argentina), 9 (Ireland); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 16th Meeting' (15 November 2001) UN Doc A/C.6/56/SR.16, 4 (Slovakia).

³²¹ See e.g. Abi-Saab, 'Uses of Article 19' (n 247), 55; Gattini Andrea, 'A Return Ticket to "Communitarisme", Please' (2002) 13 *European Journal of International Law* 1181, 1188–92. *Contra* Toufayan Mark, 'Reacting to Serious Breaches of Obligations arising under Peremptory Norms of General International Law' (2004) 42 *Canadian Yearbook of International Law* 197, 207 ('This we are told, is consisted with state practice despite its admittedly parse and embryonic nature').

³²² See ILC, 'Comments & Observations of Governments, 53rd Session' (2001) (n 261), 66 (Spain); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 11th Meeting' (2001) (n 320), 6 (Morocco); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 15th Meeting' (2001) (n 320), 8 (Argentina).

³²³ See ILC, 'Comments & Observations of Governments, 53rd Session' (2001) (n 261), 64 (France), 65 (Mexico & Netherlands), 66 (UK); 67 (China & Japan), 69–70 (US); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 13th Meeting' (2001) (n 320), 5 (Israel).

³²⁴ See ILC, 'Comments & Observations of Governments, 53rd Session' (2001) (n 261), 65 (Mexico), 66 (UK), 68 (Japan), 69 (South Korea), 71 (US); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 13th Meeting' (2001) (n 320), 5 (Israel); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 14th Meeting' (2001) (n 320), 3 (Mexico); 11 (US).

customary,³²⁵ others did not.³²⁶ One state further commented that the Commission's work was 'not grounded on legal authority' but 'reflected an effort to imagine, through deductive reasoning, ways in which certain principles could apply in hypothetical circumstances'.³²⁷ Another stressed that the 'determination of the [...] consequences of *jus cogens* 'must be based on the relevant provisions of the [VCLT] and supported by adequate state practice'.³²⁸ One further reminded the ILC to 'stay true to the Westphalian principle [...] that law was one made by states'.³²⁹

³²⁵ See Tladi, 'Fourth Report on Peremptory Norms' (2019) (n 139), 5; UNGA, Sixth Committee, 'Summary Record of the 73rd Session, 25th Meeting' (26 October 2018) UN Doc A/C.6/73/SR.25, 6 (Cyprus); UNGA, Sixth Committee, 'Summary Record of the 73rd Session, 27th Meeting' (30 October 2018) UN Doc A/C.6/73/SR.27, 18 (Iran); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 23rd Meeting' (28 October 2019) UN Doc A/C.6/74/SR.23, 13 (Nicaragua); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 24th Meeting' (29 October 2019) UN Doc A/C.6/74/SR.24, 11 (Italy: 'They were simply a restatement of the normative elements that were already part of the law [...] of state responsibility'), 19 (Micronesia); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 25th Meeting' (30 October 2019) UN Doc A/C.6/74/SR.25, 4 (Cuba); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 26th Meeting' (31 October 2019) UN Doc A/C.6/74/SR.26, 3–4 (Spain), 5 (Togo); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 27th Meeting' (31 October 2019) UN Doc A/C.6/74/SR.27, 8 (South Africa); Tladi Dire, 'Fifth Report on Peremptory Norms' (24 January 2022) UN Doc A/CN.4/747, 55 (Cyprus, Nicaragua, & Cuba); ILC, 'Comments & Observations of Governments' (2022) (n 160), 85 (Cyprus), 86 (Italy), 87 (Netherlands), 88 (Spain).

³²⁶ See UNGA, Sixth Committee, 'Summary Record of the 73rd Session, 27th Meeting' (2018) (n 325), 10 (Israel: 'Draft conclusions 20 [Duty to cooperate] and 21 [Duty not to recognise or render assistance], which were largely based on the [2001 Draft Articles], which themselves did not reflect customary [...] law'); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 23rd Meeting' (2019) (n 325), 20 (Poland: 'Required further consideration'); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 24th Meeting' (2019) (n 325), 4 (Israel); Tladi, 'Fifth Report on Peremptory Norms' (2022) (n 325), 55 (Israel, UK, & US); 56 (Japan); ILC, 'Comments & Observations of Governments' (2022) (n 160), 8 (France: 'It must be admitted that the manner in which *jus cogens* [...] reflects a development of the concept that goes beyond what was envisaged in [the] [VCLT]'); 84 (Australia: 'Requests that the commentaries identify further practice and *opinio juris*'), 86 (Israel: 'The commentary [should] make it clear that it does not reflect existing law'), 87 (Japan: 'Practice after the adoption of the [2001 Draft Articles] should be examined with a view to ascertaining whether Draft Article 41 has been accepted by states'), 88 (Russia); 89 (UK: 'encourages the [ILC] to acknowledge the unsettled status of the draft conclusions'), 89 (US: 'The supposed [duties] do not reflect customary international law').

³²⁷ UNGA, Sixth Committee, 'Summary Record of the 73rd Session, 29th Meeting' (31 October 2018) UN Doc A/C.6/73/SR.29, 6 (US).

³²⁸ Aust Helmut, 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the ILC' in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 241 citing UNGA, Sixth Committee, 'Summary Record of the 73rd Session, 25th Meeting' (2018) (n 325), 3 (China). See UNGA, Sixth Committee, 'Summary Record of the 73rd Session, 26th Meeting' (26 October 2018) UN Doc A/C.6/73/SR.26, 4 ('Slovakia noted with concern that several of the draft conclusions on the topic [...] were based merely on doctrinal opinions rather than state practice'); 14 (New Zealand: 'The [ILC] should continue to take a cautious and balanced approach to its work on the subject'); 15 (Romania: 'The [ILC's] approach] must be based on state practice, rather than on doctrinal approaches'); UNGA, Sixth Committee, 'Summary Record of the 73rd Session, 27th Meeting' (2018) (n 325), 10 (Israel); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 23rd Meeting' (2019) (n 325), 9 (Nordic Countries: 'Considering the relatively limited and varying practice [...] caution was called for'); 15 (Slovakia: 'A rushed outcome, with scant regard for the divergent views of states, was unlikely to lead to success'); 18 (UK: 'The [ILC] had adopted [an] expansive and theoretical approach, which had resulted in a set of draft conclusions that covered a diverse range of sensitive issues and that did not, in all respects, reflect current law or practice').

³²⁹ Aust, 'Serious Breaches of Peremptory Norms in the Law of State Responsibility' (n 328), 241 citing

The states' objections to the ILC's findings are not without merit. Arguably, the instances of practice cited by the Commission to support its conclusions may be attributed on grounds other than states' recognition of these duties' legal status. For instance, the ILC suggested that the duty of non-recognition has become customary citing ICJ opinions and state practice 'in international organisations'.³³⁰ It referred to the *Namibia* opinion on South Africa's denial of Namibia's people's external right to self-determination (1948–91). In *Namibia*, the ICJ ruled that states were duty-bound not to 'recognise the illegality and invalidity of South Africa's continued presence in Namibia' and 'to refrain from lending any support or [...] assistance to South Africa [in relation] to its occupation'.³³¹ The ILC further noted GA resolutions calling for states' non-recognition of South Africa's conduct.³³² There were also the responses to Israel's continued denial of the Palestinians' right to external self-determination in the Occupied Territories (1967–). The ILC cited the *Wall* opinion in which the ICJ stated that Israel's breach of its duty entailed third states' duty of non-recognition 'given the [...] importance of the rights and duties involved'.³³³ Afterwards, the GA called upon states to 'comply with their [duties] as mentioned in the [*Wall*] advisory opinion'.³³⁴

Yet, as Bird and Dawidowicz note, the ILC's conclusion is doubtful considering that the states' actions in the cited instances were due to SC resolutions urging states not to recognise the wrongful acts' effects.³³⁵ This was the ICJ's rationale in *Namibia* when it noted that the SC resolutions on Namibia were 'adopted in conformity with the [...] Charter' such that UN

UNGA, Sixth Committee, 'Summary Record of the 74th Session, 27th Meeting' (2019) (n 325), 9 (Cameroon). See UNGA, Sixth Committee, 'Summary Record of the 74th Session, 24th Meeting' (2019) (n 325), 4, 6 (Israel); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 26th Meeting' (2019) (n 325), 10 (Turkey).

³³⁰ ILC, 'Report on the Work of the 53rd Session' (2001) (n 3), 115; ILC, 'Report on the Work of the 71st Session' (2019) (n 231), 196; Tladi, 'Third Report on Peremptory Norms' (2018) (n 39), 38–40. See Lagerwall, 'Non-Recognition of Jerusalem as Israel's Capital' (n 282), 37, 39. *Contra* ILC, 'Comments & Observations of Governments' (2022) (n 160), 86 (Israel); 87 (Japan); 87 (The Netherlands); 89 (UK); 90 (US)

³³¹ *Namibia* [1970] (n 82), 54–5.

³³² ILC, 'Report on the Work of the 71st Session' (2019) (n 231), 197 *citing* Res 3411 (XXX) UNGA (28 Nov 1975) UN Doc A/RES/3411(XXX)

³³³ ILC, 'Report on the Work of the 71st Session' (2019) (n 231), 197 *citing* *Wall* [2004] (n 240), 200. See Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 371.

³³⁴ Res ES-10/15 UNGA (20 July 2004) UN Doc A/RES/ES-10/15

³³⁵ See Res 276 UNSC (30 January 1970) UN Doc S/RES/276; Res 298 UNSC (25 September 1971) UN Doc S/RES/298; Res 446 UNSC (22 March 1979) UN Doc S/RES/446; Res 478 UNSC (20 August 1980) UN Doc S/RES/478. See also Bird Anne, 'Third State Responsibility for Human Rights Violations' (2010) 21 *European Journal of International Law* 886, 888 ('[SC] resolutions all contained the duty of collective non-recognition'); Dawidowicz Martin, 'Obligation of Non-Recognition of an Unlawful Situation' in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 683; Kolb, *Peremptory International Law* (n 138), 112. Note Crawford, 'Multilateral Rights & Obligations' (n 6), 465 ('At a more general level, the [duty] of non-recognition of legality is peripheral to any issue of criminality').

member states are duty-bound ‘to accept and carry them out’.³³⁶ The same may be said about the *Wall* opinion. While it is true that the Court considered the ‘importance of the duties [...] involved’,³³⁷ it also recognised the SC resolutions that deemed all Israel acts relating to the Occupied Palestinian Territories as invalid.³³⁸

The same may be said regarding the duty of non-assistance which the ILC also claimed to be customary.³³⁹ Note that the SC, in the instances cited by the ILC, also urged states to refrain from lending aid or assistance to the wrongful states.³⁴⁰ Thus, the duty of non-assistance in these instances did not rest on the norm’s peremptory status but on the ‘binding determination’ made by the SC.³⁴¹ In addition, it must not be overlooked that states, under 2001 Draft Article 16, ‘incur responsibility for aiding and assisting violations of international law’.³⁴² Thus, it remains to be seen if the duty of non-assistance imposes a distinct duty or is simply a result of the ‘general rule on [...] complicity’.³⁴³

Finally, as to the duty to cooperate, the ILC in its 2022 Draft Conclusions claimed that this duty is ‘now recognised under international law’.³⁴⁴ Some states concurred with this conclusion.³⁴⁵ Yet, others criticised this finding citing the absence of practice.³⁴⁶ Arguably, the

³³⁶ *Namibia* [1970] (n 82), 53 citing Res 264 UNSC (20 March 1969) UN Doc S/RES/264; Res 269 UNSC (12 August 1969) UN Doc S/RES/269; Res 276 (n 335). *Wall* [2004] (n 240) (Higgins, Separate Opinion), 216.

³³⁷ *Wall* [2004] (n 240), 200.

³³⁸ See Res 276 (n 335); Res 478 (n 335). *Note Wall* [2004] (n 240) (Koojimans, separate opinion), 232 (‘The duty not to recognise amounts, therefore, in my view to [a duty] without real substance’)

³³⁹ ILC, ‘Report on the Work of the 71st Session’ (2019) (n 231), 196; ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 115. *Contra* Bird, ‘Third State Responsibility for Human Rights Violations’ (n 335), 889 (‘This [duty] does not reflect [positive] law, and state practice can be found which does not comply with this [duty]’); Talmon Stefan, ‘Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2005), 106; ILC, ‘Comments & Observations of Governments’ (2022) (n 160), 86 (Israel), 86 (Japan); 87 (The Netherlands); 89 (UK); 90 (US).

³⁴⁰ See Res 276 (n 335); Res 298 (n 335); Res 446 (n 335); Res 478 (n 335).

³⁴¹ *Wall* [2004] (n 240) (Higgins, Separate Opinion), 216 citing *Namibia* [1970] (n 82), 53.

³⁴² Aust, ‘Serious Breaches of Peremptory Norms in the Law of State Responsibility’ (n 328), 239; Brilmayer Lea & Tesfalidet Isaias Yemane, ‘Third State Obligations & the Enforcement of International Law’ (2011) 44(1) *New York University Journal of International Law & Policy* 1, 37; Hakimi, ‘Constructing an International Community’ (n 210), 334.

³⁴³ Aust, ‘Serious Breaches of Peremptory Norms in the Law of State Responsibility’ (n 328), 251.

³⁴⁴ ILC, ‘Report on the Work of the 73rd Session’ (2022) (n 278), 76.

³⁴⁵ ILC, ‘Report on the Work of the 71st Session’ (2019) (n 231), 194; ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 115. See UNGA, Sixth Committee, ‘Summary Record of the 73rd Session, 26th Meeting’ (2018) (n 328), 16 (Portugal); UNGA, Sixth Committee, ‘Summary Record of the 74th Session, 24th Meeting’ (2019) (n 325), 19 (Micronesia); UNGA, Sixth Committee, ‘Summary Record of the 74th Session, 26th Meeting’ (2019) (n 325), 5 (Togo); ILC, ‘Comments & Observations of Governments’ (2022) (n 160), 87 (Netherlands); Tladi, ‘Fifth Report on Peremptory Norms’ (2022) (n 325), 55 (Cyprus, Nicaragua, & Cuba);

³⁴⁶ Tladi, ‘Fifth Report on Peremptory Norms’ (2022) (n 325), 85. See *Wall* [2004] (n 240), (Koojimans,

criticism is well-founded. As Hakimi suggests, while the duty is ‘gaining legal traction’, it ‘remains almost entirely aspirational’.³⁴⁷ Furthermore, it is also yet to be determined if the duty to cooperate is a distinct duty or simply a logical consequence of the conduct’s illegality. As Judge Higgins noted, the ‘binding determination made by the SC’ that an act is ‘illegal cannot remain without consequence’.³⁴⁸ This entails a ‘legal consequence [for states] namely that of putting an end to an illegal situation’.³⁴⁹

CHAPTER CONCLUSION

This chapter examined the concept of collective norms. It identified two characterisations of collective norms based on different views of the international legal system which will be further discussed in *Chapters 10* and *11*. The first described an order governed by individual interests. Under this view, collective norms arise from the coincidence of interests in common goods that concern every state. This coincidence motivates efforts towards their protection leading to norms established for the benefit of all states. The second view presents a system characterised by cohesion. This submits that the shared interests in common goods and values have a transformative function resulting in an international community. Collective interests transcend individual interests and become that of the community. In turn, this community establishes collective norms to safeguard its interests.

Next, this chapter examined certain effects, other than implementation, attributed to collective norms which would later influence the formation of the rules on the implementation of state responsibility. These include those developed during the VCLT’s formation such as objective regimes, absolute and interdependent obligations, and peremptory or *jus cogens* norms. First, objective regimes attempted, albeit unsuccessfully, to give to make certain agreements, due to the nature of their objects, opposable to non-states parties. Second, absolute and interdependent obligations dealt with states’ competence to respond to material breaches of agreements by suspending or terminating their relations with the defaulting state. In doing so, it theorised the existence of legal relations that go beyond synallagmatic ones. Third,

separate opinion), 233–4; ILC, ‘Comments & Observations of Governments’ (2022) (n 160), 85 (Israel: ‘The [ILC] has itself acknowledged in the Commentary [to the 2001 Draft Articles] that “[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation [...] in that respect [such duty] may reflect the progressive development of international law” [...] This remains true today’); 87 (Japan); 89 (UK); 89 (US: ‘There is neither a relevant rule of customary international law nor express agreement of states to accept such [a duty]’).

³⁴⁷ Hakimi, ‘Constructing an International Community’ (n 210), 335.

³⁴⁸ *Namibia* [1970] (n 82), 53.

³⁴⁹ *Wall* [2004] (n 240) (Higgins, Separate Opinion), 216 citing *Haya de la Torre* (Colombia v Peru) (Judgement) [1951] ICJ 71, 82.

peremptory norms distinguished between ‘ordinary’ and ‘superior’ norms and restricted states’ capacity to derogate from norms that protect the states’ vital interests.

Finally, this chapter observed the impact of the developments in the VCLT on the consequences of wrongful acts under the 2001 Draft Articles. It noted the efforts to extend the nullifying effects of peremptory norms beyond legal acts to cover material ones. Indeed, the ILC asserted, under 2001 Draft Articles 40 and 41, that should there be a serious breach of a duty imposed by peremptory norms, third states must cooperate to bring to an end through lawful means such serious breach, must not recognise as lawful any situation created by the breach, and must not aid or assist the wrongful state in maintaining that situation. Yet, this chapter also observed that while some states and scholars claim that these duties have become positive law, others submit that they remain progressive measures.■

CHAPTER 2: IMPLEMENTATION & VIEWS ON LEGAL RELATIONS

Having examined the concept of collective norms and the effects afforded to these norms by objective regimes, absolute and integral obligations, and peremptory norms, attention now turns toward the implementation of the duties imposed by collective norms. It is recognised that a breach of duty automatically gives rise to responsibility.¹ The ILC makes this clear in Part I of the 2001 Draft Articles which deals with the principles governing wrongful acts. 2001 Draft Article 1 provides that ‘every [state’s] wrongful act [...] entails [that states’] [...] responsibility’.² Thus, when an act or omission that is attributable to a state breaches an international duty, that state, in the absence of circumstances precluding wrongfulness, becomes responsible.³ In turn, as mentioned in *Chapter 1*, the wrongful act gives rise to certain consequences under Part II of the 2001 Draft Articles. For instance, the wrongful state under 2001 Draft Article 30, must cease the wrongful act,⁴ and under 2001 Draft Article 31, must make ‘full reparation’ for the injury caused.⁵

However, while ‘responsibility arises [...] by operation of law’, it is ‘still necessary’, as Crawford and the ILC submit, for states to implement the wrongful state’s responsibility.⁶ Through implementation, as stressed in Part III of the 2001 Draft Articles, states ‘vindicate their

¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) II(2) YbILC 20, 116; Crawford James, ‘Overview of Part Three of the Articles on State Responsibility’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 931; Barboza Julio, ‘Legal Injury: The Tip of the Iceberg in the Law of State Responsibility’ in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martnus Nijhoff 2005), 7.

² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 32–3, 117.

³ Ibid, 32 citing *Phosphates of Morocco* (Italy v France) (Preliminary Objections) [1938] PCIJ Ser A/B No 74, 28; *SS Wimbledon* (UK et al v Germany) (Judgment) [1923] PCIJ Ser A No 1, 30; *Chorzów Factory* (Germany v Poland) (Merits) [1928] PCIJ Ser A No 17, 29; *Corfu Channel* (UK v Albania) (Merits) [1949] ICJ 4, 23; *US Diplomatic & Consular Staff in Tehran* (US v Iran) (Judgment) [1980] ICJ 3, 142; *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 38.

⁴ *Rainbow Warrior* (New Zealand v France) (Award) (1990) 20 RIAA 215, 270; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136, 197; *Jurisdictional Immunities of the State* (Germany v Italy; Greece intervening) (Judgment) [2012] ICJ 99, 153; Corten Olivier, ‘Obligation of Cessation’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 545

⁵ *Chorzów Factory* [1928] (n 3), 47; *Gabčíkovo-Nagymaros* [1997] (n 3), 80; *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Judgment) [2007] ICJ 43, 232; *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (Compensation) [2018] (ICJ, General List 150, 2 February 2018), 26.

⁶ Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 553; ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 116 (‘The *mise-en-oeuvre* of state responsibility’); Crawford James, *International Law Commission’s Articles on State Responsibility* (Cambridge University Press 2002), 254. See Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 64; De Jesús Jose, ‘Obligations Erga Omnes as Multilateral Obligations’ (DPhil, University of Oxford 2012), 57 (‘Responsibility alone does not guarantee the [...] means to make state responsibility effective’).

rights' and 'secure [others'] observance or performance' of their duties.⁷ Now, whether states have the competence to implement another's responsibility depends on the legal relations that rules create.⁸ Recall from *Chapter 1* that rules do not merely define standards of conduct for their subjects. They also determine which states have the prerogative to demand the conduct's observance or performance from others upon which a duty has been imposed.⁹

States may implement another's responsibility collectively or unilaterally.¹⁰ The former refers to the organised implementation by international organisations such as the UN against its members.¹¹ The latter, this thesis' focus, pertains to actions or measures taken by one or several states.¹² Unilateral implementation, according to the ILC and several scholars, may involve actions of a 'relatively formal character' which include the invocation of responsibility through judicial dispute resolution.¹³ It may also involve enforcement through 'extra-judicial' unilateral

⁷ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 116; Tams Christian, 'Individual States as Guardians of Community Interests' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 381; Wellens Karel, 'General Observations' in Komori Teruo & Wellens Karel (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge 2016), 25. See Fitzmaurice Gerald, 'Foundations of the Authority of International Law & the Problem of Enforcement' (1956) 19(1) *Modern Law Review* 1, 1–2; Koji Teraya, 'Multifaceted Conceptions of Implementation & the Human Rights Approach' in Komori Teruo & Wellens Karel (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge 2016), 77.

⁸ Sachariew Kamen, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" & Its Legal Status' (1988) 35 *Netherlands International Law Review* 273, 275; Villalpando Santiago, *L'émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 229; Hutchinson D, 'Solidarity & Breaches of Multilateral Treaties' (1988) 59 *British Yearbook of International Law* 151, 158.

⁹ Hohfeld Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning & Other Legal Essays*, Cook Walter (ed) (Yale University Press 1919), 7; Postema Gerald, *Legal Philosophy in the Twentieth Century: Common Law World* (Springer 2011), 99; Eleftheriadis Pavlos, *Legal Rights* (Oxford University Press 2008), 122 citing Kelsen Hans, *General Theory of Law & State*, Wedberg A (tr) (Harvard University Press 1945), 82. De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 18, 21 citing Ago Roberto, 'Eighth Report on State Responsibility: Addendum' (1980) II(1) YbILC 13, 18. Villalpando, *La communauté internationale* (n 8), 244.

¹⁰ Tams, 'Guardians of Community Interests' (n 8), 381.

¹¹ Tomuschat Christian, 'Obligations arising for States Without or Against Their Will' (1993) 241 *Recueil des Cours de l'Académie de Droit International* 195, 368; Alland Denis, *Justice Privée et Ordre Juridique International* (Pedone 1994), 25–6.

¹² Tams, 'Guardians of Community Interests' (n 8), 381; de Wet Erika, 'Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction' (2013) 38 *South African Yearbook of International Law* 1, 9

¹³ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117; Crawford, *State Responsibility* (n 6), 541; de Wet, 'Invoking Obligations Erga Omnes' (n 12), 9–10; Tams, 'Guardians of Community Interests' (n 8), 383; Allain Jean, 'Slavery & Obligations Erga Omnes' (2019) 36 *Australian Yearbook of International Law* 85, 112; Massimiliano Montini, 'Improving Compliance with Multilateral Environmental Agreements through Positive Measures: Kyoto Protocol' in Kiss Alexander, *et al.* (eds), *Economic Globalisation & Compliance with International Environmental Agreements* (Kluwer 2005), 158; Rose Cecily, 'Enforcing the "Community Interest" in Combating Transnational Crimes: Potential for Public Interest Litigation' (2022) 69 *Netherlands International Law Review* 57, 72; Weiss Edith Brown, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *American Journal of International Law* 798, 800; Wellens, 'General Observations' (n 7), 25. See Crawford James,

measures in the form of retorsions or countermeasures.¹⁴

This chapter analyses the concept of implementation and how it relates to the legal relations that collective norms create. First, it examines some of the means by which states implement the wrongful state's responsibility—invocation through judicial dispute resolution or enforcement via unilateral measures. Next, it analyses the concept of implementation as a function of the legal relations arising from norms. These have traditionally been viewed as synallagmatic. That is, there is an exact correlation between one state's right and another's duty. If a state breaches its duty, it 'injures' or infringes another's right which entitles the latter to implement the former's responsibility. This chapter then contrasts this approach with the contemporary view on legal relations. This posits that the acknowledgement of community interests transformed the legal relations among states and gave rise to non-synallagmatic relations and duties owed *erga omnes*. Unlike the synallagmatic view, this permits all states that have been affected in their 'interests', not just those 'injured' or whose rights have been infringed, to implement the wrongful states' responsibility.

I. MEANS OF IMPLEMENTATION OF RESPONSIBILITY

One of the means by which states implement another's responsibility, as scholars like Crawford, Allain, and Weiss point out, is through invocation via judicial dispute resolution.¹⁵ This involves the 'presentation of a claim against another state' or the 'commencement of proceedings before an international court or tribunal'.¹⁶ However, as Tams, Tzanakopoulos, and Frowein observe, the resort to this method, due to cost and complexity,¹⁷ remains an

'Multilateral Rights & Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325, 449 citing ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117; ILC, 'State Responsibility: Comments & Observations of Governments, 53rd Session' (19 March 2001) UN Doc A/CN.4/515, 59 (UK: 'Informally calling upon a state to abide by its [duties] does not count as [...] invocation').

¹⁴ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 128 ff; Crawford, *State Responsibility* (n 6), 675; Hillgruber Christian, 'Right of Third States to Take Countermeasures' in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 265; Hutchinson, 'Solidarity & Breaches of Multilateral Treaties' (n 8), 157; Proulx Vincent-Joël, 'Marshall Islands Judgements & Multilateral Disputes at the World Court' (2017) 111 *American Journal of International Law (Unbound)* 96, 98. See Hakimi Monica, 'Unfriendly Unilateralism' (2014) 55 *Harvard International Law Journal* 105, 107, 111–5.

¹⁵ Rose, 'Enforcing the "Community Interest" in Combating Transnational Crimes' (n 13), 72 ('[The] entitlement to invoke responsibility can indeed be equated with standing to bring a claim') citing Crawford, *State Responsibility* (n 6), 541, 598 ff; Allain, 'Slavery & Obligations Erga Omnes' (n 13), 112; Weiss, 'Invoking State Responsibility' (n 13), 800; de Wet, 'Invoking Obligations Erga Omnes' (n 12), 9; Massimiliano, 'Improving Compliance with MEAs' (n 13), 158. See Nollkaemper André, 'International Adjudication of Global Public Goods: Substance & Procedure' (2012) 23 *European Journal of International Law* 769, 773, 786; Chinkin Christine, 'Third Party Intervention before the International Court of Justice' (1986) 80 *American Journal of International Law* 495, 501; Wellens, 'General Observations' (n 7), 25.

¹⁶ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117.

¹⁷ See Tams Christian & Tzanakopoulos Antonios, 'Barcelona Traction: ICJ as an Agent of Legal

‘exception rather than the rule’.¹⁸

Another method of implementation, the ‘default’ one for authors like Proulx,¹⁹ is enforcement through unilateral measures,²⁰ by one or several states.²¹ These may either be retorsions or countermeasures.²² To recall, a retorsion is an ‘unfriendly’ but lawful conduct.²³

Development' (2010) 23 *Leiden Journal of International Law* 781, 793; Frowein Jochen, 'Reactions by Not Directly Affected States to Breaches of Public International Law' (1994) 248 *Recueil des Cours de l'Académie de Droit International* 345, 427; Pigrau Antoni, 'Reflections on the Effectiveness of Peremptory Norms & Erga Omnes Obligations before International Tribunals' (2018) 55 *Questions of International Law* 31, 135; Ruys Tom, 'Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?' (2021) 20 *Chinese Journal of International Law* 457, 492.

¹⁸ Proulx, 'Marshall Islands Judgements' (n 14), 98.

¹⁹ Ibid.

²⁰ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 128; Crawford, *State Responsibility* (n 6), 675; Crawford, 'Overview of Part Three' (n 1), 932 ('A further mechanism for the implementation'), 936; Beaucillon Charlotte, 'Unilateral State Sanctions & the Extraterritorial Effects of National Legislation' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 106.

²¹ Tzanakopoulos Antonios, 'State Reactions to Illegal Sanctions' in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 68; Barber Rebecca, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70 *International & Comparative Law Quarterly* 343, 348; Beaucillon Charlotte, 'Unilateral & Extraterritorial Sanctions: Definitions, State of Practice, & Contemporary Challenges' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 3. Note that these are distinct from ‘collective’ (Tzanakopoulos, 'State Reactions to Illegal Sanctions' (n 21), 68; White Nigel, 'Shades of Grey: Autonomous Sanctions in the International Legal Order' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 65), or ‘multilateral’ measures (Moret Erica, 'Unilateral & Extraterritorial Sanctions in Crisis' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 19; Schmidt Julia, 'Legality of Unilateral Extra-Territorial Sanctions under International Law' (2022) 27 *Journal of Conflict & Security Law* 53, 57; Hofer Alexandra, 'Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 *Chinese Journal of International Law* 1, 3), that international organisations impose against its members like the UN through the SC (Barber, 'GA & Unilateral Sanctions' (n 21), 347; Ruys Tom, 'Sanctions, Retorsions, & Countermeasures: Concepts & Legal Framework' in Van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 36), and regional organisations such as the European Union ('EU') and the African Union ('AU') (ibid, 36, 40; Hofer, 'Divide on Unilateral Coercive Measures' (n 21), 3). Collective measures are levied pursuant to organisations' 'constituent instrument' which member states have accepted (Barber, 'GA & Unilateral Sanctions' (n 21), 346; Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 21), 40; Douhan Alena, 'Unilateral Coercive Measures: Notion, Types, & Qualification' (UN Doc A/HRC/48/59) 8 July 2021, 13). This serves as the basis of their legality (Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 21), 40; Schmidt, 'Unilateral Extraterritorial Sanctions' (n 21), 58). They are imposed not by individual states but by an 'executive body' tasked with protecting the organisation's interests (Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 21), 36). They are largely 'political' in character (Higgins Rosalyn, 'Place of International Law in the Settlement of Disputes by the Security Council' (1970) 64 *American Journal of International Law* 1, 16). Arguably, the concept of the competence to invoke responsibility is 'irrelevant' to 'collective' or 'multilateral' measures (Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 21), 36). While these measures are still subject to 'legal limitations' (Orakhelashvili Alexander, 'Sanctions & Fundamental Rights of States: EU Sanctions Against Iran & Syria' in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 25; Craven Matthew, 'Humanitarianism & the Quest for Smarter Sanctions' (2022) 13 *European Journal of International Law* 43, 51), a breach of duty is not necessarily required for organisations to levy measures against its members (Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 21), 36; Ronzitti Natalino, 'Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (BRILL 2016), 9).

²² Crawford, *State Responsibility* (n 6), 675; Hillgruber, 'Third States & Countermeasures' (n 14), 265; Hutchinson, 'Solidarity & Breaches of Multilateral Treaties' (n 8), 157.

²³ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 128.

States may resort to these measures to implement responsibility.²⁴ Indeed, this may be seen in the examination in *Part II*. However, it must be noted that not all retorsions are measures of enforcement.²⁵ As some observe, states have also levied retorsions to compel the targeted state to ‘desist from [a certain lawful] behaviour’ or change its policy.²⁶ They are not intended to ‘restore legality’,²⁷ or to ‘stigmatise’ wrongful acts.²⁸ Instead, they serve the imposing states’ foreign-policy objectives,²⁹ and induce the targeted state to ‘desist’ from a certain conduct,³⁰ or to act according to the imposing state’s ‘values, interests, and objectives’.³¹

²⁴ Ibid (‘It may be a response to [a] wrongful act’); Crawford, *State Responsibility* (n 6), 676; Gaja Giorgio, ‘Protection of General Interests in the International Community’ (2011) 364 *Recueil des Cours de l’Académie de Droit International* 9, 101; Kolb Robert, *International Law of State Responsibility* (Elgar 2017), 175. Note Hofer Alexandra, ‘The Proportionality of Unilateral “Targeted” Sanctions: Whose Interests Should Count?’ (2020) 89 *Nordic Journal of International Law* 399, 415 (‘Retorsions “are still governed by necessity and proportionality”’) citing White Nigel & Abbas A, ‘Countermeasures & Sanctions’ in Evans Malcolm (ed), *International Law* (Oxford University Press 2014), 538,

²⁵ Crawford, *State Responsibility* (n 6), 678; Ruys, ‘Sanctions, Retorsions, & Countermeasures’ (n 21), 23.

²⁶ Bogdanova Iryna, *Unilateral Sanctions in International Law & the Enforcement of Human Rights: Impact of the Principle of Common Concern of Humankind* (BRILL 2022), 45 citing Carter Barry, ‘International Economic Sanctions: Improving the Haphazard US Legal Regime’ (1987) 75 *California Law Review* 1159, 1170; Kern Alexander, *Economic Sanctions: Law & Public Policy* (Palgrave Macmillan 2009), 10. Eckert Sue, ‘Evolution & Effectiveness of UN Targeted Sanctions’ in van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 58; Happold Matthew, ‘Economic Sanctions & International Law’ in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 2; Watson James, ‘World Trade Organisation & Unilateral Sanctions: Prohibited or Possible?’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart), 186.

²⁷ de Waart Paul, ‘Economic Sanctions Infringing Human Rights: Is There a Limit?’ in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law* (Springer 2015), 135; Beaucillon, ‘Unilateral & Extraterritorial Sanctions’ (n 21), 7. See Arangio-Ruiz Gaetano, ‘Third Report on State Responsibility’ (1991) II(1) YbILC 1, 9–10; Kelsen Hans, *Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Praeger 1950), 706; Hofer Alexandra, ‘Negotiating International Public Policy through Adoption & Contestation of Sanctions’ (2017) 50 *Revue Belge de Droit International* 440, 445;

²⁸ Hofer, ‘Adoption & Contestation of Sanctions’ (n 27), 445 citing Giumelli F, ‘The Purposes of Targeted Sanctions’ in Biersteker Thomas, *et al.* (eds), *Targeted Sanctions: Impacts & Effectiveness of United Nations Action* (Cambridge University Press 2016), 38–59; Eckert, ‘Evolution & Effectiveness of UN Targeted Sanctions’ (n 26), 58.

²⁹ Ruys, ‘Sanctions, Retorsions, & Countermeasures’ (n 21), 23; Timofeev Ivan, ‘Unilateral & Extraterritorial Sanctions Policy: the Russian Dimension’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 91. See Hofer, ‘Adoption & Contestation of Sanctions’ (n 27), 447 citing Doxey M, ‘Sanctions Revisited’ (1975) 31 *International Journal* 53, 57.

³⁰ Bothe Michael, ‘Compatibility & Legitimacy of Sanctions Regimes’ in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 33; Kern, *Economic Sanctions: Law & Public Policy* (n 26), 10; Eckert, ‘Evolution & Effectiveness of UN Targeted Sanctions’ (n 26), 58; Happold, ‘Economic Sanctions & International Law’ (n 26), 2; Joyner Daniel, ‘International Legal Limits on the Ability of States to Lawfully Impose Economic/Financial Sanctions’ in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (BRILL 2016), 193; Watson, ‘WTO & Unilateral Sanctions’ (n 26), 186.

³¹ Beaucillon, ‘Unilateral & Extraterritorial Sanctions’ (n 21), 3; Ashley Louisa, ‘Status of Unilateral Countermeasures in International Law’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 236; Mitchell Andrew, ‘Sanctions & World Trade Organisation’ in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 283; Douhan, ‘Unilateral Coercive Measures: Notion, Types, & Qualification’ (2021) (n 21), 6.

In contrast, a countermeasure, or ‘non-forcible reprisal’ in earlier parlance,³² is *a priori* unlawful.³³ As tribunals stated in *Gabčikovo, Naulilaa, Cysne*, and *Air Services*,³⁴ which the ILC repeats in 2001 Draft Article 22,³⁵ a countermeasure involves, a state’s temporary non-performance of its duties owed to the wrongful state due to the latter’s wrongful act.³⁶ The measure’s wrongfulness is precluded as it is aimed at inducing the wrongful state to comply with its duties, cease the wrongful act, and provide reparations.³⁷ For many, like the ILC, countermeasures are a necessary ‘feature of a decentralised system’ as they allow states to ‘vindicate their rights’ against the ‘responsible state’ in the absence of public organs.³⁸ Yet, it is also recognised that they are also ‘liable to abuse’—a potential ‘exacerbated by the [...] inequalities [among] states’.³⁹

Due to their exceptional nature,⁴⁰ the resort to countermeasures is subject to ‘strict [...] conditions’ to limit their “anarchical” bent’.⁴¹ The first ‘prerequisite for [a] lawful countermeasure’ per the cases mentioned above,⁴² which the ILC reflected in 2001 Draft

³² Oppenheim Lassa, *International Law* (Longmans 1905), 34; *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa (Naulilaa)* (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1012 (‘Acts of self-help by the injured state [...] in retaliation for [wrongful] acts’); Ago Roberto, ‘Eighth Report on State Responsibility’ (1979) II(1) YbILC 3, 39 (‘[A] “sanction” [is] synonymous with an action the object of which is to inflict punishment or to secure performance and which takes the form of an infringement of [...] an international subjective right’); ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 75 (‘Historically the more usual terminology was that of “legitimate reprisals” or, more generally, measures of “self-protection” or “self-help” [...] At least since the *Air Service Agreement* arbitration, the term “countermeasures” has been preferred’).

³³ Crawford, *State Responsibility* (n 6), 685; Alland Denis, ‘Definition of Countermeasures’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 1135; Hutchinson, ‘Solidarity & Breaches of Multilateral Treaties’ (n 8), 157.

³⁴ *Gabčikovo-Nagymaros* [1997] (n 3), 55; *Naulilaa* (n 32), 1025–6; *Responsibility of Germany arising out of acts committed after 31 July 1914* (Portugal v Germany) (Award) (1930) 2 RIAA 1056, 1056–7; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 443–6.

³⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 75–6.

³⁶ *Ibid.*, 75–6, 128–9.

³⁷ *Ibid.*

³⁸ *Ibid.*, 128; Kolb, *International Law of State Responsibility* (n 24), 173 (‘Hallmark of a decentralized legal order’); Zoller Elizabeth, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational 1984), 3 (‘Unilateral in form and remedial in purpose’). *But see* Stern Brigitte, ‘Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l’occasion de la fin des travaux de la C.D.I. sur la responsabilité des États’ (2001) 47 *Annuaire français de droit international* 3, 31.

³⁹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 128; Crawford, *State Responsibility* (n 6), 686; Kolb, *International Law of State Responsibility* (n 24), 173 (‘[Countermeasures] are a highly primitive and dangerous unilateral tool of pure private justice’); Stern, ‘La notion de préjudice juridique’ (n 38), 21.

⁴⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 130.

⁴¹ Kolb, *International Law of State Responsibility* (n 24), 183; Crawford, *State Responsibility* (n 6), 686; ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 129; Cannizzaro Enzo, ‘Role of Proportionality in the Law of International Countermeasures’ (2001) 12 *European Journal of International Law* 889, 908.

⁴² *Gabčikovo-Nagymaros* [1997] (n 3), 55; *Naulilaa* (n 32), 1027; *Air Services Agreement* (n 34), 443.

Article 49(1),⁴³ is the existence of a prior wrongful act. Countermeasures are aimed at inducing the wrongful state to comply with its duties.⁴⁴ Without a prior breach, a measure no longer fulfils this function. It may simply be a measure to compel the targeted state to act in a certain manner.⁴⁵ This also means that countermeasures, contrary to the claim of some, do not necessarily amount to the prohibited kind of intervention,⁴⁶ or coercion.⁴⁷ The prohibited kind of intervention involves interference in ‘matters in which each state is permitted [due to sovereignty] to decide freely’.⁴⁸ Similarly, coercion is wrongful when a state ‘compels the target in a sphere of the target’s discretion through extreme forms of pressure’.⁴⁹ Measures to enforce international duties do not fall within this category.⁵⁰

As a corollary, a countermeasure, as stated in *Air Services* and *Gabčíkovo*,⁵¹ which the ILC reiterated in 2001 Draft Article 49(2),⁵² must be ‘directed towards the wrongful state’. This does not mean that countermeasures may not ‘incidentally affect’ third states.⁵³ Collateral effects, given the interdependence among states, are unavoidable.⁵⁴ Yet, the imposing state must not breach duties owed to third states as they did not commit the wrongful act. If it does, the measure’s wrongfulness ‘as against third states’ cannot be precluded.⁵⁵ This also means that

⁴³ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 130.

⁴⁴ *Gabčíkovo-Nagymaros* [1997] (n 3), 55; *Air Services Agreement* (n 34), 443.

⁴⁵ Bogdanova, *Unilateral Sanctions & Human Rights* (n 26), 45; Kolb, *International Law of State Responsibility* (n 24), 178.

⁴⁶ See e.g. Criddle Evan, ‘Humanitarian Financial Intervention’ (2013) 24 *European Journal of International Law* 583, 584; Orakhelashvili, ‘Sanctions & Fundamental Rights of States’ (n 21), 36.

⁴⁷ See e.g. Mohamad Rhamat, ‘Unilateral Sanctions in International Law: A Quest for Legality’ in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, & Consequences* (Asser Press 2015), 72, 80; Ashley, ‘Unilateral Countermeasures in International Law’ (n 31), 251.

⁴⁸ *Military & Paramilitary Activities in & against Nicaragua* (Nicaragua v US) (Merits) [1986] ICJ 14, 108; *Armed Activities on the Territory of the Congo* (DRC v Uganda) (Judgment) [2005] ICJ 168, 227.

⁴⁹ Damrosch Lori, ‘Enforcing International Law through Non-Forcible Measures’ (1997) 269 *Recueil des Cours de l’Académie de Droit International* 9, 55; *Military & Paramilitary Activities* [1986] (n 48), 108.

⁵⁰ Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 93; Milanovic Mark, ‘Revisiting Coercion as an Element of Prohibited Intervention in International Law’ (2023) 117 *American Journal of International Law* 601, 622 (‘Coercive acts with regard to a state’s choices that fall outside the reserved domain cannot be intervention’); Ronzitti, ‘Sanctions as Instruments of Coercive Diplomacy’ (n 21), 12; Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 313; Tzanakopoulos Antonios, ‘Right to be Free from Economic Coercion’ (2015) 4 *Cambridge Journal of International & Comparative Law* 616, 620.

⁵¹ *Air Services Agreement* (n 34), 444; *Gabčíkovo-Nagymaros* [1997] (n 3), 55–6.

⁵² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 130.

⁵³ *Ibid*, 130.

⁵⁴ Dawidowicz, *Third Party Countermeasures* (n 50), 288; Kolb, *International Law of Responsibility* (n 24), 178.

⁵⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 130.

‘secondary’ and ‘targeted’ unilateral measures cannot be justified as countermeasures as they are not levied against the wrongful state. ‘Secondary’ measures ‘constrain [entities] located in or bearing [a third state’s] nationality, to abide by [the imposing state’s unilateral measures] although they are not subject to the [its] jurisdiction’.⁵⁶ As some scholars and states submit, these measures amount to an ‘overreach’ of jurisdiction,⁵⁷ and ‘impinge on [third states’] rights to ‘regulate their [...] citizens and companies’.⁵⁸ The same goes for ‘targeted’ measures which are levied directly on individuals and entities that are responsible for, have supported, or have contributed to the wrongful state’s actions.⁵⁹ As will be discussed in *Chapter 9*, these measures may entail breaches of duties that the imposing state owes not just to the wrongful state but also to the targeted individual or entity.⁶⁰

Another corollary, as highlighted in *Air Services* and *Gabčíkovo*,⁶¹ which the ILC affirms in 2001 Draft Articles 49(3), 52(3), and 53, is that a countermeasure must be ‘temporary in character’ and ‘as far as possible be reversible’.⁶² Countermeasures are not punitive but are aimed at inducing a state to comply with its duties.⁶³ Once the wrongful act has ceased,⁶⁴ or the dispute has been submitted for adjudication,⁶⁵ the imposing state must perform or observe the suspended duties.⁶⁶ Note that the criterion of ‘reversibility is not absolute’ given that

⁵⁶ Beaucillon, ‘Unilateral & Extraterritorial Sanctions’ (n 21), 6; Schmidt, ‘Unilateral Extraterritorial Sanctions’ (n 21), 60; Subedi Surya, ‘Status of Unilateral Sanctions in International Law’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 47; Timofeev, ‘Unilateral & Extraterritorial Sanctions Policy’ (n 29), 93.

⁵⁷ Ruys, ‘Sanctions, Retorsions, & Countermeasures’ (n 21), 29; Subedi, ‘Status of Unilateral Sanctions’ (n 56), 49 citing Jazairy Idriss, ‘Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights’ (26 July 2017) UN Doc A/HRC/36/44, 7; Douhan Alena, ‘Secondary Sanctions, Civil, & Criminal Penalties for Circumvention of Sanctions Regimes & Overcompliance with Sanctions’ (15 July 2021) UN Doc A/HRC/51/33, 11–2. See UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report’ (2 July 2002) UN Doc A/57/179, 2 (Japan); UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (16 October 2002) UN Doc A/57/PV.31, 13 (Australia), 13 (Canada); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (31 July 2019) UN Doc A/74/264, 5 (EU).

⁵⁸ Meyer Jeffrey, ‘Second Thoughts on Secondary Sanctions’ (2009) 30 *University of Pennsylvania Journal of International Law* 905, 932–3; Ruys Tom & Ryngaert Cedric, ‘Secondary Sanctions: A Weapon out of Control? Legality of, & European Responses to, US Secondary Sanctions’ (2020) *British Yearbook of International Law* 1, 4.

⁵⁹ Hofer Alexandra, ‘The “Curiouser & Curiouser” Legal Nature of Non-UN Sanctions: US Sanctions against Russia’ (2018) 23 *Journal of Conflict & Security Law* 76, 78.

⁶⁰ Ibid; Douhan, ‘Unilateral Coercive Measures: Notion, Types, & Qualification’ (2021) (n 21), 15. See ILC, ‘Summary Records of the 52nd Session’ (2000) I YbILC 1, 266, 271.

⁶¹ *Gabčíkovo-Nagymaros* [1997] (n 3), 56–7.

⁶² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 130–1, 136, 137

⁶³ *Gabčíkovo-Nagymaros* [1997] (n 3), 56–7.

⁶⁴ Ibid.

⁶⁵ *Air Services Agreement* (n 34), 445.

⁶⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 130.

countermeasures, while in force, would normally entail ‘consequential losses’ to the targeted state.⁶⁷ What it prohibits are measures that inflict ‘irreparable damage’ that no longer permit the resumption of the suspended duties.⁶⁸

Second, as stated in the two previously mentioned cases,⁶⁹ which the ILC reflects in 2001 Draft Article 52(1),⁷⁰ the imposing state must call on the wrongful state to fulfil its duties before imposing countermeasures. As the ILC points out, due to the ‘exceptional nature and [...] serious consequences of countermeasures’ they ‘should not be taken before the [wrongful] state is given notice of a claim and some opportunity to present a response’.⁷¹ Note however that the ILC ‘builds up’ on the requirements under case law by proposing in 2001 Draft Article 52(2) that a state may take ‘urgent countermeasures as are necessary to preserve its rights’ before ‘notification of [intent] to do so’.⁷²

Third, as further stressed in *Air Services* and *Gabčíkovo*,⁷³ which the ILC reiterates in 2001 Draft Article 51, a countermeasure must be proportionate ‘to the injury suffered’.⁷⁴ This means that a countermeasure that is excessive to the injury caused by the wrongful act is unlawful.⁷⁵ This requirement has a two-fold function.⁷⁶ It limits the kind of ‘measures [that] may be applied and their degree of intensity’.⁷⁷ In doing so, it ‘secures a certain predictability of the responses’ in a decentralised system,⁷⁸ and curtails the imposing state’s ‘broad discretion’ in levying the measure and ‘reduces the risk of abuse’.⁷⁹ It also protects the wrongful state’s rights by providing a ‘measure of assurance’ that disproportionate measures would trigger the imposing

⁶⁷ Crawford, ‘Third Report on State Responsibility’ (2000) (n 1), 88. See *Application of the Interim Accord (Macedonia v Greece)* (Judgment) [2011] ICJ 644, 691–2.

⁶⁸ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 131.

⁶⁹ *Air Services Agreement* (n 34), 445–6; *Gabčíkovo-Nagymaros* [1997] (n 3), 56.

⁷⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 135.

⁷¹ *Ibid.*, 136.

⁷² *Ibid.*

⁷³ *Air Services Agreement* (n 34), 448; *Gabčíkovo-Nagymaros* [1997] (n 3), 56–7. See also *Naulilaa* (n 32), 1028.

⁷⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 134.

⁷⁵ *Naulilaa* (n 32), 1028; *Air Services Agreement* (n 34), 448; *Gabčíkovo-Nagymaros* [1997] (n 3), 56. See Riphagen Willem, ‘Sixth Report on State Responsibility’ (1986) II(1) YbILC 1, 11; Arangio-Ruiz Gaetano, ‘Fourth Report on State Responsibility’ (1992) II(1) YbILC 6, 23, 35; Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 91, 96.

⁷⁶ Cannizzaro, ‘Proportionality & Countermeasures’ (n 41), 914.

⁷⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 134; Crawford, *State Responsibility* (n 6), 698

⁷⁸ Cannizzaro, ‘Proportionality & Countermeasures’ (n 41), 889

⁷⁹ *Ibid.*, 891, 914; Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 249, 260.

state's responsibility.⁸⁰

There are two primary methods for assessing a countermeasure's proportionality.⁸¹ The empirical approach, adopted in *Air Services* and *Gabčíkovo*,⁸² which the ILC endorsed in its Commentary to 2001 Draft Article 51,⁸³ quantitatively and qualitatively compares the wrongful act and the countermeasure. While there may be 'no perfect correlation' between the two,⁸⁴ the approach posits that a 'degree of equivalence' may be quantitatively approximated by comparing the injury and harm that the wrongful act and the countermeasure caused.⁸⁵ In this regard, countermeasures that are excessive compared to the wrongful act are deemed disproportionate.⁸⁶ Qualitatively, the approach also considers the 'importance of the interest protected by the rule infringed and the seriousness of the breach'.⁸⁷ Here, the 'gravity of the [...] wrongful act, and the rights in question',⁸⁸ are treated as aggravating or extenuating factors in assessing whether a countermeasure is appropriate.⁸⁹

In contrast, Oppenheim, McDougal, and Feliciano,⁹⁰ and later Zoller, Cannizzaro, and Proukaki,⁹¹ advocate for a functional approach. This dispenses with the difficulty of assessing the quantitative or qualitative equivalence between the wrongful act and the countermeasure.⁹²

⁸⁰ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 134. See Riphagen Willem, 'Second Report on State Responsibility' (1981) II(1) YbILC 79, 86 ('[T]he [wrongful state does not, by the mere fact of committing any breach of any obligation, become an "outlaw"]')

⁸¹ See O'Keefe Roger, 'Proportionality' in Crawford James, *et al.* (eds), *Law of International Responsibility* (Proportionality 2010), 1160 ('Against what injury a countermeasure [must] be weighed has been expressed in various ways'); Cannizzaro, 'Proportionality & Countermeasures' (n 41), 895 ('There are [different] standards [in measuring] proportionality'); Proukaki, *Problem of Enforcement* (n 79), 250 ('There is ambiguity [as to] its exact scope and content').

⁸² *Air Services Agreement* (n 34), 443; *Gabčíkovo-Nagymaros* [1997] (n 3), 56–7.

⁸³ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 135

⁸⁴ Riphagen Willem, 'Third Report on State Responsibility' (1982) II(1) YbILC 22, 40.

⁸⁵ *Air Services Agreement* (n 34), 443.

⁸⁶ *Naulilaa* (n 32), 1028.

⁸⁷ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 135 citing *Air Services Agreement* (n 34), 448; *Gabčíkovo-Nagymaros* [1997] (n 3), 56.

⁸⁸ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 135.

⁸⁹ Proukaki, *Problem of Enforcement* (n 79), 266.

⁹⁰ Oppenheim Lassa, *International Law: A Treatise*, vol II, Lauterpacht Hersch (ed) (Longmans, Green and Co 1937), 141 ('Reprisals must be in proportion to the wrong done and to the amount of compulsion necessary to get reparation'); McDougal Myres & Feliciano Florentino, *Law & Minimum World Public Order: Legal Regulation of International Coercion* (Yale University Press 1961), 682–3 ('They should be adapted and related not so much to the past illegality but rather and primarily to the future purpose sought').

⁹¹ Cannizzaro, 'Proportionality & Countermeasures' (n 41), 891 ff; Zoller, *Peacetime Unilateral Remedies* (n 38), 135; Proukaki, *Problem of Enforcement* (n 79), 271. See Council of the EU, 'Guidelines on Implementation and Evaluation of Restrictive Measures' (02 December 2005) PESC 1084 FIN 475, ¶9 ('Proportionate to their objective')

⁹² See Cannizzaro, 'Proportionality & Countermeasures' (n 41), 896.

Instead, it examines if the countermeasure is commensurate to the aim of inducing the wrongful state to comply with its duties.⁹³ For Cannizzaro, the test examines a measure's effectiveness—if it will achieve its objective.⁹⁴ In this sense, measures that are not relevant to the objective or are more than enough to achieve the aim are deemed unlawful.⁹⁵ The approach, however, is not without criticisms. For instance, De Hoogh suggests that the approach seems to imply that countermeasures that exceed the injury and harm caused by the wrongful act are lawful provided that they achieve their aim.⁹⁶ It 'amounts to [...] saying that the end justifies the means'.⁹⁷ The ILC also rejected the functional approach in favour of the empirical one.⁹⁸ Yet, it bears stressing that the approach may be construed to go beyond the examination of effectiveness. After all, the concept of proportionality, as Hofer and Zoller point out, considers not only whether a measure is appropriate but also if less restrictive means exist.⁹⁹ In this regard, the approach may also safeguard against measures that cause excessive injury and harm.

Finally, the ILC saw it fit to specify in 2001 Draft Article 50, that countermeasures 'shall not affect' duties imposed by the prohibition of the threat or use of force, norms protecting

⁹³ Ibid, 891, 899 ('[The] appropriateness of the aim that the state wishes to attain [...] [and] the appropriateness of the content of the measures adopted in relation to the result that they seek to achieve'), 900 ('[The standard to assess the objective varies. There [is the] normative standard [which examines whether the measure] re-establish[es] the normative balance altered by the breach [...] [Next, there is the] retributive standard [which looks at the] cost [inflicted on the wrongful state] for the injury suffered] [...] [There is also the] coercive standard that takes primarily into account the exigency to produce compliance [...] [and] finally, the [...] executive standard [which examines whether the measure] wipe[s] out the adverse effect[s] produced by the breach').

⁹⁴ Ibid, 899; Dawidowicz, *Third Party Countermeasures* (n 50), 358 ('Necessary or reasonably connected to the aim of ensuring compliance') citing *ADM & Tate v Mexico* (Award) (2007) ARB/(AF)/04/5, ¶¶152–60.

⁹⁵ Cannizzaro, 'Proportionality & Countermeasures' (n 41), 898; Proukaki, *Problem of Enforcement* (n 79), 271, 275.

⁹⁶ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 234.

⁹⁷ Ibid, 234.

⁹⁸ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 135. See Riphagen, 'Third Report on State Responsibility' (1982) (n 84), 40; Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 75), 23 ('It is not to be measured [...] on the basis of the likelihood of the reaction achieving a particular aim'), 35; Crawford, 'Third Report on State Responsibility' (2000) (n 6), 91 ('[Proportionality has a] function partly independent of the question whether the countermeasure was necessary to achieve a particular result'). Compare ILC, 'Report on the Work of the 48th Session: State Responsibility' (January 1997) UN Doc CN.4/L528/Add.3, 321.

⁹⁹ Hofer, 'The Proportionality of Unilateral "Targeted" Sanctions' (n 24), 403, 321; Zoller, *Peacetime Unilateral Remedies* (n 38), 135 ('The police may not use machine guns to kill birds'). See also regarding proportionality in context of self-defence: Corten Olivier, *Law Against War: Prohibition on the Use of Force in Contemporary International Law* (Hart 2010), 489–90 ('[If] other means [...], given the circumstances, [are more] appropriate [than] those [...] means [employed], it might be thought that the military reaction is disproportionate'); proportionality in the context of human rights: HRComm, 'General Comment 34: Freedoms of Opinion & Expression' (12 December 2011) UN Doc CCPR/C/GC/34, ¶34 ('They must be the least intrusive instrument amongst those which might achieve their protective function'); *Handyside v the United Kingdom* (Judgement) (ECtHR, App no 5493/72, 7 December 1976), ¶48; *Lingens v Austria* (Judgement) (ECtHR, App no 9815/82, 8 July 1986), ¶¶39–40.

fundamental human rights, humanitarian norms against reprisals, and other peremptory norms.¹⁰⁰ It also stressed that the imposing state must continue to ‘fulfil’ its duties imposed by dispute settlement procedures and the rules on diplomatic and consular inviolability.¹⁰¹ The phrase ‘shall not affect’ deserves consideration especially when it comes to duties that protect fundamental human rights.¹⁰² This is because countermeasures typically have adverse effects on the targeted state’s population.¹⁰³ Yet, as authors like Dawidowicz point out, precluding measures that affect persons but do not infringe their rights would severely limit states’ resort to countermeasures.¹⁰⁴ To this end, Crawford submits that a distinction must be made between the effect of countermeasures and their infringement on rights.¹⁰⁵ That is, measures that affect persons are not necessarily prohibited. What is precluded are measures that result in breaches of duties owed by the imposing state directly to individuals.¹⁰⁶ Indeed, the ILC stresses that the imposing state ‘must continue’ to perform the duties that norms, such as those protecting fundamental rights, impose.¹⁰⁷ Nonetheless, this does not mean adverse consequences on the target state’s population are not considered. The countermeasures’ effects, as Dawidowicz argues, are still governed by the rule on proportionality as discussed above.¹⁰⁸

¹⁰⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 131–3. See Crawford, *State Responsibility* (n 6), 688 (‘Considerations of good order and humanity strongly suggest some limitation on the range of obligations whose performance a state may legitimately suspend by way of countermeasures’)

¹⁰¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 131, 133–4.

¹⁰² Note that the term ‘fundamental’ also qualifies the restriction on countermeasures (ILC, ‘Summary Records of the 52nd Session’ (2000) (n 60), 397). Some submit that it must be understood to mean ‘non-derogable’ (Dawidowicz, *Third Party Countermeasures* (n 50), 329; ILC, ‘Summary Records of the 52nd Session’ (2000) (n 60), 397; Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 84; ILC, ‘Summary Records of the 53rd Session’ (2001) I YbILC 1, 116–7; ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 132). This suggests that countermeasures must not infringe on the rights to life, liberty, and security (ILC, ‘Summary Records of the 45th Session’ (1993) I YbILC 1, 145; Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 75), 35). Yet, other rights, like the rights to property and movement, may fall outside the scope of this limitation.

¹⁰³ Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 92; Dawidowicz, *Third Party Countermeasures* (n 50), 333; Hofer Alexandra, ‘Unilateral Sanctions as a Challenge to the Law of State Responsibility’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 197; Milaninia Nema, ‘Limits of Economic Sanctions under the Paradigm of International Humanitarian Law’ in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, & Consequences* (Asser Press 2015), 100.

¹⁰⁴ Dawidowicz, *Third Party Countermeasures* (n 50), 328.

¹⁰⁵ Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 88, 96 (‘Countermeasures must not [...] impair the rights of third parties, in particular basic human right’); ILC, ‘Summary Records of the 52nd Session’ (2000) (n 60), 266. See Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 75), 35 (‘[Measures] not in conformity with the rules [...] on the protection of fundamental human rights’)

¹⁰⁶ Dawidowicz, *Third Party Countermeasures* (n 50), 337 (‘In the absence of a [duty], let alone a breach, such action presumably cannot ‘affect’ human rights norms’ within the meaning of [2001 Draft Article 50(1)(b)]’).

¹⁰⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 129, 131.

¹⁰⁸ Dawidowicz, *Third Party Countermeasures* (n 50), 338. See Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 84 (‘[Countermeasures must have] minimal effects on private parties’), 88;

II. SYNALLAGMATIC: THE TRADITIONAL VIEW OF ALL LEGAL RELATIONS

Having examined the means by which states implement international duties, attention now turns towards the concept of competence. This concerns the identification of the state that has the power or prerogative to implement another's responsibility.¹⁰⁹ This is also the main issue concerning implementation by states not 'directly affected' by wrongful acts.

A state's competence to implement responsibility presupposes an obligation between the implementing and the wrongful states.¹¹⁰ Norms, after all, are not binding because they are capable of enforcement. Rather, the duties they impose may be implemented because they are already binding.¹¹¹ The competence to implement is determined by the legal relations that rules create.¹¹² Legal relations pertain to the obligation's structure or the ordering of the rights and duties created by the norm.¹¹³ Recall that an obligation does not only refer to the conduct a norm requires,¹¹⁴ it also pertains to the 'juridical tie',¹¹⁵ that a norm creates.¹¹⁶ While a norm is considered objective, the obligation is 'subjective'.¹¹⁷ It 'personifies' the norm, imposes duties, and grants rights to states.¹¹⁸ Thus, as stressed in *Chapter 1*, a state does not 'violate' a rule nor

ILC, 'Summary Records of the 52nd Session' (2000) (n 60), 397 ('[The] effects of countermeasures should [...] have only minimal effects on individuals').

¹⁰⁹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 116, 126; Tams, 'Guardians of Community Interests' (n 8), 382; Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 25; Stern, 'La notion de préjudice juridique' (n 38), 17; Sachariew, 'Identifying the "Injured State"' (n 8), 273.

¹¹⁰ Fitzmaurice, 'Foundations of the Authority of International Law' (n 7), 2; Villalpando, *La communauté internationale* (n 8), 229; Duff RA, 'State Responsibility: An Outsider's View' in Besson Samantha (ed), *Theories of International Responsibility Law* (Cambridge University Press 2022), 83.

¹¹¹ Fitzmaurice, 'Foundations of the Authority of International Law' (n 7), 2.

¹¹² Sachariew, 'Identifying the "Injured State"' (n 8), 275; Hutchinson, 'Solidarity & Breaches of Multilateral Treaties' (n 8), 158; Villalpando, *La communauté internationale* (n 8), 229.

¹¹³ Annacker Claudia, 'Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 137; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 8, 16.

¹¹⁴ Birks Peter & Descheemaeker Eric, *Roman Law on Obligations* (Oxford University Press 2014), 3–5; Hogg Martin, *Obligations: Law & Language* (Cambridge University Press 2017), 27.

¹¹⁵ Zimmermann Reinhard, *Law of Obligations: Roman Foundations* (Clarendon 1996), 2–3 citing *Institutes of Justinian*, Moyle JB (ed) (Clarendon 1911), 3, 13 ('Obligatio est iuris vinculum, quo necessitate ad stringimur alicuius solvendae rei secundum nostrae civitatis iura'); Hunter William, *A Systematic & Historical Exposition of Roman Law* (Maxwell 1885), 451; Hogg, *Obligations* (n 114), 27 citing *The Digest of Justinian*, vol IV, Watson Alan (ed) (University of Pennsylvania Press 1998), 44, 7.3 ('Substantia obligationum [...] [est] aliquis obligat nos ad dandum aliquid vel ad aliquid faciendum vel ad aliquid faciendum'); 41 citing *Watkinson v Hollington* (1943) 2 All ER 573 (ENG), 575.

¹¹⁶ Ago Roberto, 'Fifth Report on State Responsibility' (1976) II(1) YbILC 3, 4.

¹¹⁷ Ago Roberto, 'Second Report on State Responsibility' (1970) II(1) YbILC 177, 192; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 16 citing Birkas Géza, *Das Staatsinteresse als Grundlage des Völkerrechts* (Heymans 1993), 57; Nelson Leonard, *Die Rechtswissenschaft ohne Recht* (1917), 181.

¹¹⁸ Ago, 'Fifth Report on State Responsibility' (1976) (n 116), 4. See Hogg, *Obligations* (n 114), 14; De Bracton Henry, *Laws & Customs of England*, vol 2 (Harvard University Press 1968), 283.

would another to whom a right is granted ‘exercise’ the norm. Instead, it fails to carry out its duty or exercises its right.¹¹⁹

Under the ‘traditional’ or ‘synallagmatic’ view, espoused by scholars such as Hohfeld, Anzilotti, and Ago,¹²⁰ and contemporary authors like Stern, Villalpando, and Nedeski,¹²¹ norms impose relations among states with one holding a right and another bearing a duty.¹²² One’s right implies another’s duty to respect that right and adopt a certain behaviour.¹²³ The view claims that this approach based on ‘jural correlatives’,¹²⁴ is true for all norms,¹²⁵ even collective

¹¹⁹ Ago, ‘Second Report on State Responsibility’ (1970) (n 117), 192.

¹²⁰ Hohfeld, *Fundamental Legal Conceptions* (n 9), 7; Anzilotti Dionisio, ‘La responsabilité internationale des états à raison des dommages soufferts par des étrangers’ (1906) 13 *Revue générale de droit international public* 5, 13; Ago, ‘Second Report on State Responsibility’ (1970) (n 117), 192; Ago Roberto, ‘Le délit international’ (1939) 68 *Recueil des Cours de l’Académie de Droit International* 415, 433. See also Villalpando Santiago, ‘Legal Dimension of the International Community: How Community Interests are Protected in International Law’ (2010) 21 *European Journal of International Law* 387, 400 citing de Visscher Charles, *La responsabilité des états*, vol II (BRILL 1924), 90; Heffter August Wilhelm, *Le droit international de l’Europe*, Geffcken Friedrich Heinrich (ed) (Cotillon 1883), 226; Calvo Charles, *Le droit international théorique et pratique* (2nd edn, Tome Premier 1870), 399–400; Fauchille Paul, *Traité de droit international public*, Tome I (8th edn, Rousseau & Cie 1922), 513–5; Lattanzi Flavia, *Garanzie dei diritti dell’uomo nel diritto internazionale* (Giuffrè 1983), 79–155.

¹²¹ Stern, ‘La notion de préjudice juridique’ (n 38), 15 (‘C’est toujours un état qui invoque un de ses droits lésés et qui va mettre en œuvre la responsabilité, quel qu’en soit le contenu variable’); Villalpando, *La communauté internationale* (n 8), 254, (‘An faisceau de rapports juridiques bilatéraux, impliquant des obligations dues [...] à tous les états auxquelles correspondent des droits de ces derniers’) 289 (‘L’état est titulaire d’un droit subjectif [...] auquel correspond une obligation qui lui est due à titre individuel’); Nedeski Nataša, *Shared Obligations in International Law* (Cambridge University Press 2022), 79. See Duff, ‘State Responsibility: An Outsider’s View’ (n 110), 80–1; Dupuy Pierre-Marie, ‘Deficiencies of State Responsibility relating to Breaches of “Obligations owed to the International Community as a Whole”’ in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 215; Kolb, *International Law of State Responsibility* (n 24), 173; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 46, 83; De Jesús, ‘Obligations Erga Omnes’ (n 6), 186, 264; Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014), 222; Hutchinson, ‘Solidarity & Breaches of Multilateral Treaties’ (n 8), 160, 165; Picone Paolo, ‘Distinction between Jus Cogens & Obligations Erga Omnes’ in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 421. See also Voefray Francois, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 229; Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol II (Oxford University Press 2013), 1151.

¹²² Hohfeld, *Fundamental Legal Conceptions* (n 9), 7, 36–8.

¹²³ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 18 citing Ago, ‘Eighth Report on State Responsibility: Addendum’ (1980) (n 9), 18; Ago Roberto, ‘Sixth Report on State Responsibility’ (1977) II(1) YbILC 3, 22. See Eleftheriadis, *Legal Rights* (n 9), 114 citing Del Vecchio Giorgio, *Formal Bases of Law*, Lisle John (tr) (The Boston Book Company 1914), 164; 116 citing Grotius Hugo, *Jurisprudence of Holland*, vol I, Lee R (tr) (Scientia 1655), 48, 73; Savigny FC, *System des Heutigen Roemischen Rechts*, vol I (1840), 7 ff; Austin John, *Province of Jurisprudence Determined*, Rumble Wilfred (ed) (Cambridge University Press 1995), 237. Ago, ‘Second Report on State Responsibility’ (1970) (n 117), 192 citing Anzilotti Dionisio, *Teoria Generale della Responsabilità dello Stato nel diritto Internazionale*, Lumachi Florence (ed) (Firenze 1902), 83, 91, 121; Sereni Angelo, *Diritto internazionale*, III (Giuffrè 1962), 1514.

¹²⁴ Hohfeld, *Fundamental Legal Conceptions* (n 9), 10; Eleftheriadis, *Legal Rights* (n 9), 110; Postema, *Legal Philosophy* (n 9), 99–103; Hart HLA, *Essays on Bentham: Jurisprudence & Political Philosophy* (Oxford University Press 1982), 188.

¹²⁵ Hohfeld Wesley, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710, 717; Virally Michel, *La pensée juridique* (Librairie générale de droit et de jurisprudence 1960), 43–

ones.¹²⁶ For collective norms, although the rule applies to several states, the duties they impose are still owed to states individually.¹²⁷ Indeed, Ago, in stronger terms, submits that the correlation between rights and duties is ‘exact’ and ‘admits no exceptions’.¹²⁸ As authors like De Hoogh argue, a right without the concomitant duty to respect such a right makes it meaningless.¹²⁹ If there is no duty to respect another’s right, ‘then any subject could legitimately impede the exercise of such right without being held responsible’.¹³⁰ Likewise, it makes no sense for a duty to be established without a corresponding right to demand its performance.¹³¹ This results in a ‘legal vacuum’ or ‘responsibility in the air’ as one may simply disregard the

4; de Visscher, *La responsabilité des états* (n 120), 90; Ago, ‘Second Report on State Responsibility’ (1970) (n 117), 192; Postema, *Legal Philosophy* (n 9), 99; Eleftheriadis, *Legal Rights* (n 9), 110–1 *noting* Finnis John, ‘Some Professorial Fallacies About Rights’ (1971) 4 *Adelaide Law Review* 377, 379; Wellman Carl, *A Theory of Rights: Persons Under Laws, Institutions, & Morals* (Rowman & Alanheld 1985), 13; Kramer Matthew, ‘Rights without Trimmings’ in Kramer Matthew, *et al.* (eds), *Debate over Rights: Philosophical Enquiries* (Clarendon 1998), 24. *But see* Eleftheriadis, *Legal Rights* (n 9), 123 *noting* Raz Joseph, *Concept of a Legal System* (Clarendon 1980), 179–80; Raz Joseph, *Morality of Freedom* (Oxford University Press 1988), 171; 127 *noting* MacCormick Neil, ‘Rights in Legislation’ in Hacker PM & Raz Joseph (eds), *Law, Morality, & Society: Essays in Honour of HLA Hart* (Oxford University Press 1977), 207.

¹²⁶ See *Application of the Genocide Convention* (Gambia v Myanmar) (Provisional Measures) [2019] (ICJ, 11 November 2019), ¶52; *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022) (Kreß, declaration), 272 (‘Each of the states which make up this community is depositary of these collective interests and accountable for their respect by all the other states’); *Prosecutor v Furundžija* (Judgment) (ICTY, Trial Chamber, 95-17/1, 10 December 1998), ¶151 (‘The prohibition of torture imposes upon states [duties owed] *erga omnes* [...] each of which then has a correlative right [...] the violation of such [a duty] simultaneously constitutes a breach of the correlative right of all members of the international community’).

¹²⁷ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 75), 44 *citing* Lattanzi, *Garanzie dei diritti* (n 120), 79 ff. Villalpando, *La communauté internationale* (n 8), 237, 279, 397; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 46; Nedeski, *Shared Obligations* (n 121), 79; De Jesús, ‘Obligations Erga Omnes’ (n 6), 103, 186; Hernandez, *ICJ & Judicial Function* (n 121), 222; Kolb, *International Law of State Responsibility* (n 24), 173; Thirlway (ed), *ICJ Law & Procedure vol II* (n 121), 1151; Hutchinson, ‘Solidarity & Breaches of Multilateral Treaties’ (n 8), 160, 165; Voefray, *L’actio popularis* (n 121), 229; Picone, ‘Jus Cogens & Obligations Erga Omnes’ (n 121), 421; Quirico Ottavio, ‘Peremptory Duty to Curb Emissions?’ (2021) 44 *Fordham International Law Journal* 923, 928.

¹²⁸ Ago, ‘Second Report on State Responsibility’ (1970) (n 117), 192; Eleftheriadis, *Legal Rights* (n 9), 114 *citing* Del Vecchio, *Formal Bases of Law* (n 123), 164. *See Right of Passage over the Indian Territory* (Portugal v India) (Merits) [1960] ICJ 6, 63 (‘In other words, the rights and [duties] of both sides are concomitant and correlative’).

¹²⁹ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 18, 21; Higgins Rosalyn, *Problems & Process: International Law & How We Use It* (Clarendon 1995), 99. *See East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90 (Weeramantry, dissenting opinion), 209 (‘The existence of a right is juristically incompatible with the absence of a corresponding duty’).

¹³⁰ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 21; Eleftheriadis, *Legal Rights* (n 9), 122 *citing* Kelsen, *General Theory of Law & State* (n 9), 126. Ginossar Shalev, ‘Rights in Rem—A New Approach’ (1979) 14 *Isarel Law Review* 286, 294.

¹³¹ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 18 *citing* Ago, ‘Eighth Report on State Responsibility: Addendum’ (1980) (n 9), 18. Bleckmann Albert, ‘The Subjective Right in Public International Law’ (1985) 28 *German Yearbook of International Law* 144, 149 *citing* Bühler Ottmar *Die subjektiven öffentlichen Rechte* (Kohlhammer 1914), 223 ff. *See* Villalpando, *La communauté internationale* (n 8), 244.

rule as no one could demand the duties' observance or performance.¹³²

For a state to have the competence to implement another's responsibility, there must be a 'sufficient link' between it and the wrongful state.¹³³ The synallagmatic view posits that it is a state's 'subjective right' or a 'legally protected interest',¹³⁴ that forms this link.¹³⁵ According to scholars like Hohfeld, as noted above, a right that one state holds necessarily corresponds to another's duty to perform or observe a certain conduct.¹³⁶ In turn, the latter's failure to fulfil its duty corresponds to the infringement or lesion of the former's right,¹³⁷ otherwise called 'injury' or 'legal prejudice'.¹³⁸ This 'injury' entitles the right-holder to implement the duty-bearer's responsibility.¹³⁹ This is a necessary result of the correlation—holding a right implies an affirmative claim to 'receive something' or an entitlement to a conduct's performance or observance.¹⁴⁰ Conversely, if a state's right or if its legally protected interest has not been

¹³² De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 19–20; Crawford, 'Third Report on State Responsibility' (2000) (n 6), 29

¹³³ Tams, *Enforcing Obligations Erga Omnes* (n 109), 26 citing *Southwest Africa* (Ethiopia & Liberia v South Africa) (Preliminary Objections) [1962] ICJ 319, 343. Tams, 'Guardians of Community Interests' (n 8), 382; Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1, 2.

¹³⁴ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 22 citing Weil Prosper, 'Towards Relative Normativity in International Law?' (1983) 77(3) *American Journal of International Law* 413, 431. Bleckmann, 'Subjective Right' (n 131), 149 citing Bühler, *Die subjektiven öffentlichen Rechte* (n 131), 223 ff. Villalpando, *La communauté internationale* (n 8), 244 citing Virally, *La pensée juridique* (n 125), 43–4; Gervais André, 'L'affaire du lac Lanoux, étude critique de la sentence arbitrale' (1960) 6 *Annuaire français de droit international* 372, 242.

¹³⁵ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 141; Tams, 'Guardians of Community Interests' (n 8), 382; Bleckmann, 'Subjective Right' (n 131), 146. See *Barcelona Traction, Light, & Power Company* (Belgium v Spain) (Judgment) [1970] ICJ 1, 33 ('It is the existence [...] of a right [...] and recognised as such by international law, which is decisive for the problem of [...] capacity'); *Reparation for Injuries Suffered in the Service of the UN* (Advisory Opinion) [1949] ICJ 149, 181–2 ('Only the party to whom an international [duty] is due can bring a claim in respect of its breach'); *Southwest Africa* [1962] (n 133) (Winiarsky, dissenting), 455 ('The capacity to institute the proceedings [depends on] a subjective right, a real and existing individual interest which is legally protected').

¹³⁶ Hohfeld, *Fundamental Legal Conceptions* (n 9), 7; Virally, *La pensée juridique* (n 125), 43–4; de Visscher, *La responsabilité des états* (n 120), 90; Ago, 'Eighth Report on State Responsibility: Addendum' (1980) (n 9), 18.

¹³⁷ Ago, 'Second Report on State Responsibility' (1970) (n 117), 192 citing Anzilotti, *Teoria Generale della Responsabilità* (n 123), 83, 91, 121; Ago, 'Le délit international' (n 120), 434, 441–2; Morelli Gaetano, *Nozioni di diritto internazionale* (7th edn, CEDAM 1967), 347; Sereni, *Diritto internazionale* (n 123), 1514. But note De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 19.

¹³⁸ Stern, 'La notion de préjudice juridique' (n 38), 5, 26; Villalpando, *La communauté internationale* (n 8), 293; Hunter, *Roman Law* (n 115), 146. Compare De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 27, 31.

¹³⁹ Ago, 'Second Report on State Responsibility' (1970) (n 117), 183; Bleckmann, 'Subjective Right' (n 131), 149 citing Bühler, *Die subjektiven öffentlichen Rechte* (n 131), 223 ff. Villalpando, *La communauté internationale* (n 8), 244; Postema, *Legal Philosophy* (n 9), 195.

¹⁴⁰ Hohfeld, *Fundamental Legal Conceptions* (n 9), 60; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 21; Postema, *Legal Philosophy* (n 9), 99. See Finnis, 'Some Professorial Fallacies About Rights' (n 125), 379. See also ILC, 'Summary Records of the 16th Session' (1967) I YbILC 1, 84, 87.

infringed, then it cannot implement another's responsibility.¹⁴¹ In this regard, a 'mere interest' in the norm is deemed not sufficient to grant a state the competence to implement responsibility.¹⁴² The 'existence of an "interest" does not of itself [mean that it] is [...] juridical in character'.¹⁴³ In the long run, as Riphagen points out, 'every state has an interest in [other states'] fulfilment of [their] international duties'.¹⁴⁴ Thus, the synallagmatic view distinguishes between 'injured' states and those which are 'merely interested' and limits the competence to implement to the former.¹⁴⁵

III. NON-SYNALLAGMATIC: THE CONTEMPORARY VIEW OF LEGAL RELATIONS ARISING FROM COLLECTIVE NORMS

Scholars like Simma, Crawford, and Gaja, submit that the synallagmatic approach poses a problem to the implementation of duties arising from collective norms.¹⁴⁶ Simma, among others, claims that the approach only creates relations between states *inter se*,¹⁴⁷ and limits the competence to implement to states whose rights have been infringed by the breach of duty.¹⁴⁸

¹⁴¹ See De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 23; Weil, 'Towards Relative Normativity' (n 134), 431.

¹⁴² De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 11–3; Tams, *Enforcing Obligations Erga Omnes* (n 109), 31. See Hillgruber, 'Third States & Countermeasures' (n 14), 271–2; Linderfalk Ulf, 'International Legal Hierarchy Revisited—Status of Obligations Erga Omnes' (2011) 80 *Nordic Journal of International Law* 1, 8.

¹⁴³ *Southwest Africa* (Ethiopia & Liberia v South Africa) (Judgment) [1966] ICJ 6, 34. See Gervais, 'L'affaire du Lac Lanoux' (n 134), 423–4 citing *Lac Lanoux* (France v Spain) (1957) 62 RGDIP 179, 116; *East Timor* [1995] (n 129) (Skubizewski, dissenting) 256.

¹⁴⁴ Riphagen Willem, 'Fourth Report on State Responsibility' (1983) II(1) YbILC 1, 21; Villalpando, *La communauté internationale* (n 8), 244.

¹⁴⁵ Tams, *Enforcing Obligations Erga Omnes* (n 109), 26; Crawford, *State Responsibility* (n 6), 542, 552.

¹⁴⁶ See e.g. Simma Bruno, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 231; Crawford James, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 224–5; Gaja, 'Protection of General Interests' (n 24), 21. See also ILC, 'Fragmentation of International Law' (13 April 2006) UN Doc A/CN.4/L.682, 193; Sachariew, 'Identifying the "Injured State"' (n 8), 278; Byers Michael, 'Conceptualising the Relationship between Jus Cogens & Erga Omnes Rules' (1997) 66 *Nordic Journal of International Law* 211, 231; Goodwill-Gill Guy, 'State Responsibility & the "Good Faith" Obligation in International Law' in Fitzmaurice Malgosia & Sarooshi Dan (eds), *Issues of State Responsibility before International Judicial Institutions: Clifford Chance Lectures* (Hart 2004), 81; Tams, *Enforcing Obligations Erga Omnes* (n 109), 48 ff; Nollkaemper, 'Adjudication of Global Public Goods' (n 15), 771; Proukaki, *Problem of Enforcement* (n 79), 14.

¹⁴⁷ Simma, 'Bilateralism to Community Interest' (n 146), 229; ILC, 'Fragmentation of International Law' (2006) (n 146), 193; Toufayan Mark, 'Reacting to Serious Breaches of Obligations arising under Peremptory Norms of General International Law' (2004) 42 *Canadian Yearbook of International Law* 197, 202; Thin Sarah, 'In Search of Community: Towards a Definition of Community Interests' in Zyberi Gentian (ed), *Protecting Community Interests through International Law* (Intersentia 2021), 11.

¹⁴⁸ ILC, 'Fragmentation of International Law' (2006) (n 146), 193; Simma, 'Bilateralism to Community Interest' (n 146), 230–1, 295; Byers, 'Jus Cogens & Erga Omnes' (n 146), 232; Sachariew, 'Identifying the "Injured State"' (n 8), 278; Craven Matthew, 'For the "Common Good": Rights & Interests in the Law of State

Yet, although not ‘directly affected’, other states also possess an interest in seeing these duties fulfilled or observed.¹⁴⁹ This is especially true for the norm against force,¹⁵⁰ certain rules that safeguard human,¹⁵¹ and peoples’ rights,¹⁵² and some norms that protect the environment.¹⁵³ Thus, authors like Craven, Proukaki, and Goodwin-Gill argue that the synallagmatic approach ‘falls short of providing an effective system’ for enforcing the duties that collective norms impose.¹⁵⁴ Indeed, Simma goes as far as to say that the approach forms a ‘severe obstacle [...] in the way of stronger solidarity’.¹⁵⁵ Thus, requiring changes in how relations are viewed and how competence to implement is afforded to states.¹⁵⁶

This transformation has been difficult. States have demonstrated a ‘general reluctance’ towards ‘widening the circle of states’ that may implement international duties.¹⁵⁷ For one, there is the fear of interference in sovereignty brought by reactions to breaches of duties that do

Responsibility’ in Fitzmaurice Malgosia & Sarooshi Dan (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart 2004), 111, 118. See McIntyre Juliette, ‘Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction & Admissibility before the International Court’ (2018) 19 *Melbourne Journal of International Law* 1, 9.

¹⁴⁹ Simma, ‘Bilateralism to Community Interest’ (n 146), 233; Crawford, ‘Multilateral Rights & Obligations’ (n 13), 422–4; Sicilianos Linos-Alexander, ‘Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13(5) *European Journal of International Law* 1127, 1135; Proukaki, *Problem of Enforcement* (n 79), 14.

¹⁵⁰ See *Barcelona Traction* [1970] (n 135), 32; Crawford, ‘Multilateral Rights & Obligations’ (n 13), 443

¹⁵¹ See *Barcelona Traction* [1970] (n 135), 32; Cleveland Sarah, ‘Human Rights Sanctions & International Trade: Theory of Compatibility’ (2002) 5(1) *Journal of International Economic Law* 133, 160; Orakhelashvili Alexander, *Peremptory Norms in International Law* (Oxford University Press 2006), 248.

¹⁵² See *Barcelona Traction* [1970] (n 135), 32; Trindade Antônio, *International Law for Humankind: Towards a New Jus Gentium* (Nijhoff 2013), 83, 481; Bradley Marthe, ‘Jus Cogens’ Preferred Sister: Obligations Erga Omnes & the International Court of Justice’ in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 212.

¹⁵³ See ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126; Tignino Mara & Bréthaut Christia, ‘Role of Case Law in Implementing the Obligation not to Cause Significant Harm’ (2020) 20 *International Environmental Agreements* 632, 638; Duvic-Paoli Leslie-Anne, *Prevention Principle in International Environmental Law* (Cambridge University Press 2018), 322.

¹⁵⁴ Craven, ‘Rights & Interests in State Responsibility’ (n 148), 118; Proukaki, *Problem of Enforcement* (n 79), 14; Goodwill-Gill, ‘State Responsibility & the ‘Good Faith’ Obligation’ (n 146), 81; Proulx Vincent-Joël, ‘Review of Ragazzi & Villalpando’ (2007) 18 *European Journal of International Law* 581, 590.

¹⁵⁵ Simma Bruno, ‘Bilateralism & Community Interest in the Law of State Responsibility’ in Dinstein Yoram (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff 1989), 822; Crawford, ‘Multilateral Rights & Obligations’ (n 13), 422; Paulus Andreas, ‘Reciprocity Revisited’ in Fastenrath Ulrich, et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 123; Byers, ‘Jus Cogens & Erga Omnes’ (n 146), 231.

¹⁵⁶ Root Elihu, ‘Outlook for International Law’ (1916) 10 *American Journal of International Law* 2, 7–9; Crawford James, ‘Responsibility to the International Community as a Whole’ (Snyder Lecture, Indiana University) (2000), 17. See Urs, ‘Question of Standing before the ICJ’ (n 133), 13 citing Paddeau Federica, ‘Multilateral Disputes in Bilateral Settings’ (2017) 76 *Cambridge Law Journal* 1, 2–3.

¹⁵⁷ Proukaki, *Problem of Enforcement* (n 79), 74; Riphagen, ‘Fourth Report on State Responsibility’ (1983) (n 144), 21.

not ‘directly affect’ the implementing states.¹⁵⁸ There is also a potential risk of abuse brought by states’ general competence to implement in the absence of direct effect,¹⁵⁹ especially when it comes to the resort to countermeasures.¹⁶⁰ Yet, the predominant view in literature is that the international order has entered a stage where states are more concerned with collective interests.¹⁶¹ It is claimed that this gives rise to structural changes that expand the ‘circle of the [states] entitled to [implement] the [wrongful state’s] responsibility’ in case of breaches of duties imposed by collective norms.¹⁶² In these circumstances, the legal relation is no longer synallagmatic.

A. Duties Owed *Erga Omnes* & Non-Synallagmatic Legal Relations

1. Development of Duties owed *Erga Omnes*

Scholars like Crawford and Simma submit that the recognition of duties owed *erga omnes* demonstrates this shift.¹⁶³ The ICJ, in its 1970 *Barcelona Traction* decision, distinguished between norms that impose duties owed *inter se* or duties owed by states ‘*vis-à-vis* another state’ and those owed *erga omnes* or owed to the ‘international community as a whole’.¹⁶⁴ The latter pertains to duties derived from collective norms such as those that outlaw ‘acts of aggression and [...] genocide’ along with ‘rules concerning [...] basic [human] rights’ including the

¹⁵⁸ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 23; Longobardo Marco, ‘Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: the Gambia v Myanmar & Beyond’ (2021) *International Community Law Review* 1, 5. See Tams, ‘Guardians of Community Interests’ (n 8), 382

¹⁵⁹ Ruys, ‘Legal Standing & Public Interest Litigation’ (n 17), 488; Weil, ‘Towards Relative Normativity’ (n 134), 805.

¹⁶⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 128; Tams, ‘Guardians of Community Interests’ (n 8), 388; O’Connell Mary, ‘Controlling Countermeasures’ in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 344; Hutchinson, ‘Solidarity & Breaches of Multilateral Treaties’ (n 8), 202; Ni Kuei-Jung, ‘Third-State Countermeasures for Enforcing International Common Environmental Interests: The Implication and Inspiration of the ILC’s Articles on State Responsibility’ (2004) 22 *Chinese (Taiwan) Yearbook of International Law and Affairs* 1, 10; Hakimi, ‘Unfriendly Unilateralism’ (n 14), 117.

¹⁶¹ Simma, ‘Bilateralism to Community Interest’ (n 146), 233, 236, 268, 295; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 146), 224, 226; Tanaka Yoshifumi, ‘Legal Consequences of Obligations Erga Omnes in International Law’ (2021) 68 *Netherlands International Law Review* 1, 2; Sachariew, ‘Identifying the “Injured State”’ (n 8), 273–4. See Sartipi Hossein & Hojatzadeh Ali Reza, ‘Erga-Omniesation of International Law’ (2018) 2 *International Journal of Humanities & Social Science Studies* 189, 189, 224.

¹⁶² Proukaki, *Problem of Enforcement* (n 79), 33, 82; Simma, ‘Bilateralism to Community Interest’ (n 146), 295; Longobardo, ‘Indirectly Injured States’ (n 158), 4–5; Pigrau, ‘Effectiveness of Peremptory Norms & Erga Omnes Obligations’ (n 17), 131–2.

¹⁶³ Crawford, *State Responsibility* (n 6), 66; Simma, ‘Bilateralism to Community Interest’ (n 146), 294; Dupuy Pierre-Marie, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations & Codification of the Law of Responsibility’ (2002) 13(5) *European Journal of International Law* 1053, 1056; Proukaki, *Problem of Enforcement* (n 79), 17; Tams & Tzanakopoulos, ‘Barcelona Traction’ (n 17), 792.

¹⁶⁴ *Barcelona Traction* [1970] (n 135), 32.

‘protection from slavery and racial discrimination’.¹⁶⁵ For the Court, these norms, ‘by their very nature [...] are the concern of all states’. Thus, ‘in view of the importance of the rights involved’, all states ‘have a legal interest in their protection’.¹⁶⁶ This suggests that all states, even those not ‘directly affected’ by the breach, may implement these duties.¹⁶⁷

The *dictum* in *Barcelona Traction* was not the first attempt to endow states with the general competence to implement responsibility.¹⁶⁸ Early writers had already advocated for this.¹⁶⁹ Grotius submitted that states may implement another’s responsibility ‘not only on account of [harm] committed against themselves or their subjects’ but also for injuries that ‘do not directly affect them but excessively violate the laws of nature or nations’.¹⁷⁰ While other scholars of the time such as Vattel disagreed with this assertion,¹⁷¹ later writers like Heffter and Bluntschli supported Grotius’ claim and postulated that serious breaches of duties that affect all states

¹⁶⁵ Ibid, 32, 47.

¹⁶⁶ Ibid, 32.

¹⁶⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126–7; Crawford, *State Responsibility* (n 6), 66; Simma, ‘Bilateralism to Community Interest’ (n 146), 295 *citing* Thirlway Hugh, ‘Law & Procedure of the International Court of Justice’ (1989) 60 *British Yearbook of International Law* 1, 92 ff. Bradley, ‘Obligations Erga Omnes’ (n 152), 200. Note that the ICJ’s *dictum* in *Barcelona Traction* was met with mixed reactions especially among scholars (Tams & Tzanakopoulos, ‘Barcelona Traction’ (n 17), 782). On the one hand, there was some reluctance to accept the prerogative of states to react to breaches of duties that do not directly concern them (*See e.g.* Frowein, ‘Reactions by Not Directly Affected States’ (n 17), 408 *noting* Stern Brigitte, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone 1973), 50 ff; Dupuy Pierre-Marie, *Droit International Public* (Dalloz 1995), 372–4; Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997), 4–5 *noting* Carreau Dominique, *Droit international* (Pedone 1994), 612). There were also concerns about the *dictum*’s status considering that it was an *obiter* and was not in accord with positive law (*Nuclear Tests* (Australia v France) (Judgment) [1974] ICJ 253 (De Castro, dissenting), 387; Ragazzi, *Obligations Erga Omnes* (n 167), 4–5 *noting* McCaffrey Stephen, ‘Lex Lata or Continuum of State Responsibility’ in Weiler Joseph, *et al.* (eds), *International Crimes of State: Critical Analysis of the ILC’s Draft Article 19* (De Gruyter 1989), 243; Mann FA, ‘Doctrine of Jus Cogens in International law’ in Ehmke Horst, *et al.* (eds), *Festschrift für Ulrich Scheuner zum 70 Geburtstag* (Geburtstag 1973), 418). Yet, others deemed the *dictum* a ‘pivotal contribution’ to the establishment of an idea that has been ‘generally acknowledged’ (Proukaki, *Problem of Enforcement* (n 79), 34; Ragazzi, *Obligations Erga Omnes* (n 167), 17; Frowein, ‘Reactions by Not Directly Affected States’ (n 17), 408 *citing* Verdoss Alfred & Simma Bruno, *Universelles Völkerrecht, Theorie und Praxis* (3rd edn, Duncker & Humblot 1984), 907–9. *See* Akehurst Michael, ‘Reprisals by Third States’ (1970) 44 *British Yearbook of International Law* 1, 15–6; Schwelb Egon, ‘Actio Popularis & International Law’ (1972) 46 *Israel Yearbook on Human Rights* 46, 46).

¹⁶⁸ Ragazzi, *Obligations Erga Omnes* (n 167), 17; Bradley, ‘Obligations Erga Omnes’ (n 152), 194. *See* Rubin Alfred, ‘Actio Popularis, Jus Cogens, & Erga Omnes’ (2001) 35 *New England Law Review* 265, 278.

¹⁶⁹ Ragazzi, *Obligations Erga Omnes* (n 167), 17–8; Tams, *Enforcing Obligations Erga Omnes* (n 109), 48–9; Villalpando, *La communauté internationale* (n 8), 137–40.

¹⁷⁰ Dupuy, ‘Multilateral Dimension of Obligations’ (n 163), 1066 *citing* Grotius Hugo, *De jure belli ac pacis*, vol book II, Kelsey Francis (tr) (Clarendon 1625), 504–6. Voëffray, *L’actio popularis* (n 121), 215.

¹⁷¹ Nolte Georg, ‘From Anzilotti to Ago: Classical International Law of State Responsibility & Traditional Primacy of a Bilateral Conception of Inter-state Relations’ (2002) 13(5) *European Journal of International Law* 1083, 1085 *citing* De Vattel Emer, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, vol I (1758), ¶348. *But see* Bynkershoek Cornelius van, *De Foro Legatorum Liber Singularis* (1744), 554.

should permit every state to redress the wrong.¹⁷² This view gained further traction with authors such as Hall, Root, Jessup, and Hersch Lauterpacht.¹⁷³ But again, scholars like Anzilotti, and Strupp disagreed suggesting that responsibility may only be implemented by the states whose rights had been infringed.¹⁷⁴

Courts also recognised this prerogative before *Barcelona Traction*. The Permanent Court of International Justice's ('PCIJ') 1923 *Wimbledon* case involved a claim from the UK, France, Italy, and Japan against Germany for breach of duties under the Treaty of Versailles. While Japan and Italy were not directly affected, the PCIJ deemed the claims admissible as 'each of the [applicants] has a clear interest in the execution of [Article 386 of the Treaty of Versailles]'.¹⁷⁵ Likewise, the European Commission of Human Rights ('ECmHR') recognised states' general competence to bring claims against other states under the European Convention on Human Rights ('ECHR'). In the 1961 *Pfunders* and 1969 *Greek* cases, it held that while the applicant states were not directly affected, their claims were admissible as the parties' 'purpose [...] in concluding the [ECHR] was not to concede to each other reciprocal rights and [duties] [...] but to establish a common public order'.¹⁷⁶ Finally, there were the *Southwest Africa* cases brought before the ICJ by Liberia and Ethiopia against South Africa for the breach of its duties under the 1920 Mandate Agreement. In its 1962 judgement on preliminary objections, the Court deemed the claim admissible as the Agreement's Article 7(2) granted the League of Nation's

¹⁷² Heffter August Wilhelm, *Das Europäische Völkerrecht der Gegenwart* (1882), 222 cited in Frowein, 'Reactions by Not Directly Affected States' (n 17), 40; Bluntschli Johann Caspar, *Das moderne Völkerrecht der civilisirten Staaten* (Beck 1878), 265 cited in Proukaki, *Problem of Enforcement* (n 79), 60. Contra von Martens Georg, *Einleitung in das positive Europäische Völkerrecht* (Dieterich 1796), 295.

¹⁷³ See Hall William Edward, *Treatise of International Law* (Clarendon 1895), 57 ('When a state grossly and patently violates [a duty of] international law [...] of serious importance, it is competent to any state, or to the body of states, to hinder the wrongdoing for being accomplished, or to punish the wrongdoer'); Jessup Philip, *The Modern Law of Nations* (Macmillan 1948), 11 citing Root, 'Outlook for International Law' (n 156), 9 ('Violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilised nation to have the law maintained and a legal injury to every nation'); Oppenheim Lassa, *International Law: A Treatise*, vol I, Lauterpacht Hersch (ed) (Longmans, Green and Co 1937), 308 ('If a state [...] violates such [duties] of the Law of Nations as are universally recognised by custom or are laid down in law-making treaties, other states have a right to intervene and to make the delinquent submit to the rules concerned'). Note Peaslee JA, 'The Sanction of International Law' (1916) 10 *American Journal of International Law* 328, 335–6; Eagleton Clyde, *The Responsibility of States in International Law* (New York University Press 1928), 226.

¹⁷⁴ See Nolte, 'Classical Law of State Responsibility' (n 171), 1084–5 citing Anzilotti, *Teoria Generale della Responsabilità* (n 123), 88; Halleck Henry, *International Law* (D. Van Nostrand 1861), 309; 1089 citing Strupp Karl, *Das völkerrechtliche delikt* (Kohlhammer 1920), 16; Strupp Karl, *Die völkerrechtliche Haftung des Staates* (Institute für Internationales Recht an der Universität Kiel 1927), 8. See also de Visscher, *La responsabilité des états* (n 120), 116–9; von Liszt Franz, *Das Völkerrecht*, von Fleischmann Max (ed) (Springer 1925), 280, 287.

¹⁷⁵ *SS Wimbledon* [1923] (n 3), 20.

¹⁷⁶ *Austria v Italy (Pfunders case)* (Admissibility) (ECmHR, App No 788/60, 11 January 1961), 138; *Denmark et al v Greece (Greek case)* (Admissibility) (ECmHR, App Nos 3321/67, 3322/67, 3323/67, 3344/67, 1969).

members with a ‘legal right or interest’ in South Africa’s observance of its duties ‘towards the inhabitants of the Mandated Territory’ and the ‘League [...] and its members’.¹⁷⁷ Yet, the Court, after a change in its composition, reversed this stance in 1966 and held that the Mandate system did not give rise to rights and duties outside the system as a whole.¹⁷⁸ Thus, while League members had an interest in the observance of the duties under the Mandate system, it was the UN’s appropriate organs that possessed the competence to implement the duties and not individual states.¹⁷⁹ Unsurprisingly, the reversal was negatively received.¹⁸⁰ For this reason, the *dictum* in *Barcelona Traction* has often been viewed as an effort from the Court to ‘right a wrong’.¹⁸¹

The views discussed above do not necessarily reflect law as acknowledged and practised by states. The ICJ in *Barcelona Traction* did not explicitly rule that states, in the absence of direct effect, may implement duties owed *erga omnes*.¹⁸² Since that decision, the Court, despite ample opportunities, has abstained from discussing its effects.¹⁸³ Only recently did it clarify what has been asserted in literature in its 2012 *Obligation to Prosecute and Extradite* judgment,¹⁸⁴ and in its 2022 *Application of the Genocide Convention* decision on preliminary

¹⁷⁷ *Southwest Africa* [1962] (n 133), 343. *But see* (Winiarski, dissenting), 455 (‘Article 7 cannot be interpreted in such a way as to conflict with the general rule of procedure according to which the applicant state must have the capacity to institute proceedings’); (Spender & Fitzmaurice, dissenting), 550–2; (Morelli, dissenting), 569.

¹⁷⁸ *Southwest Africa* [1966] (n 143), 39, 99 (‘[The claim of the applicants] amounts to a plea that the Court should allow the equivalent of an *actio popularis* or [the prerogative of any state] to [...] vindicate [...] public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present’). *Compare Northern Cameroons* (Cameroon v UK) (Preliminary Objections) [1963] ICJ 15, 36.

¹⁷⁹ *Southwest Africa* [1966] (n 143). *See* (Van Wyk, separate opinion), 67 ff. *But see* (Morelli, separate opinion), 60; (Wellington Koo, dissenting), 219; (Korestky, dissenting opinion), 246; (Tanaka, dissenting), 254; (Jessup, dissenting), 325; (Mbanefo, dissenting), 491.

¹⁸⁰ Tams, *Enforcing Obligations Erga Omnes* (n 109), 65 ff; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 133; Hutchinson, ‘Solidarity & Breaches of Multilateral Treaties’ (n 8), 174; Venzke Ingo, ‘Public Interests in the International Court of Justice—A Comparison Between Nuclear Arms Race (2016) & South West Africa (1966)’ (2017) 111 *American Journal of International Law (Unbound)* 68, 68 citing Dugard John (ed), *South West Africa/Namibia Dispute* (University of California Press 1973), 292.

¹⁸¹ *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) [2019] ICJ 95 (Robinson, separate opinion), 310 citing Crawford, ‘Multilateral Rights & Obligations’ (n 13), 410, 423. *Application of the Genocide Convention* [2022] (n 126) (Xue, dissenting), 9, 10 (‘Rectification of its position’).

¹⁸² Frowein, ‘Reactions by Not Directly Affected States’ (n 17), 406; Nollkaemper, ‘Adjudication of Global Public Goods’ (n 15), 784; Tams, *Enforcing Obligations Erga Omnes* (n 109), 162; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 133. *See Nuclear Tests* [1974] (n 167) (de Castro, dissenting), 387 (‘These remarks [...] should be taken *cum grano sali*’); *Application of the Genocide Convention* [2022] (n 126) (Xue, dissenting), 10.

¹⁸³ *See e.g. Nuclear Tests* [1974] (n 167); *East Timor* [1995] (n 129); *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Judgement) [2014] ICJ 226. *Note Hernandez, ICJ & Judicial Function* (n 121), 214 (‘The Court’s [...] judgments [...] are characterised by their careful avoidance of explicit reliance upon community norms’).

¹⁸⁴ *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422, 460.

objections.¹⁸⁵ For the Court, albeit dealing only with duties owed *erga omnes partes*, states have the competence, although not directly affected by the breach, to implement duties arising from certain collective norms.¹⁸⁶ This view is in accord with the ILC's conclusion in the 2001 Draft Articles, discussed in *Chapter 3*, which at the time the ILC deemed as 'progressive measures'.¹⁸⁷ Yet, whether the Court's findings find support from state practice and *opinio juris* remains to be seen and further examined in *Part II*.¹⁸⁸

2. Non-Synallagmatic View of Legal Relations

Authors like Annacker submit that the basis for states' competence to implement duties owed *erga omnes*, without direct effect, lies in the reconfiguration of legal relations from the synallagmatic to the non-synallagmatic.¹⁸⁹ Scholars such as Simma argue norms that impose duties owed *erga omnes* do not create subjective relations.¹⁹⁰ They do not give rise to correlative rights and duties, such that a right held by a state corresponds to a duty borne by another.¹⁹¹ Instead, they create objective legal relations,¹⁹² as in the case of absolute obligations discussed

¹⁸⁵ *Application of the Genocide Convention* [2022] (n 126), 35, 37. See *Application of the Torture Convention (Canada & The Netherlands v Syria)* (Provisional Measures) [2023] General List No 188, 16; *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192, 12.

¹⁸⁶ *Obligation to Prosecute or Extradite* [2012] (n 184), 460; *Application of the Genocide Convention* [2019] (n 126), 16; *Application of the Genocide Convention* [2022] (n 126), 35–7.

¹⁸⁷ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117, 126–7.

¹⁸⁸ See Paulus, 'Reciprocity Revisited' (n 155), 128 ('It is anybody's guess whether [2001 Draft] Article 48 [on duties owed] *erga omnes* has achieved the status of customary law'); Ruys, 'Legal Standing & Public Interest Litigation' (n 17), 463; Hofer, 'Unilateral Sanctions & Responsibility' (n 103), 194 ('[Countermeasures by "states other than an injured state"] do not meet the condition of a "general practice"'); Subedi, 'Status of Unilateral Sanctions' (n 56), 38.

¹⁸⁹ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 135–6; Coffman Peter, 'Obligations Erga Omnes & the Absent Third State' (1996) 39 *German Yearbook of International Law* 285, 296, 301; Spinedi Marina, 'From One Codification to Another: Bilateralism & Multilateralism in the Codification of the Law of Treaties & the Law of State Responsibility' (2002) 13(5) *European Journal of International Law* 1099, 1123; Sicilianos, 'Classification of Obligations' (n 149), 1128; McIntyre Juliette, 'Crawford's Multilateralism & the International Court of Justice' (2022) 40 *Australian Yearbook of International Law* 271, 273–5; Pauwelyn Joost, 'Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 *European Journal of International Law* 907, 908

¹⁹⁰ Simma, 'Bilateralism to Community Interest' (n 146), 232; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 143; Coffman, 'Obligations Erga Omnes' (n 189), 296; Sachariew, 'Identifying the "Injured State"' (n 8), 279.

¹⁹¹ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 146 citing Zemanek Karl, 'La responsabilité des Etats por faits internationalement illicites ainsi que pour faits internationalement licites' in Zemanek Karl & Salmon Jean (eds), *Responsabilité internationale* (Pedone 1987), 79; Dupuy Pierre-Marie, 'Observations sur la pratique récente des "sanctions" de l'illicite' (1983) 87 *Revue générale de droit international public* 505, 547; Picone Paolo, 'Obblighi reciproci e erga omnes nel campo della protezione internazionale dell'ambiente marino dall'inquinamento' in Starace Vincenzo (ed), *Diritto internazionale e protezione dell'ambiente marino* (Giuffrè 1983), 27. Bradley, 'Obligations Erga Omnes' (n 152), 203; Tams, *Enforcing Obligations Erga Omnes* (n 109), 129.

¹⁹² Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 136, 147; Johnstone Rachael, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean' (2014) 6 *Yearbook of Polar Law* 3, 13; Tams, *Enforcing Obligations Erga Omnes* (n 109), 133.

in the previous chapter,¹⁹³ that do not grant individual rights to states.¹⁹⁴ Being objective, the duties ‘can only be fulfilled or breached towards the community and not to individual states’.¹⁹⁵

In its predominant and ‘communitarian’ conception,¹⁹⁶ which the ILC, along with scholars such as Simma, Annacker, and Tams support, duties *erga omnes* are considered ‘owed to all’ states.¹⁹⁷ The duty is performed or observed not to individual states, but the “international community as a whole”.¹⁹⁸ A state seeking to implement a duty owed *erga omnes* does not rely on its subjective right.¹⁹⁹ It does not possess this right as it is the community which is the intended beneficiary of the duty.²⁰⁰ Instead, its competence is premised on its interest, ‘presumably not [a] right but something entitled to protection’,²⁰¹ as a member of the collective to which the duty is owed.²⁰² This interest in the ‘integrity of the [collective norm] and in the common value protected by norm’ entitles it to demand the duty’s observance or performance even if it has not been directly affected by the breach.²⁰³ Thus, if a duty owed *erga omnes* is breached, all states, even those that have not been directly affected, may implement the

¹⁹³ Simma, ‘Bilateralism to Community Interest’ (n 146), 370; Tzevelekos Vassilis, ‘Revisiting the Humanisation of International Law: Limits and Potential: Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation’ (2013) 6 *Erasmus Law Review* 62, 70.

¹⁹⁴ Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 99; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 147; Sachariew, ‘Identifying the “Injured State”’ (n 8), 279.

¹⁹⁵ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 149; Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 34; Coffman, ‘Obligations Erga Omnes’ (n 189), 298; Tams, *Enforcing Obligations Erga Omnes* (n 109), 130; Barboza, ‘Legal Injury’ (n 1), 21 citing Tanzi Attila, ‘Is Damage a Distinct Condition for the Existence of a Wrongful Act?’ in Spinedi Marina & Simma Bruno (eds), *UN Codification of State Responsibility* (Oceana 1987), 8.

¹⁹⁶ Note the other conception based on *actio popularis* or ‘public interest standing’ is further discussed in Chapter 10. See Crawford, ‘Overview of Part Three’ (n 1), 934; Crawford, ‘Multilateral Rights & Obligations’ (n 13), 446; Thin Sarah, ‘Community Interest & the International Public Legal Order’ (2021) 68 *Netherlands International Law Review* 35, 36; Tams & Tzanakopoulos, ‘Barcelona Traction’ (n 17), 792; Kingsbury Benedict & Donaldson Megan, ‘From Bilateralism to Publicness in International Law’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 86.

¹⁹⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126–7; Simma, ‘Bilateralism to Community Interest’ (n 146), 244–5; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 135; Tams, *Enforcing Obligations Erga Omnes* (n 109), 174; Coffman, ‘Obligations Erga Omnes’ (n 189), 300; Pigrau, ‘Effectiveness of Peremptory Norms & Erga Omnes Obligations’ (n 17), 132.

¹⁹⁸ Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 34.

¹⁹⁹ Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 99; Linderfalk, ‘Legal Hierarchy Revisited’ (n 142), 11; Tams, *Enforcing Obligations Erga Omnes* (n 109), 174 citing Ago Roberto, ‘Obligations Erga Omnes & Community’ in Weiler Joseph, *et al.* (eds), *International Crimes of State: Critical Analysis of the ILC’s Draft Article 19* (1989), 238;

²⁰⁰ Crawford, ‘Multilateral Rights & Obligations’ (n 13), 434; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 147; Sachariew, ‘Identifying the “Injured State”’ (n 8), 279.

²⁰¹ Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol I (Oxford University Press 2013), 76; Crawford, ‘Multilateral Rights & Obligations’ (n 13), 434.

²⁰² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 127; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 146), 227; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 146–7.

²⁰³ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 1), 146; Crawford, ‘Multilateral Rights & Obligations’ (n 13), 434, 444; Dupuy, ‘Deficiencies of State Responsibility’ (n 121), 215.

wrongful state's responsibility.²⁰⁴

This approach appears to be based on two premises. The first, as noted above, is the view that the synallagmatic view cannot accommodate duties owed *erga omnes*.²⁰⁵ Yet, as *Chapter II* will show, this may not be accurate. As scholars like Arangio-Ruiz argue, duties owed *erga omnes* may still be operationalised even if the 'exact correlation' between duties and rights is maintained.²⁰⁶ They could be deemed 'owed to each state' such that every state holds a right that correlates to the duty.²⁰⁷ Under this view, the wrongful state's breach of its duty results in the 'injury' or infringement of every state's rights.²⁰⁸ Thus, the implementing state may rely on its subjective right.²⁰⁹ This approach, as will be later discussed, not only facilitates the orderly implementation of duties owed *erga omnes*,²¹⁰ but also works within the present legal order's political and institutional realities.²¹¹

The second pertains to the nature of the international community. As discussed above, the non-synallagmatic view in its 'communitarian' conception makes this community the beneficiary of duties owed *erga omnes*.²¹² For authors like Annacker and Spinedi, this implies the existence of a community capable of holding rights such duties may be owed to it.²¹³ In the

²⁰⁴ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 126–7; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 146), 228–9, 239 citing Institut de Droit International, 'Resolution: Obligations Erga Omnes in International Law' (2005), art 1(a). See Gaja, 'Protection of General Interests' (n 24), 97; Spinedi, 'From One Codification to Another' (n 189), 1123.

²⁰⁵ See e.g. Simma, 'Bilateralism to Community Interest' (n 146), 231; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 146), 224–5; Tams, *Enforcing Obligations Erga Omnes* (n 109), 3, 61.

²⁰⁶ See Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 75), 44; Nedeski, *Shared Obligations* (n 121), 100; De Jesús, 'Obligations Erga Omnes' (n 6), 186, 231. See also Villalpando, *La communauté internationale* (n 8), 246; Hutchinson, 'Solidarity & Breaches of Multilateral Treaties' (n 8), 175.

²⁰⁷ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 75), 44–5; Villalpando, *La communauté internationale* (n 8), 237 ('Etats sont donc titulaires d'un droit subjectif'), 242 ('L'obligation erga omnes consisterait en une prestation unique exigée par l'ordre juridique à l'Etat obligé et due à chacun des autres Etats de manière simultanée'); De Jesús, 'Obligations Erga Omnes' (n 6), 186; Nedeski, *Shared Obligations* (n 121), 65. See Voeffray, *L'actio popularis* (n 121), 226 ('Le terme omnis désigne le tout mais aussi chacune des parties individuelles qui le composent').

²⁰⁸ Villalpando, *La communauté internationale* (n 8), 248, 252; De Jesús, 'Obligations Erga Omnes' (n 6), 231.

²⁰⁹ Stern, 'La notion de préjudice juridique' (n 38), 24; Duff, 'State Responsibility: An Outsider's View' (n 110), 80.

²¹⁰ Weiss, 'Invoking State Responsibility' (n 13), 801; Stern, 'La notion de préjudice juridique' (n 38), 24; Villalpando, *La communauté internationale* (n 8), 289; Duff, 'State Responsibility: An Outsider's View' (n 110), 80.

²¹¹ De Jesús, 'Obligations Erga Omnes' (n 6), 267.

²¹² Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 136; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 146), 227; Tams, *Enforcing Obligations Erga Omnes* (n 109), 174; Cassese Antonio, *International Law* (Oxford University Press 2005), 16.

²¹³ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 138; Spinedi, 'From One Codification to

alternative, the ILC, along with scholars such as Cassese, Kingsbury, Donaldson, and Vaurs-Chaumette, suggests that the duties are owed to a collective that possesses some level of cohesion such that any state may act on its behalf to vindicate a breach of a duty owed *erga omnes*.²¹⁴ However, as will be discussed in *Chapter 10*, whether such a community exists remains to be seen. Arguably, the present community does not appear to be ‘personifiable’ such that it may be a party to any legal relations.²¹⁵ Neither does it exhibit cohesion thereby allowing states to act on its behalf.²¹⁶ If anything, such an abstract entity remains ‘ill-defined’ characterised by division and lack of solidarity.²¹⁷

3. *Conceptual Basis for Duties owed Erga Omnes*

Before proceeding, the nature of duties owed *erga omnes* needs to be examined. While the concept may be established,²¹⁸ there remain theoretical differences regarding its foundations.²¹⁹ Some, like Ragazzi, Trindade, and Orakhelashvili, submit that what elevates a duty from one owed *inter se* to *erga omnes* is the importance or value of the interest that the norm protects.²²⁰ That is, the norms’ importance or value is its ‘distinctive feature’,²²¹ reflects the ‘notion of

Another’ (n 189), 1123; Toufayan, ‘Reacting to Serious Breaches of Obligations’ (n 147), 228. See Ago, ‘Obligations Erga Omnes’ (n 199), 238 cited in De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 81–2.

²¹⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 146), 227; Cassese, *International Law* (n 212), 16; Kingsbury & Donaldson, ‘From Bilateralism to Publicness’ (n 196), 80; Vaurs-Chaumette Anne-Laure, ‘International Community as a Whole’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 1024.

²¹⁵ Morss John, ‘Legal Relations of Collectives: Belated Insights from Hohfeld’ (2009) 22 *Leiden Journal of International Law* 289, 304; Kritsiotis Dino, ‘Imagining the International Community’ (2002) 13 *European Journal of International Law* 961, 977; Voefray, *L’actio popularis* (n 121), 227; Barboza, ‘Legal Injury’ (n 1), 20

²¹⁶ Kolb Robert, *Theory of International Law* (Hart 2016), 97; Voefray, *L’actio popularis* (n 121), 306. See Nissel Alan, ‘ILC Articles on State Responsibility: Between Self-Help & Solidarity’ (2005) 38 *New York University Journal of International Law & Policy* 355, 356, 366.

²¹⁷ *Arrest Warrant* (DRC v Belgium) (Judgment) [2002] ICJ 3 (Guillaume, separate opinion), 44; Focarelli Carlo, ‘International Law & Third-Party Countermeasures in the Age of Global Instant Communication’ (2016) 29 *Questions of International Law* 18, 21. See Weil, ‘Towards Relative Normativity’ (n 134), 441–2.

²¹⁸ Alland Denis, ‘Countermeasures of General Interest’ (2002) 13 *European Journal of International Law* 1220, 1229; Bradley, ‘Obligations Erga Omnes’ (n 152), 196; Nollkaemper, ‘Adjudication of Global Public Goods’ (n 15), 784.

²¹⁹ Johnstone, ‘Invoking Responsibility for Environmental Injury’ (n 192), 13; Proukaki, *Problem of Enforcement* (n 79), 49. See Tams, *Enforcing Obligations Erga Omnes* (n 109), 128.

²²⁰ See e.g. Ragazzi Maurizio, ‘International Obligations Erga Omnes: Their Moral Foundation & Criteria of Identification’ in Goodwill-Gill Guy & Talmon Stefan (eds), *Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999), 466; Orakhelashvili, *Peremptory Norms* (n 151), 243; Trindade, *International Law for Humankind* (n 220), 291, 314, 443; Bradley, ‘Obligations Erga Omnes’ (n 152), 199; Iovane Massimo & Rossi Pierfrancesco, ‘International Fundamental Values & Obligations Erga Omnes’ in Iovane Massimo, *et al.* (eds), *Protection of General Interests in Contemporary International Law* (2021), 48; Vidmar Jure, ‘Protecting the Community Interest in a State Centric Legal System: UN Charter & Certain Norms of “Special Standing”’ in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 111.

²²¹ Proukaki, *Problem of Enforcement* (n 79), 50.

value-loaded community interest',²²² forms the 'common core of norms',²²³ gives them a 'higher normative value',²²⁴ and grants them a 'different [...] status than others'.²²⁵ By 'reason of the importance of the rights' that these norms protect,²²⁶ all states have the competence to implement the duty arising from the norm.²²⁷

For others, like the Institut de Droit International ('IDL'), it is the commonality of states' interests in the norms that affords *erga omnes* effect to these rules.²²⁸ By 'their very nature', these norms concern all states such that every state has an interest in the performance or observance of the duties to which they give rise.²²⁹ This holds even when they have not been directly affected.²³⁰ The common interests in the norm also mean that they cannot remain as

²²² Vidmar, 'Community Interest in a State Centric Legal System' (n 220), 11; Ragazzi, 'International Obligations Erga Omnes' (n 220), 466 citing *Southwest Africa* [1966] (n 143) (Tanaka, dissenting).

²²³ International Law Association, 'First Report of the Study Group on the Law of State Responsibility' (2000), ¶105.

²²⁴ Linderfalk, 'Legal Hierarchy Revisited' (n 142), 5 citing De Hoogh André, 'Relationship between Jus Cogens, Obligations Erga Omnes & International Crimes: Peremptory Norms in Perspective' (1991) 42 *Austrian Journal of Public International Law* 183, 192; Delbrück Jost, 'Laws in the Public Interest—Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law' in Gotz Volkmar, *et al.* (eds), *Liber Amicorum Gunther Jaenicke* (Springer 1998), 35; St John Macdonald Ronald, 'Fundamental Norms in Contemporary International Law' (1987) 25 *Canadian Yearbook of International Law* 115, 136–9; Shelton Dinah, 'Hierarchy of Norms & Human Rights: Of Trumps and Winners' (2002) 65 *Saskatchewan Law Review* 301, 323; Fassbender Bardo, 'UN Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529, 591–2.

²²⁵ Shaw Malcom, *International Law* (6th edn, Cambridge University Press 2008), 124.

²²⁶ *Barcelona Traction* [1970] (n 135), 32; Orakhelashvili, *Peremptory Norms* (n 151), 84, 243. See ILC, 'Peremptory Norms: Comments & Observations of Governments' (9 March 2022) UN Doc A/CN.4/748, 82 (Switzerland).

²²⁷ Proukaki, *Problem of Enforcement* (n 79), 54, 59; Bradley, 'Obligations Erga Omnes' (n 152), 200; Meron Theodor, 'On a Hierarchy of International Human Rights' (1986) 80 *American Journal of International Law* 1, 9.

²²⁸ See e.g. Institut de Droit International, 'Obligations Erga Omnes in International Law' (n 204), art 1 cited in ILC, 'Fragmentation of International Law' (2006) (n 146), 203; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 149; Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 223; Besson Samantha, 'Community Interests in International Law: Whose Interests are They & How Should We Best Identify Them?' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2017), 38; Tanaka, 'Consequences of Obligations Erga Omnes' (n 161), 9; Bradley, 'Obligations Erga Omnes' (n 152), 213; Iovane Massimo, *et al.*, 'Some Introductory Remarks' in Iovane Massimo, *et al.* (eds), *Protection of General Interests in Contemporary International Law* (Oxford University Press 2021), 5; Wolfrum Rüdger, 'Identifying Community Interests in International Law: Common Spaces & Beyond' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2017), 19; Voigt Christina, 'Delineating the Common Interest in International Law' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 20; Trindade, *International Law for Humankind* (n 220), 347; Toufayan, 'Reacting to Serious Breaches of Obligations' (n 147), 203.

²²⁹ *Barcelona Traction* [1970] (n 135), 32; Crawford, 'Multilateral Rights & Obligations' (n 13), 413; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 136; Ragazzi, *Obligations Erga Omnes* (n 167), 17; Tanaka, 'Consequences of Obligations Erga Omnes' (n 161), 9; Voigt, 'Common Interest in International Law' (n 228), 20 citing Shelton Dinah, 'Common Concern of Humanity' (2009) 1 *Iustum Aequum Salutare* 33, 38.

²³⁰ Brilmayer Lea & Tesfalidet Isaias Yemane, 'Third State Obligations & the Enforcement of International Law' (2011) 44(1) *New York University Journal of International Law & Policy* 1, 11; Shelton Dinah, 'Hierarchy in International Law' (2006) 100(2) *American Journal of International Law* 291, 319.

‘non-directed responsibilities’,²³¹ and nor can they be ‘left to the free disposition of states’.²³² This affects ‘the way [the duty] is performed’.²³³ They are no longer owed to states individually but to the ‘international community as a whole’.²³⁴ Thus, every state may implement the duty.²³⁵

These approaches, based on the importance and commonality of interests in norms, relate to the norm’s substance and are referred to as ‘material approaches’.²³⁶ In contrast, the ‘structural approach’ posits that what differentiates duties owed *erga omnes* from duties owed *inter se* is not the value nor the commonality of states’ interests in a particular norm but the resulting legal relations.²³⁷ In what Tams deems the ‘strong version’, supported by scholars such as Annacker, Lefeber, and Seidermann, duties owed *erga omnes* are characterised by their non-synallagmatic character.²³⁸ If a norm does not create synallagmatic relations, it imposes duties owed *erga omnes*.²³⁹ In contrast, its ‘moderate version’ restricts duties owed *erga omnes* to those that are ‘non-bilateralisable and important’.²⁴⁰

Arguably, the material approaches give rise to several problems seen in the previous chapter’s discussion of the peremptory norms’ conceptual basis. These assume that the values that states afford to norms can be easily established. Yet, as Linderfalk points out, this is

²³¹ Besson, ‘Community Interests in International Law’ (n 228), 41.

²³² Simma Bruno, ‘International Crimes: Injury & Countermeasures’ in Weiler Joseph, *et al.* (eds), *International Crimes of State: Critical Analysis of the ILC’s Draft Article 19* (De Gruyter 1989), 285.

²³³ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 149.

²³⁴ Tanaka, ‘Consequences of Obligations Erga Omnes’ (n 161), 9; Vidmar, ‘Community Interest in a State Centric Legal System’ (n 220), 110; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 149; Bradley, ‘Obligations Erga Omnes’ (n 152), 213.

²³⁵ See ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126–7; *Obligation to Prosecute or Extradite* [2012] (n 184), 450; *Application of the Genocide Convention* [2022] (n 126), 36; ILC, ‘Comments & Observations of Governments’ (2022) (n 226), 81 (Spain); Tladi Dire, ‘Fifth Report on Peremptory Norms’ (24 January 2022) UN Doc A/CN.4/747, 52 (France, Spain, & Switzerland).

²³⁶ Tams, *Enforcing Obligations Erga Omnes* (n 109), 136–41.

²³⁷ Ibid, 130–6; ILC, ‘Fragmentation of International Law’ (2006) (n 146), 197.

²³⁸ Tams, *Enforcing Obligations Erga Omnes* (n 109), 131 citing Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 136; Lefeber René, *Transboundary Environmental Interference & the Origin of State Liability* (BRILL 1996), 113–4; Seiderman Ian, *Hierarchy in International Law: Human Rights Dimension* (Intersettia 2001), 126–9; Pegna Olivia Lopes, ‘Counter-claims and Obligations Erga Omnes before the International Court of Justice’ (1998) 9 *European Journal of International Law* 724, 732; 131 citing Biermann Frank, ‘Common Concern of Humankind: Emergence of a New Concept of Environmental Law’ (1996) 34 *Archiv des Völkerrechts* 426, 451; Günther Carsten Alexander, *Die Klagebefugnis der Staaten in internationalen Streitbeilegungsverfahren* (Heymann 1999), 99–101, 109–115; Simma Bruno, ‘Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?’ in Delbrück Jost & Heinz Ursula (eds), *Future of International Law Enforcement* (Duncker & Humblot 1993), 132–3; Paulus Andreas, *Die internationale Gemeinschaft im Völkerrecht* (Beck 2001), 335.

²³⁹ Seiderman, *Hierarchy in International Law* (n 238), 126–9.

²⁴⁰ Tams, *Enforcing Obligations Erga Omnes* (n 109), 133–5. See Crawford James, ‘Responsibility to the International Community as a Whole’ (2001) 8 *Indiana Journal of Global Legal Studies* 303, 314 (‘A formulation [...] [that excludes] that moral element does not seem appropriate’).

problematic as states seldom say if one norm is more important than another.²⁴¹ Furthermore, there are no established criteria to determine the importance of norms in international law.²⁴² The process is subjective and creates uncertainty as to what norms ‘graduate from the status of an ordinary norm’ to a ‘higher grade’.²⁴³ This lack of objectivity risks the undue proliferation of norms that impose duties owed *erga omnes*.²⁴⁴

Moreover, the recourse to the interests’ importance raises the question of ‘to whom is it important?’.²⁴⁵ Opinions concerning an interest’s value largely depend on one’s perception.²⁴⁶ For this reason, the attribution of importance to an interest tends to be based on ‘nothing more than the author’s opinion on what is essential and indispensable’.²⁴⁷ This makes the process ‘bluntly and excessively ideological in nature’.²⁴⁸ It makes it possible for a select few to arrogate upon ‘themselves the role of law-giver’,²⁴⁹ and allows for the imposition by a minority of their ‘values and aspirations’ thereby ‘fostering parochial interests’.²⁵⁰ In other words, the approach gives rise to a ‘syllogistic transformation’ that ‘allows the interpreter’ to attribute *erga omnes* effect to existing rules by simply ‘elaborating on the need’ for such an effect.²⁵¹

Similar arguments may be made regarding the commonality of states’ interests. Arguably, the concept of collective interests ‘is not wholly unambiguous’ as ‘there is no universally established criteria for deciding on [such] interests’.²⁵² This lack of subjectivity runs the risk of

²⁴¹ Linderfalk, ‘Legal Hierarchy Revisited’ (n 142), 8–9.

²⁴² Tanaka, ‘Consequences of Obligations Erga Omnes’ (n 161), 9; Voefray, *L’actio popularis* (n 121) 224, citing Meron Theodor, *Human Rights & Humanitarian Norms as Customary Law* (Clarendon 1989), 192.

²⁴³ See Weil, ‘Towards Relative Normativity’ (n 134), 425.

²⁴⁴ Ragazzi, *Obligations Erga Omnes* (n 167), 163; Tams, *Enforcing Obligations Erga Omnes* (n 109), 117.

²⁴⁵ Linderfalk, ‘Legal Hierarchy Revisited’ (n 142), 8.

²⁴⁶ See de Wet, ‘Invoking Obligations Erga Omnes’ (n 12), 7; Mik Cezary, ‘Jus Cogens in Contemporary International Law’ (2013) 33 *Polish Yearbook of International Law* 27, 52; Hofer, ‘Adoption & Contestation of Sanctions’ (n 27), 442.

²⁴⁷ See Zemanek Karl, ‘Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?’ in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 384 citing Gómez Robledo Antonio, ‘Le jus cogens international: Sa genèse, sa nature, ses fonctions’ (1981) 172 *Recueil des Cours de l’Académie de Droit International* 9, 167; 386 citing Tomuschat, ‘Obligations arising for States Without or Against Their Will’ (n 11), 307.

²⁴⁸ See Kolb Robert, *Peremptory International Law—Jus Cogens: A General Inventory* (Hart 2020), v; Voefray, *L’actio popularis* (n 121), 224 (‘Vouloir différencier entre les droits “fondamentaux” de l’homme et de simples droits “ordinaires” serait un exercice à la fois ardu d’un point de vue conceptuel et délicat sur le plan politique’).

²⁴⁹ See Kolb, *Peremptory International Law* (n 248), v; Focarelli Carlo, *International Law as Social Construct: Struggle for Global Justice* (Oxford University Press 2012), 470.

²⁵⁰ See Bianchi Andrea, ‘Human Rights & the Magic of Jus Cogens’ (2008) 19 *European Journal of International Law* 491, 495–6.

²⁵¹ Focarelli, *International Law as Social Construct* (n 249), 470.

²⁵² Tanaka, ‘Consequences of Obligations Erga Omnes’ (n 161), 9.

a ‘snowball effect’ leading to the undue expansion of norms deemed to impose duties owed *erga omnes*.²⁵³ Crucially, the commonality of states’ interests in a norm does not necessarily mean that the duties it imposes are owed *erga omnes*.²⁵⁴ As discussed in *Section II*, while all states have an interest in other states’ compliance with their duties, this interest *per se* ‘by no means authorises—let alone obliges—every state to demand the performance [or observance] by every other state of its duties’.²⁵⁵

This thesis takes the view that the value of the interest that a norm protects and the fact that states share this interest do not *per se* imply that the duties the norm imposes are owed *erga omnes*. They may motivate states, in their ‘legal policy’, to agree that a norm imposes duties owed *erga omnes*.²⁵⁶ Yet, for Hillgruber, they do not, by themselves, dictate the duties’ ‘enforceability by every legal subject of the [...] legal system’.²⁵⁷ As Linderfalk suggests, ‘the real answer [should] lie elsewhere’.²⁵⁸ Arguably, the transformation of duties owed *inter se* to owed *erga omnes* is akin to how peremptory norms are formed discussed in the previous chapter.²⁵⁹ That is, duties owed *erga omnes* ‘result’ from a ‘two-step process’ where states

²⁵³ Ruys, ‘Legal Standing & Public Interest Litigation’ (n 17), 467; Mao Xiao, ‘Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case’ (2002) 21 *Chinese Journal of International Law* 589, 598. See Weil, ‘Towards Relative Normativity’ (n 134), 432; Duff, ‘State Responsibility: An Outsider’s View’ (n 110), 81 ([‘Duties owed *erga omnes* as they are understood] are not grounded in agreements; it is unclear what pre-existing interests of each state they protect, or why individual states should have standing to invoke responsibility’).

²⁵⁴ Ahmadov Farid, *Right of Actio Popularis before International Courts & Tribunals* (Brill Nijhoff 2018), 148; De Jesús, ‘Obligations Erga Omnes’ (n 6), 280. See also Gorobets Kostiantyn, ‘Solidarity as a Practical Reason: Grounding the Authority of International Law’ (2022) 69 *Netherlands International Law Review* 3, 11 citing Wolfrum Rüdger, ‘Concluding Remarks’ in Wolfrum Rüdger & Kojima Chie (eds), *Solidarity* (Springer 2010), 225–8.

²⁵⁵ Riphagen, ‘Fourth Report on State Responsibility’ (1983) (n 144), 21. See *Southwest Africa* [1966] (n 143), 34; *Lac Lanoux* (n 143), 116; *East Timor* [1995] (n 129) (Skubizewski, dissenting) 256.

²⁵⁶ Hillgruber, ‘Third States & Countermeasures’ (n 14), 271; Sartipi & Hojatzadeh, ‘Erga-Omnisation of Law’ (n 161), 222. See Linderfalk, ‘Legal Hierarchy Revisited’ (n 142), 10; Mao, ‘Public-Interest Litigation before the ICJ’ (n 253), 598 citing *Nuclear Tests* (Australia v France) (Provisional Measures) [1973] ICJ 99 (Gros, separate opinion), 290.

²⁵⁷ Hillgruber, ‘Third States & Countermeasures’ (n 14), 271. See De Jesús, ‘Obligations Erga Omnes’ (n 6), 189.

²⁵⁸ Linderfalk, ‘Legal Hierarchy Revisited’ (n 142), 10; Hillgruber, ‘Third States & Countermeasures’ (n 14), 272 (‘It needs to be demonstrated that states have created a norm [...] that allows [“states other than an injured state”] to respond to violations [of the duties they impose]’). See *Obligation to Prosecute or Extradite* [2012] (n 184) (Skotnikov, separate opinion), 484; (Xue, dissenting), 575 (‘The fact that the states parties have a common interest in their observance [...] does not, in and by itself, give that state standing to bring a case in the Court.’); *Application of the Genocide Convention* [2022] (n 126) (Xue, dissenting), 6; *Application of the Torture Convention* [2023] (n 185), (Xue, dissenting), 1–2 (‘Whether the states parties accepted [...] *actio popularis* [...] is [...] determined by the intention of the parties’)

²⁵⁹ See Linderfalk Ulf, ‘Creation of Jus Cogens—Making Sense of Article 53 of the Vienna Convention’ (2011) 71 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 360, 370–1; Kolb, *Peremptory International Law* (n 248), 67; Villalpando, *La communauté internationale* (n 8), 77; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 39; Green James, ‘Questioning the Peremptory Status of the Prohibition of the Use of Force,’ (2011) 32 *Michigan Journal of International Law* 215, 243–4.

create a rule and then structure the legal relations that the rule creates in a manner that permits every state to implement the duties the norm imposes.²⁶⁰ In this sense, it is the acceptance and recognition of states that transforms duties owed *inter se* to *erga omnes*.²⁶¹ It remains a function of states' intent. Because of the importance and the interest of every state in a norm, states deem it desirable and appropriate that all states have the competence to implement the duty that it imposes.²⁶²

Note that the structural approach too suffers from problems. First, the approach tends to 'cast the net too wide' by considering all norms that give rise to non-synallagmatic relations to impose duties owed *erga omnes*.²⁶³ Second, it assumes that non-synallagmatic relations are the primary characteristic of duties owed *erga omnes*. Yet, whether this is true remains to be seen. As will be shown in *Chapter 11*, duties owed *erga omnes* are arguably synallagmatic.²⁶⁴ Finally, the view dispenses with the process that gives rise to duties owed *erga omnes*. It places much emphasis on the result of the process in which duties owed *erga omnes* are formed—the structure of legal relations—but disregards the process itself—states' acceptance and recognition.²⁶⁵

B. Relation between Duties Owed Erga Omnes & Duties Owed Erga Omnes Partes

A subset of duties owed *erga omnes* are those owed *erga omnes partes*. Scholars like Sicilianos Dupuy, and Vidmar, submit that the distinction between duties owed *erga omnes* and

²⁶⁰ Byers, 'Jus Cogens & Erga Omnes' (n 146), 233; Bradley, 'Obligations Erga Omnes' (n 152), 203. See Hillgruber, 'Third States & Countermeasures' (n 14), 270 ('[The competence of states] cannot simply and directly be [...] deduced from legal constructions [...] without having regard to [...] methods of establishing [custom] and interpreting treaties'); Paulus Andreas, 'Whether Universal Values can Prevail over Bilateralism & Reciprocity' in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 91. Lekhi Pranay, 'Nuclear Problem: A Communitarian Response' (2021) 68 *Netherlands International Law Review* 89, 100 ('The [...] procedural rule is dependent on the [...] substantive right').

²⁶¹ Hillgruber, 'Third States & Countermeasures' (n 14), 271–2. De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 37; Voefray, *L'actio popularis* (n 121), 328. See Weil, 'Towards Relative Normativity' (n 134), 421 ('Without this positivistic approach, the neutrality so essential to international law would remain in continual jeopardy').

²⁶² Byers, 'Jus Cogens & Erga Omnes' (n 146), 233; Bradley, 'Obligations Erga Omnes' (n 152), 203; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 113), 136 ('[Duties owed] *erga omnes* necessarily protect [...] community interests [and] are the result of "consensus according to which respect for certain fundamental values is not to be left to the free disposition of states individually"'). See Linderfalk, 'Legal Hierarchy Revisited' (n 142), 10.

²⁶³ Ruys, 'Legal Standing & Public Interest Litigation' (n 17), 456; Proukaki, *Problem of Enforcement* (n 79), 49. See Tams, *Enforcing Obligations Erga Omnes* (n 109), 133.

²⁶⁴ See Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 75), 44–5; Villalpando, *La communauté internationale* (n 8), 237, 242, 279, 397; Nedeski, *Shared Obligations* (n 121), 65, 81, 87; De Jesús, 'Obligations Erga Omnes' (n 6), 2, 103, 186, 264; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 44, 53; Picone, 'Jus Cogens & Obligations Erga Omnes' (n 121), 421. See Thirlway (ed), *ICJ Law & Procedure vol II* (n 121), 1151; Hernandez, *ICJ & Judicial Function* (n 121), 222.

²⁶⁵ See Hillgruber, 'Third States & Countermeasures' (n 14), 272; Byers, 'Jus Cogens & Erga Omnes' (n 146), 233; Bradley, 'Obligations Erga Omnes' (n 152), 203.

erga omnes partes is based on the rule's source.²⁶⁶ That is, duties owed *erga omnes* are found in customary law. They are opposable to all states and protect the community's common interest.²⁶⁷ In contrast, duties owed *erga omnes partes* come from conventional rules. They apply to all parties and safeguard their shared interests.²⁶⁸ Yet, their effects are similar. Duties owed *erga omnes* and *erga omnes partes* allow states that have only been affected in their interests—every state for duties owed *erga omnes* and all parties for duties owed *erga omnes partes*—to implement the duty without direct effect.²⁶⁹

The view appears to be reasonable—current examples of duties deemed owed *erga omnes partes* are found in conventional law. The Genocide Convention imposes the *duty to prevent genocide* and *punish its perpetrators*.²⁷⁰ Similarly, the Torture Convention imposes the *duty to prevent torture*, *punish its perpetrators*, and *provide remedies* to victims.²⁷¹ The same may be said for the conventional counterparts of the norms imposing the *duty not to engage in racial discrimination*,²⁷² the *duty to prohibit and abolish slavery and forced labour*,²⁷³ and the *duty to*

²⁶⁶ See e.g. Sicilianos, 'Classification of Obligations' (n 149), 1136; Dupuy, 'Multilateral Dimension of Obligations' (n 163), 1072; Vidmar, 'Community Interest in a State Centric Legal System' (n 220), 113; Gaja, 'Protection of General Interests' (n 24), 62; Bradley, 'Obligations Erga Omnes' (n 152), 220; Pauwelyn Joost, *Conflict of Norms in Public International Law* (Cambridge University Press 2003), 62; Fitzmaurice Malgosia & Elias Olufemi, *Contemporary Issues in the Law of Treaties* (Eleven International 2005), 162; McIntyre, 'Crawford's Multilateralism' (n 189), 273. See also Brunnée Jutta, 'International Legal Accountability through the Lens of State Responsibility' (2005) 36 *Netherlands International Law Review* 3, 24; Paulus, 'Reciprocity Revisited' (n 155), 126.

²⁶⁷ Bradley, 'Obligations Erga Omnes' (n 152), 220; Gaja Giorgio, 'Obligations Erga Omnes, International Crimes & Jus Cogens: A Tentative Analysis of Three Related Concepts' in Weiler Joseph, *et al.* (eds), *International Crimes of State: Critical Analysis of the ILC's Draft Article 19* (De Gruyter 1989), 152–3.

²⁶⁸ Longobardo, 'Indirectly Injured States' (n 158), 7. See Duff, 'State Responsibility: An Outsider's View' (n 110), 83 ('[Duties] owed *erga omnes partes* [are] contractual [duties owed] *erga omnes*').

²⁶⁹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 126. *Obligation to Prosecute or Extradite* [2012] (n 184), 460; *Application of the Genocide Convention* [2019] (n 126), 16; *Application of the Genocide Convention* [2022] (n 126), 35–7. See Institut de Droit International, 'Obligations Erga Omnes in International Law' (n 204), art 1.

²⁷⁰ *Convention on the Prevention & Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. See *Application of the Genocide Convention* [2022] (n 126), 35, 37.

²⁷¹ *Convention against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 2(1). See *Obligation to Prosecute or Extradite* [2012] (n 184), 450; 'Memorial of Belgium', *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Merits) (ICJ, General List No 144, 1 July 2010), 79–80.

²⁷² *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 182, art 2. See CERD, *Comm No 100/5*, 100th sess, UN Doc CERD/C/100/5 (12 December 2019) ('*Palestine v Israel*'), ¶¶3.43, 3.50.

²⁷³ *International Convention to Suppress Slave Trade & Slavery* (adopted 25 September 1926, entered into force 7 March 1927) 60 LNTS 253, art 1; *Supplementary Convention on the Abolition of Slavery* (adopted 30 April 1956, entered into force 7 September 1956) 266 UNTS 3, art 1; *International Covenant on Civil & Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 2(1), 5. See Allain, 'Slavery & Obligations Erga Omnes' (n 13); HRCComm, 'General Comment 31: Nature of the General Legal Obligation Imposed on States Parties' (2004) UN Doc C/21/Rev1/Add13, ¶2; *Effect of Reservations on the Entry Into Force*

*respect a people's right to internal self-determination.*²⁷⁴ Finally, some also submit that certain environmental treaties allow states to implement another's responsibility in the absence of direct effect.²⁷⁵

Yet, whether duties owed *erga omnes partes* need to be restricted to those imposed by conventional rules remains to be seen. While these duties tend to be found in conventional law,²⁷⁶ there is arguably no reason to limit them to treaty norms. To claim that only conventional norms may impose these duties arguably prejudices future examples of duties owed *erga omnes partes*. Granted that the ICJ in *Barcelona Traction* suggested that duties owed *erga omnes partes* are derived from treaty norms when it stated that these duties are 'conferred by [...] instruments of a universal or quasi-universal character'.²⁷⁷ However, as Tams suggests, the passage is 'best interpreted as an indication' that duties that grant the general competence to implement may also be found in conventional law.²⁷⁸

As Urs, Crawford, and Voefray submit, duties owed *erga omnes* and *erga omnes partes* are conceptually similar.²⁷⁹ They differ only as to which states the norm applies and which

of the IACHR (Arts 74 & 75) (Advisory Opinion) (IACtHR, OC-2/82, 24 September 1982), ¶29.

²⁷⁴ ICCPR (n 273), art 1(1); *International Covenant on Economic, Social & Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1(1). See HRCComm, 'General Comment No 12: Article 1 (The Right to Self-Determination of Peoples)' (13 March 1984) UN Doc HRI/GEN/1/Rev.1, ¶6. Note internal self-determination as will be discussed in Chapter 7 differs from external self-determination in that it is more closely associated with human rights (McCorquodale Robert, 'Self-Determination: A Human Rights Approach' (1994) 43 *International & Comparative Law Quarterly* 857, 883–4).

²⁷⁵ See generally Rest Alfred, 'Erga Omnes Obligations & Judicial Control' (2010) 40 *Environmental Policy & Law* 298, 301; Murase Shinya, 'Perspectives from International Economic Law on Transnational Environmental Issues' (1995) 253 *Recueil des Cours de l'Académie de Droit International* 283, 311; Scovazzi Tullio, 'State Responsibility for Environmental Harm' (2001) 12 *Yearbook of International Environmental Law* 43, 62. On the ICRW: Tanaka Yoshifumi, 'Reflections on Locus Standi in Response to a Breach of Obligations Erga Omnes Partes: A Comparative Analysis of the Whaling in the Antarctic & South China Sea Cases' (2018) 17 *Law & Practice of International Courts & Tribunals* 527, 535. On the UNCLOS: ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 127; Ragazzi, *Obligations Erga Omnes* (n 167), 158 citing Picone, 'Obblighi reciproci e erga omnes degli Stati' (n 191), 114. On the Montreal Protocol: Biermann, 'Common Concern of Humankind' (n 238), 451; Peel Jacqueline, 'New State Responsibility Rules & Compliance with Multilateral Environmental Obligations' (2020) 10 *Review of European, Comparative & International Environmental Law* 82, 92; Sands Philippe, *et al.*, *Principles of International Environmental Law* (Cambridge University Press 2012), 148. On the Kyoto Protocol: Fitzmaurice Malgosia, 'Responsibility & Climate Change' (2010) 53 *German Yearbook of International Law* 89, 97 citing Richard SJ & Verheyen Roda, 'State Responsibility & Compensation for Climate Change Damages: Legal & Economic Assessment' (2004) 32 *Energy Policy* 1109, 1115; Treves Tullio, 'Settlement of Disputes & Non-Compliance Procedures' in Treves Tullio, *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009), 514.

²⁷⁶ Orakhelashvili, *Peremptory Norms* (n 151), 268

²⁷⁷ *Barcelona Traction* [1970] (n 135), 32.

²⁷⁸ Tams, *Enforcing Obligations Erga Omnes* (n 109), 123; Longobardo, 'Indirectly Injured States' (n 158), 24.

²⁷⁹ Ruys, 'Legal Standing & Public Interest Litigation' (n 17), 463 ('No qualitative distinction exists between [duties owed] *erga omnes* and [duties owed] *erga omnes partes*'); Urs, 'Question of Standing before the ICJ' (n

states may implement the duties it imposes.²⁸⁰ While duties imposed by norms that apply to all states and allow all to implement the duties are owed *erga omnes*, those imposed by norms that only apply to some states but still grant a similar competence to states are owed *erga omnes partes*.²⁸¹ As Crawford points out the norm's source is immaterial.²⁸² The source itself 'does not [*per se*] allow any conclusions regarding the [legal relation's] structure'.²⁸³ Accordingly, duties owed *erga omnes partes* may be found in either conventional or regional customary law.²⁸⁴

Still, duties owed *erga omnes partes* found in treaty law—*erga omnes partes contractes*,²⁸⁵ have one advantage compared to their customary counterparts—the inclusion of compromissory clauses. As mentioned above, one way of implementing responsibility is through invocation via judicial dispute resolution. Yet, this method is dependent on states' consent to adjudication and a norm's *erga omnes* status does not constitute an exception to this rule.²⁸⁶ While consent may be difficult to obtain in the case of non-treaty norms, treaties that

133), 14; Crawford, *State Responsibility* (n 6), 367 ('Certain communitarian norms are owed either to the other states (*erga omnes partes*) or to "the international community as a whole" (*erga omnes*)'); Crawford, *Articles on State Responsibility* (n 6), 277–8; Voefray, *L'actio popularis* (n 121), 225; Longobardo, 'Indirectly Injured States' (n 158), 24.

²⁸⁰ Voefray, *L'actio popularis* (n 121), 225, 229 ('Seule l'échelle varie: les obligations *erga omnes* relevant du droit international général sont dues à l'égard de la communauté internationale dans son ensemble, alors que des obligations découlant d'un traité ou d'une coutume régionale sont dues à l'égard [...] celles que constituent les parties au traité ou celles que forment les Etats d'une même région géographique.'). Stern, 'La notion de préjudice juridique' (n 38), 14 ('Qu'il s'agisse d'une collectivité restreinte—et l'on parlera alors d'obligations *erga omnes partes*—ou de la communauté internationale dans son ensemble—et l'on parlera alors d'obligations *erga omnes*'); Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 75), 34 ('State infringes not only the right of the latter but also the rights of all the other parties to which the *erga omnes* rule that has been infringed applies'). See 'Application to Intervene of Australia', *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 23 August 1995), 11.

²⁸¹ De Jesús, 'Obligations *Erga Omnes*' (n 6), 192 ('These [duties] are owed "to all" [...] the parties to a multilateral rule less general than general customary law'); Sicilianos Linos-Alexander, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 1139 ('[Duties] emanating from a treaty or other source of international law which bind a group of states'); de Wet Erika, 'International Constitutional Order' (2006) 55 *International & Comparative Law Quarterly* 51, 55 citing Dupuy Pierre-Marie, 'L'unité de l'ordre juridique international—Cours général de droit international public' (2002) 297 *Recueil des Cours de l'Académie de Droit International* 1, 384;

²⁸² Crawford, 'Third Report on State Responsibility' (2000) (n 6), 35 ('There is no reason to exclude from the scope of [duties] *erga omnes partes* [duties] arising under general international law').

²⁸³ Annacker, 'Legal Regime of *Erga Omnes* Obligations' (n 113), 136; Longobardo, 'Indirectly Injured States' (n 158), 24.

²⁸⁴ Annacker, 'Legal Regime of *Erga Omnes* Obligations' (n 113), 135 ('An *erga omnes* [duty] can be [a duty] towards all the parties to a treaty ("*erga omnes contractantes*")', [a duty] *vis-a-vis* a community of states bound by a [...] regional custom [...], or [a duty] towards the international community'); Voefray, *L'actio popularis* (n 121), 263.

²⁸⁵ *Prosecutor v Blaskić* (Request for Review) (ICTY, Appeals Chamber, 95-14/1, 29 October 1997), ¶26. See Duff, 'State Responsibility: An Outsider's View' (n 110), 83 ('contractual obligations *erga omnes partes*').

²⁸⁶ *East Timor* [1995] (n 129), 120; *Armed Activities on the Territory of the Congo* (DRC v Rwanda) (Provisional Measures) [2002] ICJ 219, 245.

give rise to duties owed *erga omnes contractantes* ‘very often’ recognise states’ right to resort to judicial dispute resolution through compromissory clauses,²⁸⁷ and allow implementing states to seize tribunals’ jurisdiction. Nonetheless, this is more of a practical consideration rather than a conceptual one.

C. Relation between Duties Owed *Erga Omnes* & Peremptory Norms

Another point that needs examination is the relation between peremptory norms and duties owed *erga omnes*. The two concepts have different legal effects.²⁸⁸ As discussed in the previous chapter, peremptory norms deal with a norm’s validity and impose restrictions on states’ law-making capacity prohibiting derogations from norms ‘accepted and recognised’ to be peremptory.²⁸⁹ In contrast, duties owed *erga omnes* concern implementation,²⁹⁰ and permit states, in the absence of direct effect, to implement the wrongful state’s responsibility.²⁹¹ While the exact relationship between the two concepts is yet to be definitively established,²⁹² the predominant view attributes a strong link between the two.²⁹³ Some assert that peremptory norms are coextensive with duties owed *erga omnes* while others claim that peremptory norms invariably give rise to duties owed *erga omnes*.²⁹⁴

As to the first view, some like Simma claim, to which some states agree,²⁹⁵ that peremptory

²⁸⁷ Tams, ‘Guardians of Community Interests’ (n 8), 383; Vidmar, ‘Community Interest in a State Centric Legal System’ (n 220), 113. See Longobardo, ‘Indirectly Injured States’ (n 158), 24.

²⁸⁸ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 111–2; Bassiouni M. Cherif, ‘International Crimes: Jus Cogens & Obligations Erga Omnes’ (1996) 59(4) *Law & Contemporary Problems* 63, 63; Kadelbach Stefan, ‘Jus Cogens, Obligations Erga Omnes, & other Rules—Identification of Fundamental Norms’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2005), 40; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 81.

²⁸⁹ *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331, art 53; Hillgruber, ‘Third States & Countermeasures’ (n 14), 270; Voefray, *L’actio popularis* (n 121), 232.

²⁹⁰ ILC, ‘Fragmentation of International Law’ (2006) (n 146), 193; Crawford, ‘Multilateral Rights & Obligations’ (n 13), 412; Tams, *Enforcing Obligations Erga Omnes* (n 109), 152.

²⁹¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126–7; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 146), 239 citing Institut de Droit International, ‘Obligations Erga Omnes in International Law’ (n 204), art 1(a); Kadelbach, ‘Identification of Fundamental Norms’ (n 288), 40.

²⁹² ILC, ‘Fragmentation of International Law’ (2006) (n 146), 204; Tladi Dire, ‘Third Report on Peremptory Norms’ (12 February 2018) UN Doc A/CN.4/714, 42; Mani VS, ‘Centrifugal & Centripetal Tendencies in the International System’ in St John Macdonald Ronald & Johnston Douglas (eds), *Towards World Constitutionalism* (Nijhoff 2005), 254

²⁹³ Frowein, ‘Reactions by Not Directly Affected States’ (n 17), 405 citing Thierry H, ‘L’évolution du droit international cours général de droit international public’ (1990) 222 *Recueil des Cours de l’Académie de Droit International* 9, 62 ff.

²⁹⁴ Tams, *Enforcing Obligations Erga Omnes* (n 109), 146.

²⁹⁵ See UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (29 October 2001)

norms and duties owed *erga omnes* are ‘two sides of the same coin’.²⁹⁶ They are ‘merely designations for the same thing from different viewpoints’.²⁹⁷ In Crawford’s words, they are ‘virtually’ or ‘largely’ coextensive.²⁹⁸ That is, a norm’s peremptory status implies that the duty it imposes is owed *erga omnes* and *vice versa*. The rationale for this view appears to lie in deduction. Both peremptory norms and duties owed *erga omnes* protect fundamental values.²⁹⁹ Due to the norm’s importance, all states have an interest in its protection. As Bassiouni puts it, ‘what is “compelling” “flows to all”’ and ‘what “flows to all” is “compelling”’.³⁰⁰ Thus, the norm both nullifies derogations and permits every state to implement the duties it imposes.³⁰¹

Others like Bassiouni and Pellet, agree that peremptory norms impose duties owed *erga omnes*.³⁰² Yet, they submit that norms that impose duties owed *erga omnes* are not necessarily

UN Doc A/C.6/56/SR.11, 6 (Finland on behalf of Nordic states); UNGA, ‘Verbatim Record, 56th Session, 14th Meeting’ (2 Oct 2001) UN Doc A/56/PV.14, 11 (Portugal); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 15th Meeting’ (26 November 2001) UN Doc A/C.6/56/SR.15, 4–5 (Jordan); UNGA, Sixth Committee, ‘Summary Record of the 74th Session, 26th Meeting’ (31 October 2019) UN Doc A/C.6/74/SR.26, 10 (Armenia).

²⁹⁶ Simma, ‘Bilateralism to Community Interest’ (n 146), 300; Tams, *Enforcing Obligations Erga Omnes* (n 109), 146 noting Hannikainen Lauri, *Peremptory Norms (Jus Cogens) in International Law: Development, Criteria, Present Status* (Finnish Laywer 1988), 269–92; Pieper Stephanie, *Neutralität von Staaten* (Lang 1997), 388–9; Reimann Heinrich Bernhard, *Ius Cogens im Völkerrecht* (Schulthess 1971), 97; Gómez Robledo, ‘Le jus cogens international’ (n 247), 62.

²⁹⁷ Sicilianos, ‘Classification of Obligations’ (n 149), 1136; Sartipi & Hojatzadeh, ‘Erga-Omnisation of Law’ (n 161), 208; Gattini Andrea, ‘A Return Ticket to “Communitarisme”, Please’ (2002) 13 *European Journal of International Law* 1181, 1184 (‘Mere difference in accent’)

²⁹⁸ Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 34.

²⁹⁹ Byers, ‘Jus Cogens & Erga Omnes’ (n 146), 233; Ragazzi, *Obligations Erga Omnes* (n 167), 72; St John Macdonald Ronald, ‘International Community as a Legal Community’ in St John Macdonald Ronald & Johnston Douglas (eds), *Towards World Constitutionalism* (Nijhoff 2005), 870. See Scobbie Iain, ‘Invocation of Responsibility for the Breach of Obligations under Peremptory Norms of General International Law’ (2002) 13 *European Journal of International Law* 1201, 1210; Wyler Eric, ‘From “State Crime” to Responsibility for “Serious Breaches of Obligations under Peremptory Norms”’ (2002) 13(5) *European Journal of International Law* 1147, 1157.

³⁰⁰ Bassiouni, ‘Jus Cogens & Obligations Erga Omnes’ (n 288), 72. See ILC, ‘Report on the Work of the 48th Session: State Responsibility’ (1996) (n 98), 109, 112 (‘[It] would seem contradictory if, in the case of a breach of a [duty] so important to the entire international community as to be described as a “peremptory” rule, the relationship of responsibility was established solely between the state which committed the breach and the state directly injured by it’). Note that Bassiouni nevertheless argues that this ‘simplistic formulation is circular’. ‘It is difficult to distinguish between what constitutes a “general principle” creating [a duty] so self-evident as to be “compelling” and so “compelling” as to be “flowing to all”, that is, binding on all states’ (Bassiouni, ‘Jus Cogens & Obligations Erga Omnes’ (n 288), 72).

³⁰¹ *Barcelona Traction* [1970] (n 135) (Ammoun, separate opinion), 325. See Orakhelashvili, *Peremptory Norms* (n 151), 245; Ragazzi, *Obligations Erga Omnes* (n 167), 189

³⁰² Bassiouni, ‘Jus Cogens & Obligations Erga Omnes’ (n 288), 73; Pellet Alain, ‘Conclusions’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2005), 418 cited in Tladi, ‘Third Report on Peremptory Norms’ (2018) (n 292), 43; Gaja, ‘Protection of General Interests’ (n 24), 55; ILC, ‘Fragmentation of International Law’ (2006) (n 146), 204; Longobardo, ‘Indirectly Injured States’ (n 158), 8; Trindade, *International Law for Humankind* (n 220), 276, 297, 312. See Tladi, ‘Fifth Report on Peremptory Norms’ (2022) (n 235), 52 (France, Spain, & Switzerland);

peremptory.³⁰³ This claim appears to be derived from observational evidence. Norms deemed peremptory, such as the norm against force and some norms that protect human and peoples' rights like the prohibition of genocide, torture, racial discrimination, slavery, and the respect for self-determination, are also considered to impose duties owed *erga omnes*.³⁰⁴ Yet, not all norms deemed to impose duties owed *erga omnes* are widely acknowledged to be peremptory—case in point, the customary norms safeguarding the environment.³⁰⁵ By material implication, peremptory status implies that the duties the norm imposes are owed *erga omnes* but not the converse.³⁰⁶ In short, the two concepts are concentric rather than coextensive.³⁰⁷

Whether the views discussed above reflect positive law or reside primarily in literature remains to be seen. For its part, the ICJ has yet to 'pronounce that a link exists between peremptory norms [...] and [duties owed] *erga omnes*'.³⁰⁸ In contrast, the ILC implicitly linked

UNGA, Sixth Committee, 'Summary Record of the 74th Session, 26th Meeting' (2019) (n 295), 11 (Estonia); ILC, 'Comments & Observations of Governments' (2022) (n 226), 80 (Italy), 82 (Switzerland)

³⁰³ ILC, 'Fragmentation of International Law' (2006) (n 146), 204; Gaja, 'Protection of General Interests' (n 24), 55; Pellet, 'Conclusions' (n 302), 418; Tams, *Enforcing Obligations Erga Omnes* (n 109), 146 noting Paulus, *Die internationale Gemeinschaft im Völkerrecht* (n 238), 413–5; Gaja Giorgio, 'Jus Cogens Beyond the Vienna Convention' (1981) 172 *Recueil des Cours de l'Académie de Droit International* 271, 281; Meron, 'Hierarchy of International Human Rights' (n 227), 11; Pellet Alain, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 *European Journal of International Law* 425, 429; Kadelbach Stefan, *Zwingendes Völkerrecht* (Duncker & Humblot, 1992), 32–3; Günther, *Die Klagebefugnis der Staaten in internationalen Streitbeilegungsverfahren* (n 238), 111–4. ILC, 'Fragmentation of International Law' (2006) (n 146), 204; Dupuy, 'Multilateral Dimension of Obligations' (n 163), 1074; Byers, 'Jus Cogens & Erga Omnes' (n 146), 237; Orakhelashvili, *Peremptory Norms* (n 151), 268; Proukaki, *Problem of Enforcement* (n 79), 33; Rosenne Shabtai, 'Decisions of the International Court of Justice & the New Law of State Responsibility' in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 304; Sicilianos, 'Classification of Obligations' (n 149), 1137; Villalpando, *La communauté internationale* (n 8), 84.

³⁰⁴ Tladi, 'Third Report on Peremptory Norms' (2018) (n 292), 40–1; Bradley, 'Obligations Erga Omnes' (n 152), 215; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 48; de Wet Erika, 'Jus Cogens & Obligations Erga Omnes' in Shelton Dinah (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2013), 555; Kadelbach, 'Identification of Fundamental Norms' (n 288), 27.

³⁰⁵ ILC, 'Fragmentation of International Law' (2006) (n 146), 205; Dupuy Pierre-Marie, Le Moli Ginevra, & Viñuales Jorge, 'Customary International Law & the Environment' in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021), 393; Birnie Patricia, Boyle Alan, & Redgewell Catherine, *International Law & the Environment* (3rd edn, Oxford University Press 2007), 109–10.

³⁰⁶ Note that this can logically be represented as: all norms, n, that are peremptory, P, also impose duties that are owed erga omnes, E. That is, $\forall n ([n \in P] \Rightarrow [n \in E])$. Thus, $P \subseteq E$. Further, it may be said that $P \Rightarrow E$ but not $E \Rightarrow P$.

³⁰⁷ Gaja, 'Obligations Erga Omnes, International Crimes & Jus Cogens' (n 267), 156; Sicilianos, 'Classification of Obligations' (n 149), 1137; ILC, 'Summary Records of the 50th Session' (1998) I YbILC 1, 104; ILC, 'Report on the Work of the 71st Session' (2019) UN Doc A/74/10, 191; Tladi, 'Third Report on Peremptory Norms' (2018) (n 292), 41. See UNGA, 'Topical Summary of the Discussion of the Sixth Committee, 55th Session' (15 February 2001) UN Doc A/CN.4/513, 21; ILC, 'Comments & Observations of Governments' (2022) (n 226), 80 (Italy); UNGA, Sixth Committee, 'Summary Record of the 74th Session, 26th Meeting' (2019) (n 295), 11 (Estonia).

³⁰⁸ ILC, 'Report on the Work of the 71st Session' (2019) (n 307), 191; Bassiouni, 'Jus Cogens & Obligations Erga Omnes' (n 288), 73. See Toufayan, 'Reacting to Serious Breaches of Obligations' (n 147), 207.

the two concepts in its 2001 Draft Articles,³⁰⁹ and explicitly asserted in its 2022 Draft Conclusion 17 that ‘peremptory norms of [...] give rise to [duties] owed [*erga omnes*].’³¹⁰ Yet, states’ reactions to this conclusion were divergent. Some states supported this claim.³¹¹ Others suggested that it needs more clarification or evidence.³¹² Still, a few have expressly voiced their opposition to this conclusion.³¹³

Again, it is submitted that the recourse to deduction leads to problems.³¹⁴ This attributes effects to peremptory norms solely due to the character of the interests they protect or the commonality of states’ interests in these norms. However, as discussed in *Chapter 1*, these are not ‘trump cards’ that justify the attribution of consequences to norms without a basis in a positive rule of law.³¹⁵ This includes a norms’ *erga omnes* status. As stressed above, the states’ competence to implement duties owed *erga omnes* is ‘by no means the logical conclusion to be necessarily drawn’ from their importance or the commonality of states’ interests in their

³⁰⁹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 111–2; Crawford, ‘Third Report on State Responsibility’ (2000) (n 6), 49 (‘They are thus virtually coextensive with peremptory obligations [...] For if a particular [norm] can be set aside or displaced as between two states, it is hard to see how that [duty] is owed to the international community as a whole’); 99 (‘It may be inferred that the content of those [duties] is largely coextensive with the content of the peremptory norms’); Crawford, ‘Multilateral Rights & Obligations’ (n 13), 473 (‘The discarded notion of “international crime” has been broken down into a number of distinct components, more closely related to the twin concepts of peremptory norms and [duties owed] to the international community as a whole, which have always provided its legal [...] underpinnings’). See although referring to the deleted 1976 Draft Article 18/1996 Draft Article 19 ILC, ‘Report on the Work of the 28th Session’ (1976) II(2) YbILC 3, 102; ILC, ‘Summary Records of the 36th Session’ (1984) I YbILC 1, 262; ILC, ‘Report on the Work of the 48th Session: State Responsibility’ (1996) (n 98), 109, 112.

³¹⁰ Tladi, ‘Fifth Report on Peremptory Norms’ (2022) (n 235), 52.

³¹¹ See UNGA, Sixth Committee, ‘Summary Record of the 74th Session, 26th Meeting’ (2019) (n 295), 10 (Armenia), 11 (Estonia); ILC, ‘Comments & Observations of Governments’ (2022) (n 226), 80 (Italy), 82 (Switzerland); Tladi, ‘Fifth Report on Peremptory Norms’ (2022) (n 235), 52 (France, Spain, & Switzerland); Tladi Dire, ‘Fourth Report on Peremptory Norms’ (31 January 2019) UN Doc A/CN.4/727, 5.

³¹² See UNGA, Sixth Committee, ‘Summary Record of the 74th Session, 24th Meeting’ (29 October 2019) UN Doc A/C.6/74/SR.24, 14 (US); UNGA, Sixth Committee, ‘Summary Record of the 74th Session, 25th Meeting’ (30 October 2019) UN Doc A/C.6/74/SR.25, 4 (Cuba); UNGA, Sixth Committee, ‘Summary Record of the 73rd Session, 26th Meeting’ (26 October 2018) UN Doc A/C.6/73/SR.26, 8 (Slovakia), 16 (Portugal); UNGA, Sixth Committee, ‘Summary Record of the 74th Session, 27th Meeting’ (31 October 2019) UN Doc A/C.6/74/SR.27, 9 (Cameroon); ILC, ‘Comments & Observations of Governments’ (2022) (n 226), 80 (Japan), 81 (Russia & Spain); Tladi, ‘Fifth Report on Peremptory Norms’ (2022) (n 235), 53 (Japan).

³¹³ See ILC, ‘Comments & Observations of Governments’ (2022) (n 226), 82 (US: ‘The commentary should therefore be adjusted to make clear that the [2001 Draft Articles] are not necessarily the “rules” referenced in Draft Conclusion 17, as they [...] have not yet become subject to state agreement’). See also UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 13th Meeting’ (31 October 2001) UN Doc A/C.6/56/SR.13, 5 (Israel: ‘Not convinced [...] that *jus cogens* [norms] coincided with the norms [that impose duties owed *erga omnes*]’), 7 (Poland).

³¹⁴ See Bassiouni, ‘Jus Cogens & Obligations Erga Omnes’ (n 288), 72; Picone, ‘Jus Cogens & Obligations Erga Omnes’ (n 121), 412.

³¹⁵ Vidmar, ‘Community Interest in a State Centric Legal System’ (n 220), 116; Kolb Robert, ‘Peremptory Norms as a Legal Technique rather than Substantive Super-Norms’ in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 38.

protection.³¹⁶ They may be factors for the attribution of *erga omnes* status but they are not determinative.³¹⁷ It is the acceptance and recognition of states that afford the general competence to implement the wrongful state's responsibility.³¹⁸ Thus, the fact that peremptory norms protect important values to which every state has an interest does not *per se* mean that the norm imposes duties owed *erga omnes* and *vice versa*.

As to the claim based on implication, it is recognised that all known examples of peremptory norms are also duties owed *erga omnes*. Yet stress must be laid on 'all known'. Granted that all known peremptory norms also impose duties owed *erga omnes*. However, to say that all peremptory norms, even those yet to be recognised, will also impose duties owed *erga omnes* may be a hasty generalisation that prejudices future examples of peremptory norms and duties owed *erga omnes*.³¹⁹ The relation between the two is better described as a correlation rather than an implication. A norm's *erga omnes* character is not a consequence of its peremptory status.³²⁰ Instead, norms deemed peremptory also tend to be acknowledged to impose duties owed *erga omnes*.³²¹

States, in attributing peremptory and *erga omnes* effects to norms, may indeed be motivated by similar factors. Yet, this does not mean that when states agree that a norm permits no derogations, they also agree that the duties the norm imposes are owed *erga omnes*.³²² As may

³¹⁶ Hillgruber, 'Third States & Countermeasures' (n 14), 271; Voefray, *L'actio popularis* (n 121), 223–4 ('Le caractère *erga omnes* d'une obligation internationale découle [...] non de l'importance intrinsèque de l'intérêt protégé'); De Jesús, 'Obligations Erga Omnes' (n 6), 189–90.

³¹⁷ Linderfalk, 'Legal Hierarchy Revisited' (n 142), 10; Hillgruber, 'Third States & Countermeasures' (n 14), 272. See Weil, 'Towards Relative Normativity' (n 134), 430 ('There is a growing tendency [...] to consider that peremptory norms [grant] standing [to every state] to call for those [duties] to be fulfilled and to assert [another's] responsibility').

³¹⁸ Hillgruber, 'Third States & Countermeasures' (n 14), 271–2; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 9), 37. See also *Application of the Genocide Convention* [2022] (n 126) (Xue, dissenting), 6.

³¹⁹ Tanaka, 'Consequences of Obligations Erga Omnes' (n 161), 11 ('As a consequence, an attempt to identify [duties owed *erga omnes*] by reference to *jus cogens* may entail the risk of explaining the unknown by means of the more unknown (*ignotum per ignotius*) [...] Therefore, it is difficult to consider that [duties owed] *erga omnes* can be properly identified on the basis of the concept of *jus cogens*'). But note that Tanaka nevertheless claims that '*jus cogens* norms derive from the matrix of [duties owed] *erga omnes*, but not the reverse situation'.

³²⁰ See Picone, 'Jus Cogens & Obligations Erga Omnes' (n 121), 418 ('Not set out as an independent and additional sanction opposable only to "international crimes"'). Contra Bassiouni, 'Jus Cogens & Obligations Erga Omnes' (n 288), 73 ('*Erga omnes* [status] [...] is a consequence of a [norm] having risen to the level of *jus cogens*'); Voefray, *L'actio popularis* (n 121), 233 ('La restriction à la liberté contractuelle des Etats qu'incarne le *jus cogens* n'est compréhensible qu'au motif de protéger des intérêts collectifs, donc parce que les normes en cause instituent des obligations *erga omnes*').

³²¹ See Henry Etienne, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law' (2017) 18 *Melbourne Journal of International Law* 1, 18 ('Often [...] not necessarily always [...] the *erga omnes* character of the rights and [duties] flowing from a customary rule coincides with [its] peremptory character').

³²² Note Kolb, *Peremptory International Law* (n 248), 108 ('The possible or actual effects of *jus cogens* have

be observed from the discussions above and in the previous chapter, the two differ in their process of formation. For peremptory norms, the interest that the norm protects is fundamentally important to the community. Thus, states deem it desirable and appropriate that no derogations from the norm be permitted and that no modification of the norm be allowed except by a subsequent peremptory norm.³²³ For norms that impose duties owed *erga omnes*, the interest that they safeguard is also fundamentally important to the community. Accordingly, states deem it desirable and appropriate that all states possess the competence to implement the duty that the norm imposes.³²⁴

CHAPTER CONCLUSION

This chapter analysed the concept of implementation which is the primary subject of this thesis. It discussed the means by which states unilaterally implement responsibility. This may be via actions of a ‘relatively formal character’ such as the invocation of responsibility through judicial dispute resolution. This also be done through ‘extra-judicial’ enforcement measures in the form of retorsions or countermeasures.

Next, it examined the competence of states to implement responsibility. Implementation requires a ‘sufficient link’ between the implementing and the wrongful state. That is, there must be a legal relation between them. Under the ‘traditional view’, these relations are considered synallagmatic—there is an exact correlation between one’s right and another’s duty. The right’s infringement right or ‘injury’ entitles the state to implement the duty borne by the wrongful state. Conversely, if a state’s right or legally protected interest has not been infringed, then it does not have the prerogative to implement another’s responsibility.

However, recognition of collective interests and norms challenged this view. Thus, the non-synallagmatic view became the predominant approach toward the implementation of collective norms. In its communitarian conception, duties owed *erga omnes* are considered owed to a group of states or to the international community. A state seeking to implement a duty does not rely on its subjective right. It does not possess any as it is the collective that is the duty’s intended beneficiary. Rather, it relies on its legal interest as a member of the collective to see

exploded in all directions [...] like a seminal Big Bang’); Kolb, *Theory of International Law* (n 216), 326 (‘These [...] have often gone well beyond what is actually borne out by practice’); Kawasaki Kyoji, ‘A Brief Note on the Legal Effects of Jus Cogens in International Law’ (2006) 34 *Hitobashi Journal of Law & Politics* 27, 28.

³²³ Linderfalk, ‘Creation of Jus Cogens’ (n 259), 377.

³²⁴ Byers, ‘Jus Cogens & Erga Omnes’ (n 146), 233; Bradley, ‘Obligations Erga Omnes’ (n 152), 203; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 113), 140. See Hillgruber, ‘Third States & Countermeasures’ (n 14), 270. Compare Voeffray, *L’actio popularis* (n 121), 223 (‘C’est à la communauté internationale de décider si elle veut conférer à une obligation erga omnes un caractère indérogeable’).

the duty imposed by the collective norm fulfilled or observed. This chapter also noted that this view is primarily based on two premises which would be further examined in *Chapters 10* and *11*—the existence of a community to whom duties may be owed and on whose behalf rights may be enforced and the apparent limitations of the synallagmatic view. ■

CHAPTER 3: IMPLEMENTATION OF STATE RESPONSIBILITY BY ‘STATES OTHER THAN AN INJURED STATE’ UNDER THE 2001 DRAFT ARTICLES

After discussing the concept of duties owed *erga omnes*, attention now turns to how the ILC accommodated this concept in its 2001 Draft Articles. This chapter examines the Commission’s view of the legal relations created by collective norms, its development of rules to reflect this view, and states’ responses to the ILC’s conclusions. Of particular interest is Part III of the 2001 Draft Articles which identifies the state that has the competence to implement the wrongful state’s responsibility which may be in the form of invocation through ‘measures of a relatively formal character’ including judicial dispute resolution,¹ or enforcement measures such as countermeasures.²

I. VIEWS DURING THE EARLY & MIDDLE STAGES OF DRAFTING

A. Under García-Amador

The divide between the synallagmatic and non-synallagmatic approaches permeated much of the 2001 Draft Articles’ history.³ For instance, its first Special Rapporteur, García-Amador (1956–68), viewed legal relations as synallagmatic—one that existed between the wrongful state and the ‘injured’ state.⁴ This viewpoint, however, was the necessary result of his attempt to limit the codification’s scope. For García-Amador, international responsibility was so vast that efforts to codify it had to begin with the narrower topic of diplomatic protection which was considered synallagmatic.⁵

García-Amador’s limited focus was problematic for some of the ILC’s members who considered it outmoded.⁶ Furthermore, several states, ‘particularly [...] socialist and third world countries’, also urged the Commission to focus on ‘breaches of the most important [...] international law [duties]’.⁷ To this end, his successor, Special Rapporteur Ago (1969–80),

¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) II(2) YbILC 20, 117.

² Ibid, 128 ff; Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 675.

³ See Spinedi Marina, ‘From One Codification to Another: Bilateralism & Multilateralism in the Codification of the Law of Treaties & the Law of State Responsibility’ (2002) 13(5) *European Journal of International Law* 1099, 1101; Crawford, *State Responsibility* (n 2), 367.

⁴ García Amador Francisco, ‘First Report on State Responsibility’ (1956) II YbILC 174, 180 (‘The legal content of [...] responsibility [...] was regarded as a consequence of the breach or non-performance of [duty], the state being then under a “duty to make reparation” for the injury [caused]’).

⁵ Ibid, 176 citing *Mavrommatis Palestine Concessions* (Greece v Britain) (Judgment) [1925] PCIJ Ser A No 5, 12; *Payment of Various Serbian Loans* (France v Serb-Croat-Slovene State) (Judgment) [1929] PCIJ Ser A No 20, 17; *Panevezys-Saldutiskis Railway* (Estonia v Lithuania) (Judgment) [1939] PCIJ Ser A/B No 76, 16.

⁶ Crawford James, *International Law Commission’s Articles on State Responsibility* (Cambridge University Press 2002), 1–2. See ILC, ‘Summary Records of the 9th Session’ (1957) I YbILC 1, 154–72, 246.

⁷ Spinedi, ‘From One Codification to Another’ (n 3), 1109.

shifted the emphasis away from diplomatic protection. Ago stressed that ILC should not focus on ‘primary’ rules which impose substantive duties. Instead, it should be on the ‘general rules governing [states’] [...] responsibility’ deemed as ‘secondary’ rules.⁸ What Ago envisioned were rules not limited to diplomatic protection but applicable to all fields of international law.⁹ Thus, he reframed the project’s structure by separating the issues concerning the responsibility’s content, the wrongful acts’ consequences, and the concept of implementation.¹⁰ This structure had far-reaching consequences to the extent that it was the one finally adopted by the ILC.¹¹ As noted in the previous chapter, Part I of the 2001 Draft Articles is concerned with the responsibility’s content while Parts II and III deal with the wrongful acts’ consequences and implementation respectively.

B. Ago & Synallagmatic Relations

Ago, like García-Amador, viewed all legal relations as synallagmatic. In his 1970 report, he asserted that the ‘correlation between a [duty] and a subjective right [...] admits no exception’,¹² and that ‘there are certainly no [duties] [of] a subject which are not matched by [another’s] [...] right’.¹³ This, of course, was not surprising. As discussed in *Chapter 2*, this was the prevailing view at the time.¹⁴ Anzilotti, whose work Ago heavily relied upon,¹⁵ also theorised that state responsibility was based ‘precisely on the paradigm of [synallagmatic] relations’.¹⁶ He did not deny the existence of collective interests.¹⁷ He agreed that states have an interest in the respect for the law as a normative system of rules.¹⁸ Yet, for Anzilotti, only the subjective right’s violation provided a state with the competence to implement another’s

⁸ Ago Roberto, ‘First Report on State Responsibility’ (1969) II(1) YbILC 125, 139

⁹ Ibid, 141; ILC, ‘Report on the Work of the 15th Session’ (1963) II YbILC 187, 228.

¹⁰ Ago Roberto, ‘Second Report on State Responsibility’ (1970) II(1) YbILC 177, 178.

¹¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 31.

¹² Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 192–3.

¹³ Ibid, 193.

¹⁴ See Nolte Georg, ‘From Anzilotti to Ago: Classical International Law of State Responsibility & Traditional Primacy of a Bilateral Conception of Inter-state Relations’ (2002) 13(5) *European Journal of International Law* 1083, 1086 citing Halleck Henry, *International Law* (D. Van Nostrand 1861), 309; de Martens George Friedrich, *Précis du droit des gens moderne de l’Europe*, vol 2 (2nd edn, Vergé 1864), 198; Heilborn Paul, *Das System des Völkerrechts* (Springer 1896), 352.

¹⁵ See e.g. Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 179, 180–1, 185, 187, 189, 192–3.

¹⁶ Crawford James, ‘Multilateral Rights & Obligations in International Law’ (2006) 319 *Recueil des Cours de l’Académie de Droit International* 325, 435; Dupuy Pierre-Marie, ‘Le fait générateur de la responsabilité internationale des Etat’ (1984) 188 *Recueil des Cours de l’Académie de Droit International* 9, 29–33.

¹⁷ Dupuy Pierre-Marie, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations & Codification of the Law of Responsibility’ (2002) 13(5) *European Journal of International Law* 1053, 1056–7.

¹⁸ Ibid, 1057.

responsibility.¹⁹

Yet, the ILC was also mindful of recent developments in international law. It emphasised that it must not only ‘codify already established [...] norms’ but also ‘incorporate concepts’ towards international law’s progressive development.²⁰ Indeed, during the VCLT’s formation as observed in *Chapter 1*, there was the idea that states, without direct effect, may suspend or terminate the operation of agreements. There was also the distinction between ‘ordinary’ and ‘fundamental’ rules that permit no derogation that gave rise to peremptory norms. The Commission took notice of these developments and introduced the concept of international crimes in its work on state responsibility.²¹ This concept was crafted with the aim of imposing additional duties upon states not directly affected by certain wrongful acts. Furthermore, *Barcelona Traction* also opened the question of whether states, in the absence of direct effect, may implement responsibility.²² Indeed, Ago noted in his 1970 report the scholars’ ‘growing tendency’ to recognise ‘certain kinds of [wrongful] acts’ that are ‘so grave and so injurious’ that a ‘state committing them [must] be [...] held responsible to all states’.²³

Yet, Ago maintained that all relations remained synallagmatic.²⁴ For him, international

¹⁹ Nolte, ‘Classical Law of State Responsibility’ (n 14), 1087 citing Anzilotti Dionisio, *Teoria Generale della Responsabilità dello Stato nel diritto Internazionale*, Lumachi Florence (ed) (Firenze 1902), 89 ff. See Dupuy Pierre-Marie, ‘Dionisio Anzilotti & the Law of International Responsibility of State’ (1992) 3 *European Journal of International Law* 139, 145 citing Anzilotti Dionisio, ‘La responsabilité internationale des états à raison des dommages soufferts par des étrangers’ (1906) 13 *Revue générale de droit international public* 5, 13.

²⁰ Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 55; Craven Matthew, ‘For the ‘Common Good’: Rights & Interests in the Law of State Responsibility’ in Fitzmaurice Malgosia & Sarooshi Dan (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart 2004), 105. See ILC, ‘Report on the Work of the 15th Session’ (1963) (n 9), 188; ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 5; García Amador, ‘First Report on State Responsibility’ (1956) (n 4), 176 (‘[It is] necessary to [...] adapt traditional law so that it will reflect the transformation which has occurred [...] [and to bring the] ‘principles [on] responsibility [in] line with [the] law at its present stage of development’). See also *Establishment of an International Law Commission* Res 174(II) UNGA (21 November 1947) UN Doc A/RES/174(II).

²¹ Ago Roberto, ‘Fifth Report on State Responsibility’ (1976) II(1) YbILC 3, 26, 28–9.

²² See also discussions within the ILC prior to *Barcelona Traction*: Spinedi, ‘From One Codification to Another’ (n 3), 1110–2 citing ILC, ‘Summary Records of the 19th Session’ (1967) I YbILC 1, 225–8; ILC, ‘Summary Records of the 21st Session’ (1969) I YbILC 1, 112, 233, 241.

²³ Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 184 (‘Ideas of this kind may be worth studying [...] for the writers concerned do not always seem to be quite clear whether [...] it would be a relationship with states *uti singuli* or with states as members of an [...] organisation which would alone be competent to decide on the action to be taken’). See ILC, ‘Summary Records of the 36th Session’ (1984) I YbILC 1, 277 (Ushakov: ‘In [cases of aggression] [...], the responsibility of the author state towards the international community as a whole [is] entailed since, when a breach of international order [occurs], it [is] the international community that was regarded as the injured party’).

²⁴ See for the discussion within the ILC: Spinedi, ‘From One Codification to Another’ (n 3), 1115–8 citing ILC, ‘Summary Records of the 22nd Session’ (1970) I YbILC 1, 175–92, 209–27; ILC, ‘Summary Records of the 25th Session’ (1973) I YbILC 1, 5–17; ILC, ‘Summary Records of the 28th Session’ (1976) I YbILC 1, 55–91, 239–53.

crimes only widened the circle of states affected in their rights. The ‘responsibility flowing from the breach of [these] duties’, Ago argued, ‘is entailed not only [as to] [...] the [breach’s] direct victim’ but also the international community.²⁵ This allows every state, ‘even if not immediately and directly affected by the breach’, to implement the wrongful state’s responsibility.²⁶ Simply, it is as if their ‘individual rights were infringed by the international [crime’s] commission’.²⁷ In part, this may be attributed to his reluctance to recognise the existence of a community to whom duties may be owed and on whose behalf rights may be implemented. Ago stressed that the ‘idea [of] [...] a legal relation between the [wrongful] state and the international community [...] just as municipal law creates a relation between the person committing an offence and the state itself’ must be ‘ruled out’.²⁸ For Ago, ‘international law can have no such effect’ as ‘it does not recognise the [community’s] personification’.²⁹

Ago also cautioned against states’ general competence to resort to countermeasures which he referred to in his 1979 report as ‘sanctions’.³⁰ In 1979 Draft Article 30 (1985 Draft Article 22/1996 Draft Article 47), he suggested that wrongfulness of measures imposed in response to a wrongful act is precluded if they are ‘countermeasures taken against the [wrongful] state’.³¹ However, while Ago recognised the competence of states that have not been directly affected by the breach to implement the wrongful state’s responsibility, he doubted if this prerogative included the resort to countermeasures. For Ago, the states’ general competence to ‘take punitive measures against the [wrongful] state’ involved inherent risks.³² He stressed that this

²⁵ Ago, ‘Fifth Report on State Responsibility’ (1976) (n 21), 29.

²⁶ Ibid.

²⁷ ILC, ‘Report on the Work of the 37th Session’ (1985) II(2) YbILC 19, 27.

²⁸ Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 184

²⁹ Ibid. See Ago Roberto, ‘Third Report on State Responsibility’ (1971) II(1) YbILC 199, 211 (‘These views are of particular interest, inasmuch as they reveal a trend towards incipient personification of the [...] community and are a factor which will make it possible gradually to outline a concept of “crime” in international law’), 203 (‘Later, it will be for the Commission to say whether such relationships may arise between that state and the injured state or [...] possibly even with the international community as a whole’). Compare Ago Roberto, ‘Obligations Erga Omnes & Community’ in Weiler Joseph, *et al.* (eds), *International Crimes of State: Critical Analysis of the ILC’s Draft Article 19* (1989), 237 (‘We then began to see the emergence of [...] [an] international community, distinct from its members who have rights and obligations, is able to enter into legal relationships with its members’).

³⁰ Ago Roberto, ‘Eighth Report on State Responsibility’ (1979) II(1) YbILC 3, 43, 47.

³¹ Ibid, 47 (‘[Draft Article 30]: The wrongfulness of an act of a state not in conformity with [a duty] of that state towards another state is precluded if the act constitutes a measure legitimate under international law against that other state, in consequence of an internationally wrongful act of that other state’).

³² Ibid. See states that affirmed Ago’s view: UNGA, Sixth Committee, ‘Summary Record of the 31st Session, 18th Meeting’ (15 October 1976) UN Doc A/C.6/31/SR.18, 14 (Finland); UNGA, Sixth Committee, ‘Summary Record of the 31st Session, 21st Meeting’ (19 October 1976) UN Doc A/C.6/31/SR.21, 3 (Japan); UNGA, Committee Sixth, ‘Summary Record of the 34th Session, 45th Meeting’ (20 November 1979) UN Doc

required ‘universal solidarity in dealing with the most serious assaults on international order’.³³ Thus, he argued that attention should instead be turned to ‘seeking a more structured organisation’ for ‘determining the [breach’s] existence’ and for ‘deciding what measures should be taken’.³⁴

C. Riphagen & the Definition of an ‘Injured State’

As noted in *Chapter 1*, Ago’s departure from the ILC prevented him from developing the consequences of breaches of duties including those deemed international crimes.³⁵ This task fell upon his successors, Special Rapporteurs Riphagen (1980–86) and Arangio-Ruiz (1988–96). For his part, Riphagen noted there are two ways for states to respond to wrongful acts—collective reactions within organisations and unilaterally by one or more states.³⁶ As for unilateral responses to wrongful acts, he developed the definition of an ‘injured state’ in his 1984 report which the ILC adopted as 1985 Draft Article 5 (1996 Draft Article 40).³⁷ This

A/C.6/34/SR.45, 6–7 (Brazil); UNGA, Committee Sixth, ‘Summary Record of the 34th Session, 49th Meeting’ (23 November 1979) UN Doc A/C.6/34/SR.49, 7–8 (Trinidad & Tobago); UNGA, Sixth Committee, ‘Summary Record of the 36th Session, 48th Meeting’ (12 November 1981) UN Doc A/C.6/36/SR.4, 4–5 (Finland). *But see* other states that disagreed: UNGA, Sixth Committee, ‘Summary Record of the 31st Session, 22nd Meeting’ (20 October 1976) UN Doc A/C.6/31/SR.22, 3–4 (The Netherlands); UNGA, Sixth Committee, ‘Summary Record of the 31st Session, 30th Meeting’ (1976) UN Doc A/C.6/31/SR.30, 8 (Indonesia); UNGA, Sixth Committee, ‘Summary Record of the 35th Session, 45th Meeting’ (14 November 1986) UN Doc A/C.6/35/SR.45, 3–4 (Germany, FR).

³³ Ago, ‘Eighth Report on State Responsibility’ (1979) (n 30), 43.

³⁴ *Ibid* (‘Under the [...] Charter, those responsibilities are vested in the competent organs of the Organisation’); Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 262 (‘The action of the community is, to be sure, carried out first and foremost through the action of the members of the state organisation proper; but to this action must be added that of the machinery of all the other institutions belonging to the same complex’). *See also* ILC, ‘Report on the Work of the 31st Session’ (1979) II(2) YbILC 1, 118–9.

³⁵ Klein Pierre, ‘Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law’ (2002) 13 *European Journal of International Law* 1241, 1244.

³⁶ Riphagen Willem, ‘First Report on State Responsibility’ (1980) II(1) YbILC 107, 123.

³⁷ Riphagen Willem, ‘Fifth Report on State Responsibility’ (1984) II(1) YbILC 1, 3 (‘[Draft Article 5] 1. [An] ‘injured state’ [is the] state a right of which is infringed by the act of another, if that act constitutes, [...] an internationally wrongful act of that state [...] 2. In particular, ‘injured state’ means: (a) if the right infringed by the act of a state arises from a bilateral treaty, the other state party to the treaty; (b) if the right infringed by the act of a state arises from a judgment [...] of an international court or tribunal, the other state or states parties to the dispute and entitled to benefit of that right; (c) if the right infringed by the act of a state arises from a binding decision of an international organ [...], the state or states which [...] are entitled to the benefit of that right; (d) if the right infringed by the act of a state arises from a treaty provision for a third state, that third state; (e) if the right infringed by the act of a state arises from a multilateral treaty or from a rule of customary international law, any other state party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that: (i) the [duty] was stipulated in its favour; or (ii) the breach of the [duty] by one state party necessarily affects the exercise of the rights or the performance of the obligations of all other states parties; or (iii) the [duty] was stipulated for the protection of collective interests of the states parties; or (iv) the [duty] was stipulated for the protection of individual persons, irrespective of their nationality; (f) If the right infringed by the act of a state arises from a multilateral treaty, any other state party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the states parties thereto. [...] 3. In addition, ‘injured state’ means, if the [...] wrongful act constitutes an international crime, all other states’).

identifies the state that has the competence to implement the wrongful state's responsibility.³⁸ It also performs a crucial role in the regime of state responsibility as it operationalises implementation.³⁹ It connects Part I of the Draft Articles which deals with the concept of a wrongful act and the defences available to states with Part II which deals with the wrongful acts' consequences.⁴⁰ In other words, 1985 Draft Article 5/1996 Draft Article 40, by defining which states have the competence to implement the wrongful state's responsibility, acts as a 'bridge' between the breach of a duty and its consequences.⁴¹

Compared to Ago, Riphagen was more open to the idea of an 'international community'.⁴² Yet, he still shared Ago's synallagmatic view and defined an 'injured state' as 'any state [whose] right [was] infringed by [another's] act'.⁴³ Indeed, he stressed in his 1985 report that 'to each and every [duty] corresponds *per definitionem* a right of at least one [...] state'.⁴⁴ Based on this definition, Riphagen provided examples, although not exhaustive, of 'injured states'.⁴⁵ 1985 Draft Article 5/1996 Draft Article 40 paragraphs (2)(a) to (e) provided that when it comes to bilateral relations, whether arising from a bilateral treaty, an international court's judgement, an international organ's binding decision, or a stipulation *pour autrui*, the 'injured state' is the state to whom the duty breached is owed.⁴⁶ For multilateral rules which involve several states, paragraph (2)(e)(i) provided that the 'injured state' is any state which has a 'right that has been created or is established in its favour'.⁴⁷ Adopting the VCLT's concept of interdependent

³⁸ ILC, 'Report on the Work of the 37th Session' (1985) (n 27), 25.

³⁹ Ibid, 102, 107, 113.

⁴⁰ ILC, 'Report on the Work of the 48th Session' (1996) II(2) YbILC 57, 53–4, 58–62

⁴¹ Sicilianos Linos-Alexander, 'Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility' (2002) 13(5) *European Journal of International Law* 1127, 1132; Crawford, 'Multilateral Rights & Obligations' (n 16), 433.

⁴² See Riphagen Willem, 'Sixth Report on State Responsibility' (1986) II(1) YbILC 1, 15 ('This holds true even where a state is injured only in its capacity [...] as a member of the international community of states as a whole'). See Riphagen Willem, 'Second Report on State Responsibility' (1981) II(1) YbILC 79, 82; Riphagen Willem, 'Third Report on State Responsibility' (1982) II(1) YbILC 22, 39.

⁴³ Riphagen, 'Fifth Report on State Responsibility' (1984) (n 37), 3. See Riphagen, 'First Report on State Responsibility' (1980) (n 36), 113, 114, 119; Riphagen, 'Third Report on State Responsibility' (1982) (n 42), 25, 27; Riphagen Willem, 'Fourth Report on State Responsibility' (1983) II(1) YbILC 1, 13, 14–5, 21.

⁴⁴ ILC, 'Report on the Work of the 37th Session' (1985) (n 27), 25–6. See ILC, 'Summary Records of the 37th Session' (1985) I YbILC 1, 89, 90; Riphagen, 'Third Report on State Responsibility' (1982) (n 42), 38 ('[Grotius'] statement 'that kings [...] have the right [to demand] punishments [...] [for] injuries which [...] violate the law of nature or of nations [...] to any persons whatsoever be accepted without qualification as a description of present-day [...] law').

⁴⁵ Sicilianos, 'Classification of Obligations' (n 41), 1132, 1138.

⁴⁶ Riphagen, 'Fifth Report on State Responsibility' (1984) (n 37), 3.

⁴⁷ ILC, 'Report on the Work of the 37th Session' (1985) (n 27), 26–7 ('Customary law recognises that the sovereign equality of states entails certain [duties] the breach of which in a particular case in the first instance

obligations, paragraph (2)(e)(ii) referred to the 'injured state' as 'any state' affected in 'the enjoyment of [its] rights or the performance of [its duties]'.⁴⁸ Employing the VCLT's concept of absolute obligations, paragraph (2)(e)(iii) defined the 'injured state' as a state that has a right arising from norms for the 'protection of human rights and fundamental freedoms'.⁴⁹ For multilateral treaties 'expressly stipulated [...] the protection of the [parties'] collective interests', paragraph (2)(f) stated that the 'injured state' is 'any other [...] party to the multilateral treaty' provided that 'the right has been expressly stipulated'.⁵⁰ Finally, for international crimes, every state, under paragraph (3), is 'injured'.⁵¹ For Riphagen, this is because international crimes infringe on the 'fundamental interests' of the 'international as a whole'.⁵² In the alternative, following the synallagmatic approach, it may be because every state's correlative right is infringed by another's breach of duty.⁵³

Riphagen also dealt with the issue of distinction among 'injured states' based on the degree to which they were affected by the breach.⁵⁴ For some states and scholars, a distinction had to

"injures" only the state whose rights are thereby infringed [...] The same applies in the case of certain multilateral treaties")

⁴⁸ Ibid, 26–7 ('[This] deals with a situation of fact recognised [...] in the [VCLT] in so far as multilateral treaties are concerned (see e.g. [...] article 60, paragraph 2 (c))'); Riphagen, 'Sixth Report on State Responsibility' (1986) (n 42), 8 ('One may safely assume that all other states parties are directly affected by the breach and are injured states').

⁴⁹ ILC, 'Report on the Work of the 37th Session' (1985) (n 27), 27 ('The interests protected [...] are not allocatable to a particular state. Hence, the necessity to consider [...] every other party to the multilateral convention, or bound by the relevant rule of customary law, as an injured state'); Riphagen, 'Sixth Report on State Responsibility' (1986) (n 42), 7.

⁵⁰ ILC, 'Report on the Work of the 37th Session' (1985) (n 27), 27 ('Parties to a multilateral treaty may agree to consider a breach of [a duty], imposed by such treaty, as infringing a collective interest of all [...] parties'); Riphagen, 'Sixth Report on State Responsibility' (1986) (n 42), 8 ('A breach of such [a duty] injures the collectivity of [...] parties rather than [...] individual states [...] It may be that the same multilateral treaty contains [...] rules, which organise the way in which the [...] protection of such collective interests are ensured [...] in the absence of particular rules in the multilateral treaty which "translate" the recognised collectivity of interests into rules of "action" in defence of such interests, one can only assume that each [...] party [...] is injured by a breach of [duties] imposed by the treaty').

⁵¹ ILC, 'Report on the Work of the 37th Session' (1985) (n 27), 27 ('All states other than the author state are to be considered "injured states"'); Riphagen, 'Sixth Report on State Responsibility' (1986) (n 42), 7 ('[The] "international community as a whole", while recognising a breach as an international crime, may [...] [also] determine additional special legal consequences [...] [including allowing] every state to require the [wrongful] state to fulfil its [...] [duties].').

⁵² Riphagen, 'Sixth Report on State Responsibility' (1986) (n 42), 8 ('[This] seems to presuppose the recognition of a collective interest of all (other) states.')

⁵³ Ibid, 8 ('The alternative is to consider every other State [...] an injured state.'). See ILC, 'Summary Records of the 36th Session' (1984) (n 23), 305 (Quentin-Baxter); ILC, 'Summary Records of the 37th Session' (1985) (n 44), 50 (Barboza: 'According to article 5(e), the expression "injured state", in the case of an international crime, meant any state suffering injury'), 89 (Riphagen), 310 (Arangio-Ruiz). But see ILC, 'Summary Records of the 36th Session' (1984) (n 23), 277 (Ushakov), 304 (Sinclair); ILC, 'Summary Records of the 37th Session' (1985) (n 44), 310 (Ushakov).

⁵⁴ Riphagen, 'First Report on State Responsibility' (1980) (n 36), 114.

be made between the ‘directly injured’, ‘directly affected’, or ‘specially affected’ states, and the ‘non-directly injured’, ‘indirectly affected’, or ‘non-specially affected’ states.⁵⁵ Particularly, there was the question of whether the latter may demand cessation, restitution, compensation, satisfaction, and guarantees of non-repetition. In his 1980 report, Riphagen stated that ‘obviously an [indirectly affected] state cannot claim [...] [material reparations] since by definition there is no [damage] to its material interest’ and thus all it can demand are ‘guarantee[s] against further breaches’.⁵⁶ Thus, 1985 Draft Article 5 did not distinguish between ‘directly affected’ and ‘indirectly affected’ states.

Despite widening the circle of states entitled to implement the wrongful states’ responsibility,⁵⁷ Riphagen, like Ago, was also wary of the states’ general competence to impose countermeasures. He argued that a ‘state cannot take upon itself the role of “policeman” of the [...] community’.⁵⁸ He also noted the apprehension among states concerning this prerogative. For Riphagen, ‘there is little chance that states [...] will accept’ such a rule ‘without a legal guarantee that they will not be charged’ of ‘having committed an international crime’ and be ‘faced with demands and countermeasures [...] without an independent and authoritative establishment of the facts and the applicable law’.⁵⁹ Thus, while Riphagen proposed in his 1984 report that all injured states are ‘entitled, by way of reprisal’ to ‘suspend the performance of its

⁵⁵ See ILC, ‘Summary Records of the 35th Session’ (1983) I YbILC 1, 130 (Jagota); ILC, ‘Summary Records of the 36th Session’ (1984) (n 23), 277 (Ushakov), 303–4 (Sinclair), 310 (Ogiso), 316 (Balanda); ILC, ‘Summary Records of the 37th Session’ (1985) (n 44), 96 (McCaffrey), 102 (Flitan), 109 (Huang), 127 (Mahiou), 311 (Ogiso), 312 (Lacleta Muños), 314 (Rodrigues); UNGA, Sixth Committee, ‘Summary Record of the 39th Session, 42nd Meeting’ (12 November 1984) UN Doc A/C.6/39/SR.42, 9 (Afghanistan); UNGA, Sixth Committee, ‘Summary Record of the 39th Session, 43rd Meeting’ (13 November 1984) UN Doc A/C.6/39/SR.43, 14 (Romania); UNGA, Sixth Committee, ‘Summary Record of the 39th Session, 45th Meeting’ (14 November 1984) UN Doc A/C.6/39/SR.45, 5 (Germany DR); UNGA, Sixth Committee, ‘Summary Record of the 40th Session, 25th Meeting’ (31 October 1985) UN Doc A/C.6/40/SR.25, 4 (Germany DR); UNGA, Sixth Committee, ‘Summary Record of the 40th Session, 27th Meeting’ (4 November 1985) UN Doc A/C.6/40/SR.27, 6–7 (Bulgaria), 16 (Vietnam); UNGA, Sixth Committee, ‘Summary Record of the 40th Session, 29th Meeting’ (5 November 1985) UN Doc A/C.6/40/SR.29, 5 (Czechoslovakia); UNGA, Committee Sixth, ‘Summary Record of the 40th Session, 31st Meeting’ (7 November 1985) UN Doc A/C.6/40/SR.31, 3 (New Zealand); UNGA, Sixth Committee, ‘Summary Record of the 40th Session, 34th Meeting’ (11 Nov 1985) UN Doc A/C.6/40/SR.34, 12 (France).

⁵⁶ Riphagen, ‘First Report on State Responsibility’ (1980) (n 36), 114. Compare Riphagen, ‘Third Report on State Responsibility’ (1982) (n 42), 47 (‘At this stage, the question whether only the directly injured state or also other states may—or possibly, should—invoke the [duties] of the author state, should not be prejudiced’).

⁵⁷ ILC, ‘Report on the Work of the 37th Session’ (1985) (n 27), 27 (‘While implying that all other states, individually, are entitled to invoke some legal consequences as “injured” States (including in any case the entitlement to require the author state to stop the breach). [However, 1985 Draft Article 5(3)] does not and cannot prejudice the extent of the legal consequences otherwise to be attached to the commission of an international crime’).

⁵⁸ Riphagen, ‘Third Report on State Responsibility’ (1982) (n 42), 45.

⁵⁹ Riphagen, ‘Fourth Report on State Responsibility’ (1983) (n 43), 12–3; Riphagen, ‘Sixth Report on State Responsibility’ (1986) (n 42), 11. See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 38th Session’ (30 January 1984) UN Doc A/CN.4/L.369, 75, 83, 84; UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 39th Session’ (25 January 1985) UN Doc A/CN.4/L.382, 109, 111, 113.

other [duties] towards the [wrongful state]’,⁶⁰ this was subject to safeguards (1985 Draft Articles 10 to 13) that included the exhaustion of ‘international procedures for [the] settlement of disputes’ before resorting to countermeasures.⁶¹ For its part, the ILC adopted Riphagen’s definition of an injured state in 1985 but did not take a position as to his views on countermeasures. The task of developing these provisions fell on Special Rapporteur Arangio-Ruiz.⁶²

D. Under Arangio-Ruiz

Arangio-Ruiz also shared Ago’s view on legal relations,⁶³ and the international community.⁶⁴ Like Riphagen, Arangio-Ruiz claimed that the need for a ‘distinction between directly and non-directly injured states [did] not hold water’.⁶⁵ He asserted that the crucial element of an ‘injured state’ is the infringement of a right ‘whether or not damage has been caused’.⁶⁶ He suggested that despite ‘recent developments’, the ‘traditional view’ of relations based on the correlation between duties and rights remained valid.⁶⁷ In his 1992 report, Arangio-Ruiz submitted, rather correctly as will be further discussed in *Chapter 11*, that even norms that impose duties *erga omnes*, including those that prohibit force, protect human rights, and safeguard the environment, may be represented synallagmatically.⁶⁸ He posited that these

⁶⁰ Riphagen, ‘Fifth Report on State Responsibility’ (1984) (n 37), 3 ([Draft Article 9]: [...] The injured state is entitled, by way of reprisal, to suspend the performance of its other [duties] towards the state which has committed the internationally wrongful act [...] 2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed’). See Sachariew Kamen, ‘State Responsibility for Multilateral Treaty Violations: Identifying the “Injured State” & Its Legal Status’ (1988) 35 *Netherlands International Law Review* 273, 283; Treves Tullio, ‘Articles on State Responsibility and the Settlement of Disputes’ in Ragazzi Maurizio (ed), *International Responsibility Today Essays in Memory of Oscar Schachter* (Nijhoff 2005), 227.

⁶¹ Riphagen, ‘Fifth Report on State Responsibility’ (1984) (n 37), 3–4.

⁶² Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 81.

⁶³ See Arangio-Ruiz Gaetano, ‘Fourth Report on State Responsibility’ (1992) II(1) YbILC 6, 43 (‘An internationally wrongful act constitutes or results in the infringement of a right’); Arangio-Ruiz Gaetano, ‘Second Report on State Responsibility’ (1989) II(1) YbILC 3, 6; Arangio-Ruiz Gaetano, ‘Third Report on State Responsibility’ (1991) II(1) YbILC 1, 27.

⁶⁴ See Arangio-Ruiz Gaetano, ‘Seventh Report on State Responsibility’ (1995) II(1) YbILC 6, 27 7 (‘The rather undefined or ill-defined “international community” [...] is not endowed, and is not likely to be endowed soon, with such institutions as a public prosecutor’); Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 46.

⁶⁵ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 45.

⁶⁶ Ibid, 43. See UNGA, Sixth Committee, ‘Summary Record of the 40th Session, 27th Meeting’ (1985) (n 55), 14

⁶⁷ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 43, 44–6.

⁶⁸ Ibid, 44–5 (‘[Regarding the] rules on the protection of human rights. [...] any violation of its [duties] by state A will constitute a simultaneous infringement of the corresponding right of states B, C, D and E respectively

are characterised by their ‘legal indivisibility’.⁶⁹ They bind ‘simultaneously each and every state [...] with respect to all the others’.⁷⁰ If state S_0 owed an *erga omnes* duty to states S_1 , S_2 , S_3 , (...), S_n , then S_0 ’s breach of this duty constitutes a ‘simultaneous infringement of states [S_1 , S_2 , S_3 , (...), S_n ’s] corresponding rights’.⁷¹ Thus, states [S_1 , S_2 , S_3 , (...), S_n ’s] are all ‘injured states’.⁷²

Arangio-Ruiz further argued that the concern regarding the distinction between ‘directly affected’ and ‘indirectly affected’ states ‘[called] neither for amendments to the draft articles adopted or proposed’.⁷³ For him, the issue of ‘directness’ or ‘indirectness’ of ‘injury’ was an ‘improper portrayal’ of the ‘differences relating to the nature or degree of the injury’,⁷⁴ or ‘damage’ to be more precise.⁷⁵ This, he argued, ‘simply [required the] a proper understanding and application of the general rules’.⁷⁶ In contrast with ‘directly affected’ states, those ‘indirectly affected’ would only be entitled to ‘claim cessation and guarantees of non-repetition but not ‘pecuniary compensation or [...] restitution of some kind’ there being no ‘material damage’.⁷⁷ Thus, he maintained Riphagen’s definition of an ‘injured state’ which later became 1996 Draft Article 40 that formed part of the 1996 Draft Articles which the ILC adopted on its first reading.⁷⁸

[...] Another example would be the breach of an *erga omnes* [duty] related to environmental protection [which] would constitute a simultaneous legal injury for all the States parties to a multilateral [...] Another example [...] would be the various legal positions of states confronted with an act of aggression’).

⁶⁹ Ibid, 34

⁷⁰ Ibid.

⁷¹ Ibid, 44–5 citing Lattanzi Flavia, *Garanzie dei diritti dell'uomo nel diritto internazionale* (Giuffrè 1983), 79–155. Compare Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 49 (‘As the infringed rule protects a collective interest, any reactions to the breach [...] may be lawfully resorted to only to the extent to which they perform the function of guaranteeing the (primary) legal situation represented by the common legal interest’).

⁷² Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 45 (‘[Some] states may be [materially affected] [but] this does not make the injury [...] legally more direct than that suffered by the other states [...] in no case would it be correct to define this difference in terms of a "direct", "less direct" or "indirect" juridical [or legal] injury’)

⁷³ Ibid, 49.

⁷⁴ Ibid, 45.

⁷⁵ See discussion in Chapter 11. See also Crawford James, ‘First Report on State Responsibility’ (1998) II(1) YbILC 1, 24; De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 26; Fernandez Gemmo, ‘Revisiting the Concepts of Rights, Obligations, & Injury in the Invocation of State Responsibility in Inter-State Adjudication’ (2018) 91 *Philippine Law Journal* 832, 855.

⁷⁶ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 49.

⁷⁷ Ibid, 47.

⁷⁸ ILC, ‘Report on the Work of the 48th Session’ (1996) (n 40), 62; Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 49 (‘The only useful—and probably indispensable—*ad hoc* provision would be a

Finally, Arangio-Ruiz, in his 1993 report (1993 Draft Article 11/1996 Draft Article 47), also affirmed that all ‘injured states’, whether directly or indirectly affected, should be permitted to adopt countermeasures against wrongful states.⁷⁹ He argued that to ‘exclude the lawfulness of [unilateral] measures would be to accept that the violations [of duties owed *erga omnes*] would not give rise to [responsibility]’ and ‘this would be tantamount to accepting that the rules infringed are not binding’.⁸⁰ Yet, Arangio-Ruiz was also concerned with the risks posed by the general competence of states to resort to countermeasures.⁸¹ For him, the ILC ‘should take the greatest care’ and ‘[devise] the conditions of [...] resort to such actions’ to ‘ensure that the [...] inequalities among states do not unduly operate to the advantage of the strong and rich over the weak and poor’.⁸² Arangio-Ruiz was also mindful of states’ divergent views on the general competence to take countermeasures.⁸³ Thus, he proposed a ‘two-phased procedure’ in his 1995 proposal (1995 Draft Articles 17 and 19) for the unilateral enforcement via countermeasures of responsibility arising from international crimes that required an assessment from the UN General Assembly (‘GA’) or Security Council (‘SC’) and a legal determination from the ICJ.⁸⁴ Yet this was rejected for being ‘too broad to be realistic’ and

new draft article to follow article 5 [...] [This] would [...] provide that whenever an internationally wrongful act affects more than one injured state, each one of them is entitled to exercise the rights and *facultés* laid down in the relevant articles, to the extent that any such rights or *facultés* appertain to it by virtue of the right infringed and the injury sustained’).

⁷⁹ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 22 (‘[Draft Article 11]: An injured state whose demands under Articles 6 to 10 have not met with adequate response from the state which has committed the internationally wrongful act is entitled, subject to the conditions and restrictions set forth in the following articles, not to comply with one or more of its [duties] towards the said state’). See Arangio-Ruiz Gaetano, ‘Sixth Report on State Responsibility’ (1994) II(1) YbILC 3, 17; Arangio-Ruiz, ‘Seventh Report on State Responsibility’ (1995) (n 64), 15, 17; ILC, ‘Summary Records of the 47th Session’ (1995) I YbILC 1, 83.

⁸⁰ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 46.

⁸¹ Ibid.; Arangio-Ruiz Gaetano, ‘Fifth Report on State Responsibility’ (1995) II(1) YbILC 3, 13 (‘No responsible “legislator” can avoid the temptation either expressly to rule out the practice of countermeasures as illegal [...] or at least to keep silent on that practice so as not explicitly to legitimise it’).

⁸² ILC, ‘Report on the Work of the 43rd Session’ (1991) II(2) YbILC 126, 127.

⁸³ Arangio-Ruiz, ‘Fifth Report on State Responsibility’ (1993) (n 81), 13–4. See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 50th Session’ (16 February 1996) UN Doc A/CN.4/472/Add.1, 25–7. See states opposing countermeasures: UNGA, Sixth Committee, ‘Summary Record of the 47th Session, 25th Meeting’ (2 November 1992) UN Doc A/C.6/47/SR.25, 9 (Brazil), 14 (Iran), 19 (Morocco); UNGA, Sixth Committee, ‘Summary Record of the 47th Session, 28th Meeting’ (4 November 1993) UN Doc A/C.6/47/SR.28, 14 (Indonesia); 23–4 (Russia); UNGA, Sixth Committee, ‘Summary Record of the 47th Session, 29th Meeting’ (5 November 1992) UN Doc A/C.6/47/SR.29, 14 (Cuba). But see states supporting countermeasures with safeguards: UNGA, Sixth Committee, ‘Summary Record of the 47th Session, 25th Meeting’ (1992) (n 83), 21 (Switzerland); UNGA, Sixth Committee, ‘Summary Record of the 47th Session, 27th Meeting’ (4 November 1992) UN Doc A/C.6/47/SR.27, 3 (Sri Lanka), 6 (Israel), 8 (Thailand), 9 (Azerbaijan), 10 (United States), 19 (Belarus); UNGA, Sixth Committee, ‘Summary Record of the 47th Session, 28th Meeting’ (1992) (n 83), 9 (Jordan), 17 (Poland); UNGA, Sixth Committee, ‘Summary Record of the 47th Session, 29th Meeting’ (1992) (n 83), 6 (Romania), 11 (Italy); 16 (Algeria); UNGA, Sixth Committee, ‘Summary Record of the 47th Session, 26th Meeting’ (3 November 1995) UN Doc A/C.6/47/SR.26, 3 (France), 7 (Bahrain), 9 (Japan), 18 (Spain).

⁸⁴ Dawidowicz, *Third Party Countermeasures* (n 62) 82–3 citing Arangio-Ruiz, ‘Seventh Report on State Responsibility’ (1995) (n 64), 29–30. See Arangio-Ruiz, ‘Fifth Report on State Responsibility’ (1993) (n 81), 21–9, 33.

‘unattuned to states sense of international law’.⁸⁵ Thus, while the ILC adopted the general competence of states to take countermeasures under 1996 Draft Article 47,⁸⁶ it deemed that 1996 Draft Articles 48 to 50 which provided for the conditions on the resort to countermeasures, requirement of proportionality, and prohibited kind of countermeasures, applied ‘without exception or modification to international crimes’.⁸⁷ Furthermore, should a state protest the countermeasures, there were also post-dispute settlement procedures outlined in 1996 Draft Articles 54 to 60 that included, among others, the referral of a dispute to a conciliation commission and an arbitral tribunal.⁸⁸

II. RE-EVALUATION & COMPETENCE OF ‘STATES OTHER THAN AN INJURED STATE’

A. *Concerns regarding the 1996 Draft Articles*

The provisions on implementation under the 1996 Draft Articles, which the ILC provisionally adopted, rested on the synallagmatic view of legal relations. 1996 Draft Article 40 defined an ‘injured state’, the state with the competence to implement the wrongful state’s responsibility, as the state whose right has been infringed thereby maintaining the ‘exact correlation’ between rights and duties.⁸⁹ This applies even to breaches of duties arising from collective norms—some of which were considered international crimes under 1996 Draft Article 19.⁹⁰ Furthermore, under 1996 Draft Article 47, the ‘injured state’, whether directly or indirectly affected, had the prerogative to levy countermeasures against the wrongful state.⁹¹ Given the risks of this general competence, the resort to countermeasures was governed by the strict requirements under 1996 Draft Articles 48 to 50 and subject to dispute settlement procedures in 1996 Draft Articles 64 to 60.

The 1996 Draft Articles’ provisions on implementation proved to be divisive. Questions remained regarding the concept of an ‘injured state’, and their general capacity to implement

⁸⁵ ILC, ‘Report on the Work of the 47th Session’ (1995) II(2) YbILC 43, 47.

⁸⁶ ILC, ‘Report on the Work of the 48th Session’ (1996) (n 40), 63.

⁸⁷ Ibid, 63–4; ILC, ‘Summary Records of the 48th Session’ (1996) I YbILC 1, 178.

⁸⁸ ILC, ‘Report on the Work of the 48th Session’ (1996) (n 40), 64–5. Stern Brigitte, ‘Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l’occasion de la fin des travaux de la C.D.I. sur la responsabilité des États’ (2001) 47 *Annuaire français de droit international* 3, 21 (‘À la base de cette construction assez peu réaliste, il y avait pourtant une idée juste: à savoir qu’à l’heure actuelle, l’utilisation par les États de contre-mesures—et l’on sait qu’ils ne s’en privent pas—est totalement incontrôlée’).

⁸⁹ Crawford, ‘Multilateral Rights & Obligations’ (n 16), 432–3.

⁹⁰ Crawford, ‘First Report on State Responsibility’ (1998) (n 75), 20.

⁹¹ Ibid, 11; Alland Denis, ‘Countermeasures of General Interest’ (2002) 13 *European Journal of International Law* 1220, 1230.

responsibility including the resort to countermeasures.⁹² By this time, the ILC's work on state responsibility had gone on for more than four decades.⁹³ Faced with mounting pressure from states, the ILC in 1997 adopted a timetable to complete the Draft Articles by 2001.⁹⁴ Due to Arangio-Ruiz's resignation,⁹⁵ this difficult task fell on Special Rapporteur Crawford (1996–2001).

First, there were concerns regarding the fact that 1996 Draft Article 40 did not distinguish between 'directly' and 'indirectly affected states',⁹⁶ for the purposes of the consequences of wrongful acts including reparations,⁹⁷ and the competence to implement responsibility including the resort to countermeasures.⁹⁸ As to the consequences of wrongful acts, it is worth stressing that Riphagen and Arangio-Ruiz, as discussed above, already addressed this issue. Arangio-Ruiz argued that this only required the 'proper understanding and application of the general rules' on reparations.⁹⁹ A few states agreed with this view and stated that 1996 Draft Article 40 had merit.¹⁰⁰ Nonetheless, some of the ILC's members,¹⁰¹ and several states argued that the wrongful acts' consequences 'are too broadly available'.¹⁰² It was submitted that there

⁹² Crawford James, 'Third Report on State Responsibility' (2000) II(2) YbILC 12, 102. *Note* that Crawford refers to these as 'collective countermeasures' as distinguished from 'individual' ones that are 'taken by one state or by a group of states acting in its individual capacity' and 'institutional reactions' in 'the framework of international organisations'.

⁹³ *See Request for the Codification of the Principles of International Law Governing State Responsibility* Res 799 (VIII) UNGA (7 December 1953) A/RES/799; ILC, 'Report on the Work of the 1st Session' (12 April 1949) UN Doc A/CN.4/13 & Corr.1-3, 280.

⁹⁴ ILC, 'Summary Records of the 48th Session' (1996) (n 87), 31.

⁹⁵ *Ibid.*, 46–7.

⁹⁶ Kramer Francisco, 'Draft Report of the International Law Commission on the Work of its 47th Session' (6 July 1995) UN Doc A/CN.4/L.512, 25 ('Universalisation of the status of injured state'). *See* Voefray Francois, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 259 ('Les critiques les plus sévères que l'on peut adresser à l'article [...] rapportent [...] à l'idée implicite d'une uniformité des droits entre les différents Etats lésés. Dès lors qu'on considère que chaque Etat est lésé dans un droit subjectif, il est difficile ne pas reconnaître à tous des droits similaires'); Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1, 4 ('[The] broad definition of "injury" [...] would have provided a unified basis for the invocation of responsibility').

⁹⁷ Crawford, 'Multilateral Rights & Obligations' (n 16), 343 ('Once a state had qualified as an "injured state" under [1996 Article 40], it seemed to have, individually, all the rights that the most directly injured state would have, including [...] restitution [...] compensation [and] satisfaction').

⁹⁸ *Ibid.*, 343 ('Even the right to take countermeasures individually').

⁹⁹ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 63), 49; Riphagen, 'First Report on State Responsibility' (1980) (n 36), 114.

¹⁰⁰ ILC, 'State Responsibility: Comments & Observations of Governments, 50th Session' (1998) UN Doc A/CN.4/488, 104 (Italy), 139 (Singapore), 141 (Switzerland).

¹⁰¹ Crawford, 'Third Report on State Responsibility' (2000) (n 92), 25; ILC, 'Report on the Work of the 50th Session' (1998) II(2) YbILC 60, 72.

¹⁰² Crawford, 'Third Report on State Responsibility' (2000) (n 92), 27. *See* UN GA, 'Topical Summary of the Discussion of the Sixth Committee, 51st Session' (1 May 1997) UN Doc A/CN.4/479/Add.1, 11; UNGA, Sixth

should be a distinction between states that had been ‘directly affected’ and those ‘indirectly affected’. In turn, this would allow for the specification of available reparations based on how they were affected or damaged by the wrongful act.¹⁰³

As for implementation, some states welcomed the view that all ‘injured states’, regardless of direct effect, may implement the wrongful state’s responsibility.¹⁰⁴ However, notwithstanding the traditional view that this competence only required the infringement of a right,¹⁰⁵ some states remained wary of this general prerogative and argued that the implementing state must be ‘materially affected’.¹⁰⁶ This problem became even more pronounced when it came to states’ prerogative to levy countermeasures to enforce breaches of duties owed *erga omnes*.¹⁰⁷ Several states supported the capacity of all states, even those not directly affected, to enforce these duties via countermeasures.¹⁰⁸ However, many opposed this

Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (8 November 1996) UN Doc A/C.6/51/SR.36, 6 (France), 14 (Bulgaria); UNGA, Sixth Committee, ‘Summary Record of the 52nd Session, 23rd Meeting’ (5 December 1997) UN Doc A/C.6/52/SR.23, 3 (Slovenia), 4 (France); UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 53rd Session’ (16 February 1999) UN Doc A/CN.4/496, 19; UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 18th Meeting’ (2 November 1998) UN Doc A/C.6/53/SR.18, 3 (Mexico); UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 20th Meeting’ (4 November 1998) UN Doc A/C.6/52/SR.20, 5 (France); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 100), 101, 138 (France), 141, (Austria), 142 (US), 143 (Germany); UNGA, Sixth Committee, ‘Summary Record of the 54th Session, 19th Meeting’ (28 October 1999) UN Doc A/C.6/54/SR.19, 5 (US); UNGA, Sixth Committee, ‘Summary Record of the 54th Session, 26th Meeting’ (4 November 1999) UN Doc A/C.6/54/SR.26, 6 (Malaysia), 11 (Cyprus); UNGA, Sixth Committee, ‘Summary Record of the 54th Session, 27th Meeting’ (4 November 1999) UN Doc A/C.6/54/SR.27, 2 (Costa Rica), 7 (Egypt); UNGA, Sixth Committee, ‘Summary Record of the 54th Session, 28th Meeting’ (5 November 1999) UN Doc A/C.6/54/SR.28, 9 (Bangladesh); ILC, ‘State Responsibility: Comments & Observations of Governments, 51st Session’ (1999) UN Doc A/CN.4/492, 108 (Japan)

¹⁰³ Crawford, ‘Third Report on State Responsibility’ (2000) (n 92), 36–7.

¹⁰⁴ See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 51st Session’ (1997) (n 102), 12; UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 34th Meeting’ (7 November 1996) UN Doc A/C.6/51/SR.34, 13 (Germany); UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 102), 13 (Cameroon), 18 (Spain); UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 19th Meeting’ (3 November 1998) UN Doc A/C.6/53/SR.19, 4 (Singapore); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 100), 104 (Italy), 117 (Ireland).

¹⁰⁵ Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 183; Hohfeld Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning & Other Legal Essays*, Cook Walter (ed) (Yale University Press 1919), 7. See *Southwest Africa* (Ethiopia & Liberia v South Africa) (Judgment) [1966] ICJ 6, 34; *Lac Lanoux* (France v Spain) (1957) 62 RGDIP 179, 116; *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90 (Skubizewski, dissenting) 256.

¹⁰⁶ See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 51st Session’ (1997) (n 102), 11–2; UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 102), 13 (Cameroon); UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 52nd Session’ (20 January 1998) UN Doc A/CN.4/483, 13; UNGA, Sixth Committee, ‘Summary Record of the 52nd Session, 23rd Meeting’ (1997) (n 102), 3 (Slovenia); UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 53rd Session’ (1999) (n 102), 18; UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 18th Meeting’ (1998) (n 102), 3 (Mexico); UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 21th Meeting’ (5 November 1998) UN Doc A/C.6/53/SR.21, 6 (India); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 100), 101, 141 (France), 142, 144 (US).

¹⁰⁷ See Stern, ‘La notion de préjudice juridique’ (n 88), 31.

¹⁰⁸ See UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 34th Meeting’ (1996) (n 104), 10

competence. Some argued that only the ‘effective victim’ of the breach should have this prerogative.¹⁰⁹ Others questioned the appropriateness of this ‘individualised’ remedy where the entire community has been affected and claimed that in these cases, only the SC has the competence to impose these measures.¹¹⁰ Several also highlighted the risk presented by countermeasures levied by states not ‘directly affected’ given the differences in power among states and the potential for abuse.¹¹¹

Second, many of the ILC’s members and scholars deemed the 1996 Draft Article 40’s synallagmatic premise defective.¹¹² Indeed, Crawford argued that the assumption that ‘all [...] relations are to be assimilated to classical [...] right-duty relations’ was problematic.¹¹³ For him, recent developments in international law had demonstrated that there is no ‘*a priori* reason to reduce all relations’ in this manner.¹¹⁴ Indeed, *Barcelona Traction* suggested that there exists a community of states to whom duties may be owed as a whole.¹¹⁵ Thus, Crawford submitted that

(UK); UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 102), 2 (Italy), 15 (Bulgaria), 19 (Spain); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 100), 152 (Denmark); 159 (Ireland)

¹⁰⁹ See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 51st Session’ (1997) (n 102), 17, 22; UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 34th Meeting’ (1996) (n 104), 8 (Austria), 15 (Brazil); UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 102), 16 (Iran); UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 53rd Session’ (1999) (n 102), 18; UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 18th Meeting’ (1998) (n 102), 3 (Mexico); UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 21th Meeting’ (1998) (n 106), 6 (India); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 100), 137–8 (Czech Republic), 141 (France); ILC, ‘Comments & Observations of Governments, 51st Session’ (1999) (n 102), 107 (Japan). See also UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 102), 11–2 (Jordan); UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 34th Meeting’ (1996) (n 104), 16 (Switzerland); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 100), 101 (France).

¹¹⁰ See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 50th Session’ (1995) (n 83), 24; UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 102), 7 (France); UNGA, Sixth Committee, ‘Summary Record of the 54th Session, 28th Meeting’ (1999) (n 102), 2 (Greece).

¹¹¹ See UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 41st Meeting’ (15 November 1996) UN Doc A/C.6/51/SR.41, 14 (India); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 100), 85 (Czech Republic); UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 20th Meeting’ (1998) (n 102), 4 (Iran); UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 21th Meeting’ (1998) (n 106), 6 (India); UNGA, Sixth Committee, ‘Summary Record of the 54th Session, 28th Meeting’ (1999) (n 102), 11 (Cuba).

¹¹² Crawford, ‘Third Report on State Responsibility’ (2000) (n 92), 25. See ILC, ‘Summary Records of the 50th Session’ (1998) I YbILC 1, 103 (Economides), 104 (Simma), 124 (Rosenstock), 130 (Yamada), 135 (Mikulka), 146 (Goco), 155 (Pellet); ILC, ‘Summary Records of the 51st Session’ (1999) I YbILC 1, 53 (Economides), 244 (Melescanu); ILC, ‘Report on the Work of the 52nd Session’ (2000) II(2) YbILC 13, 30. See also Sachariew, ‘Identifying the “Injured State”’ (n 60), 273; Simma Bruno, ‘Bilateralism & Community Interest in the Law of State Responsibility’ in Dinstein Yoram (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff 1989), 821; Sicilianos Linos-Alexander, *Les réactions décentralisées à l’illicite: des contre-mesures la légitime défense* (Librairie générale de droit et de jurisprudence 1990), 103 ff.

¹¹³ Crawford, ‘Third Report on State Responsibility’ (2000) (n 92), 33.

¹¹⁴ Ibid, 29

¹¹⁵ Ibid, 29–30. See ILC, ‘Report on the Work of the 50th Session’ (1998) (n 101), 67.

the 1996 Draft Article 40 ‘could not provide a suitable basis for the codification and [...] development of the law of state responsibility’.¹¹⁶

Arguably, the problem here is that synallagmatic relations were equated with bilateral relations.¹¹⁷ The latter reduces legal relations, even multilateral ones, between pairs of states.¹¹⁸ These give rise to separate right-duty relations between states such that when one breaches its duty, only the other can implement the wrongful state’s responsibility.¹¹⁹ Yet, as Arangio-Ruiz had already shown in his 1992 report, and as will be further discussed in *Chapter 11*, that this is not the case for synallagmatic relations.¹²⁰ The ‘exact correlation’ between rights and duties does not proscribe the situation in which a duty is ‘simultaneously owed’ to all states such every state is injured and has the competence to implement should the duty be breached.¹²¹ Thus, the approach arguably could accommodate duties owed *erga omnes*.¹²² At this point, several states still supported the synallagmatic view. Some maintained that it is the infringement of the right that granted states the competence to implement responsibility.¹²³ Others doubted the concept of an international community which was deemed fraught with difficulties and an ‘un-legal concept’.¹²⁴

¹¹⁶ Crawford, ‘Multilateral Rights & Obligations’ (n 16), 442. See UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 35th Meeting’ (7 November 1996) UN Doc A/C.6/51/SR.35, 6 (Ireland).

¹¹⁷ Crawford, ‘Multilateral Rights & Obligations’ (n 16), 426–7; Simma Bruno, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours de l’Académie de Droit International* 217, 231.

¹¹⁸ Crawford, ‘Multilateral Rights & Obligations’ (n 16), 344.

¹¹⁹ Byers Michael, ‘Conceptualising the Relationship between Jus Cogens & Erga Omnes Rules’ (1997) 66 *Nordic Journal of International Law* 211, 232. See Coffman Peter, ‘Obligations Erga Omnes & the Absent Third State’ (1996) 39 *German Yearbook of International Law* 285, 298, 300.

¹²⁰ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 44–5. See De Jesús Jose, ‘Obligations Erga Omnes as Multilateral Obligations’ (DPhil, University of Oxford 2012), 231, 265; Stern, ‘La notion de préjudice juridique’ (n 88), 15 (‘“Subjectif” n’est en aucune façon synonyme de bilatéral, comme différentes présentations ont pu conduire à le faire croire’).

¹²¹ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 63), 44–5.

¹²² See Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 192; Arangio-Ruiz, ‘Second Report on State Responsibility’ (1989) (n 63), 6. See also Villalpando Santiago, *L’émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 237, 242, 279, 397; Stern, ‘La notion de préjudice juridique’ (n 88), 15–6; Nedeski Nataša, *Shared Obligations in International Law* (Cambridge University Press 2022), 65, 81, 87; De Jesús, ‘Obligations Erga Omnes’ (n 120), 2, 103, 186, 264; Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014), 222; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 75), 44, 53. See further Voeffray, *L’actio popularis* (n 96), 229; Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol II (Oxford University Press 2013), 1151.

¹²³ See UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 19th Meeting’ (1998) (n 104), 4 (Singapore); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 100), 104 (Italy), 139 (Singapore), 141 (Switzerland).

¹²⁴ See UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 102), 6 (France), 11 (Jordan).

B. Split among 'Injured', 'Specially Affected', & 'States other than an Injured State'

Due to the issue concerning the distinction between 'directly affected' and 'indirectly affected' states,¹²⁵ and concerns regarding the concept of an 'injured state' and its insistence on the exact correlation between rights and duties,¹²⁶ Crawford abandoned the synallagmatic approach to the implementation of duties owed *erga omnes*.¹²⁷ In his 2000 report, he heavily revised 1996 Draft Article 40 and split the provision to cover 'injured states' and states that have a 'legal interest in the performance of an international [duty]' (2000 Draft Article 40 *bis* later 2000 Draft Articles 43 and 49).¹²⁸ These articles would later be adopted as 2001 Draft Article 42 on 'injured states' and 2001 Draft Article 48 on 'states other than an injured state'.¹²⁹

2001 Draft Article 42 provided for three classes of 'injured states' that may demand the whole range of reparations including cessation, restitution, compensation, satisfaction, and in some cases, guarantees of non-repetition,¹³⁰ and means of implementation including countermeasures.¹³¹ The first, under paragraph (a), are states to whom the duty breached is owed individually by the wrongful state. This retains the synallagmatic view and requires that there be a breach of duty arising from a norm, whether unilateral, bilateral, or multilateral,¹³² that infringes the state's right.¹³³ Next, under paragraph (b)(i) are states that have been 'specially affected' by a wrongful act. This covers breaches of duties owed *erga omnes* or *erga omnes partes* which by this time was deemed, following the non-synallagmatic approach, not owed individually but to the 'international community as a whole' or a group of states respectively.¹³⁴ While all members of the collective may be 'affected' by duty's breach, the provision recognises that the wrongful act may have 'particular adverse effects' on one or a few

¹²⁵ Crawford, 'Third Report on State Responsibility' (2000) (n 92), 38, 76; ILC, 'Summary Records of the 52nd Session' (2000) I YbILC 1, 393–4 (Crawford).

¹²⁶ Crawford, 'Third Report on State Responsibility' (2000) (n 92), 17, 29–30, 34–5, 99; ILC, 'Summary Records of the 52nd Session' (2000) (n 125), 4, 6, 7 (Crawford).

¹²⁷ Crawford James, 'Overview of Part Three of the Articles on State Responsibility' in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 934 ('[This] represents a conceptual shift from [1996] Draft Article 40').

¹²⁸ Crawford, 'Third Report on State Responsibility' (2000) (n 92), 39; ILC, 'Report on the Work of the 52nd Session' (2000) (n 112), 69–70.

¹²⁹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117–9, 126–8.

¹³⁰ *Ibid.*, 88–95, 95–107.

¹³¹ *Ibid.*, 128–37.

¹³² *Ibid.*, 118; Crawford, *State Responsibility* (n 2), 546.

¹³³ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117; Scobbie Iain, 'Invocation of Responsibility for the Breach of Obligations under Peremptory Norms of General International Law' (2002) 13 *European Journal of International Law* 1201, 1204.

¹³⁴ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 118

states.¹³⁵ Taking influence from VCLT Article 60(2)(b), these states are deemed ‘specially affected’ and are distinguished from the ‘generality of other states’ forming the collective to which the duty is owed.¹³⁶ Finally, mirroring VCLT Article 60(2)(c), paragraph (b)(ii) deals with the circumstance in which the duty breached arises from an interdependent obligation.¹³⁷ To recall, states’ duties in these relations are indivisible such that each state owes its duties to every other state. Should a state breach its duty that ‘radically [...] changes the position of all the other states to which the [duty] is owed’,¹³⁸ all are considered ‘injured states’.¹³⁹

On the other hand, 2001 Draft Article 48 deals with ‘states other than an injured state’.¹⁴⁰ In what the ILC deemed a ‘measure of progressive development’,¹⁴¹ 2001 Draft Article 48 operationalises duties arising from collective norms. It permits states to implement the wrongful state’s responsibility if the duty breached is owed *erga omnes partes* or to a ‘group of states’ and ‘established for the protection of the collective interest of the group’, under paragraph 1(a),¹⁴² or owed *erga omnes* or to the ‘international community as a whole’, under paragraph 1(b). It adopts the non-synallagmatic approach.¹⁴³ Under this approach, as discussed in *Chapter 2*, a state no longer relies on its subjective right as the basis for its competence to implement

¹³⁵ Ibid, 119

¹³⁶ Ibid; Pauwelyn Joost, ‘Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 *European Journal of International Law* 907, 919; Sachariew, ‘Identifying the “Injured State”’ (n 60), 288.

¹³⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 119. *But see* Voeffray, *L’actio popularis* (n 96), 266 (‘La justification de ce traitement spécial n’est pas claire [...] Selon nous, il n’est cependant nullement indispensable de reprendre dans le droit de la responsabilité la formule de la Convention de Vienne [...] Si l’on s’intéresse à ses origines, on doit constater que le texte de l’article 60, § 2 [...] correspond à une proposition formulée par [...] Fitzmaurice et avait été justifié par ce dernier sur la base de la notion d’obligations “integrals”’).

¹³⁸ Sicilianos, ‘Classification of Obligations’ (n 41), 1136; Sachariew, ‘Identifying the “Injured State”’ (n 60), 276.

¹³⁹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 119

¹⁴⁰ Note that the deletion of 1996 Draft Articles 19 and 40 removed the explicit link between peremptory norms and duties owed *erga omnes* (See Crawford, ‘Multilateral Rights & Obligations’ (n 16), 473). Yet, as discussed in *Chapter 2*, this is the correct view as the norm’s peremptory status does not imply that the duty it imposes it owed *erga omnes*.

¹⁴¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 127. See Crawford, *State Responsibility* (n 2), 552 (‘[2001 Draft Article 48] emerged not as a codification of established practice, but to provide a basic framework for the further development of the law’); 389 (‘Established more on *a priori* grounds than on the basis of established practice’); Stern Brigitte, ‘A Plea for “Reconstruction” of International Responsibility Based on the Notion of Legal Injury’ in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 99 (‘[2001 Draft] Article 48 [...] adopted by the Commission, in the form of a declaration, lacks any clear legal status’).

¹⁴² Note that the ILC does not limit duties owed *erga omnes partes* to conventional norms. Rather it only requires that the norm create a ‘collective obligation’ that apply to a group ‘states and have been established in some collective interest’ (ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126)

¹⁴³ Crawford, ‘Third Report on State Responsibility’ (2000) (n 92), 17, 29–30, 34–5.

responsibility. It no longer possesses this right.¹⁴⁴ Rather it only has a ‘legal interest’, which is not a right but ‘apparently something entitled to protection’,¹⁴⁵ in the performance or observance of the duties arising from collective norms.¹⁴⁶ Furthermore, a ‘state other than an injured state’ does not implement responsibility in its individual capacity. It acts in its capacity ‘as a member of a group of states to which the [duty] is owed’ or ‘the international community as a whole’,¹⁴⁷ and on behalf of the group or the community.¹⁴⁸ Finally, as they have not been directly affected or ‘injured in their own right’,¹⁴⁹ they are not entitled to all the remedies granted to ‘injured states’. Under paragraph (2)(a), they may claim cessation and guarantees of non-repetition. Moreover, under paragraph (2)(b) they may also claim reparation but only in the interest of the ‘injured state’ or the ‘beneficiaries of the [duty] breached’.

The split between ‘injured states’ and ‘states other than an injured state’ received varied reactions from states. Some ‘welcomed’ it ‘as a major improvement’ that acknowledged the ‘diversity of international [duties] notably [duties] owed *erga omnes*’,¹⁵⁰ and distinguished between the ‘directly affected’ and ‘indirectly affected’ states.¹⁵¹ Others sought clarification of

¹⁴⁴ Ibid, 99, 146; Crawford, ‘Multilateral Rights & Obligations’ (n 16), 434; Annacker Claudia, ‘Legal Regime of Erga Omnes Obligations in International Law’ (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 147.

¹⁴⁵ Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol I (Oxford University Press 2013), 76 Crawford, ‘Multilateral Rights & Obligations’ (n 16), 434.

¹⁴⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 127.

¹⁴⁷ Ibid, 126.

¹⁴⁸ Crawford James, ‘Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 227; Cassese Antonio, *International Law* (Oxford University Press 2005), 16.

¹⁴⁹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 127.

¹⁵⁰ UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (15 Feb 2001) UN Doc A/CN.4/513, 9, 25. See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 16th Meeting’ (25 Oct 2000) UN Doc A/C.6/55/SR.16, 2 (New Zealand), 5 (Egypt), 7 (Australia); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 17th Meeting’ (27 Oct 2000) UN Doc A/C.6/55/SR.17, 13 (Austria); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 20th Meeting’ (31 Oct 2000) UN Doc A/C.6/55/SR.20, 5 (Mexico); ILC, ‘State Responsibility: Comments & Observations of Governments, 53rd Session’ (19 March 2001) UN Doc A/CN.4/515, 73 (Mexico), 75 (South Korea, & Slovakia), 76 (US); 79 (Austria), 80 (Denmark); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (29 Oct 2001) UN Doc A/C.6/56/SR.11, 5 (Finland), 8 (New Zealand), 9 (Belgium); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (31 October 2001) UN Doc A/C.6/56/SR.12, 9 (Australia); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 13th Meeting’ (31 October 2001) UN Doc A/C.6/56/SR.13, 10 (Cyprus); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (1 Nov 2001) UN Doc A/C.6/56/SR.14, 5 (Greece), 9 (Mongolia); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 15th Meeting’ (26 Nov 2001) UN Doc A/C.6/56/SR.15, 4 (Hungary & Jordan), 6 (Venezuela).

¹⁵¹ UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 150), 9, 25. See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 14th Meeting’ (23 October 2000) UN Doc A/C.6/55/SR.14, 11 (Japan); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (24 October 2000) UN Doc A/C.6/55/SR.15, 10 (Argentina); UNGA, Sixth Committee, ‘Summary Record of the 55th

the concepts of ‘collective interests’ and duties owed to the ‘international community as a whole’.¹⁵² A few also asked if the provisions reflected state practice.¹⁵³ Still, some criticised the change. Several maintained that the concept of an ‘injured state’ under the 1996 Draft Article 40 based on the infringement of rights was ‘clearer and more direct’ even for collective norms.¹⁵⁴ A few questioned the existence of a community capable of possessing rights.¹⁵⁵ Finally, some states, perhaps mindful of the risks,¹⁵⁶ questioned the competence of states to implement responsibility without direct effect.¹⁵⁷

C. *Question concerning Countermeasures by ‘States other than an Injured State’*

After splitting the concept of an ‘injured state’ under 1996 Draft Article 40 to ‘injured states’ under 2001 Draft Article 42 and ‘states other than an injured state’ under 2001 Draft Article 48, Crawford had to determine whether the latter may enforce responsibility via countermeasures.¹⁵⁸ Based on his survey of practice, he found that there was no sufficient evidence to conclude that states have accepted the competence of ‘states other than an injured state’ to take countermeasures.¹⁵⁹ He found that the practice, ‘dominated by [...] Western states’,

Session, 16th Meeting’ (2000) (n 150), 2 (New Zealand), 4 (Italy); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (27 October 2000) UN Doc A/C.6/55/SR.18, 7 (Cyprus), 13 (US); ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 150), 45 (US), 75 (UK), 79 (Argentina), 81 (UK); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 150), 4 (South Africa), 7 (Bahrain); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (2001) (n 150), 7 (India), 8 (Russia); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 15th Meeting’ (2001) (n 150), 7 (Argentina), 8 (Croatia), 9 (Ireland); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 16th Meeting’ (15 November 2001) UN Doc A/C.6/56/SR.16, 6 (Guatemala).

¹⁵² See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (2000) (n 151), 4 (Jordan); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 19th Meeting’ (30 October 2000) UN Doc A/C.6/55/SR.19, 12 (South Korea); ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 150), 81 (Argentina); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (2001) (n 150), 3 (Mexico)

¹⁵³ See ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 150), 73 (Mexico); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 150), 3 (Belarus); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (2001) (n 150), 9 (Cameroon). See also ILC, ‘Peremptory Norms: Comments & Observations of Governments’ (9 March 2022) UN Doc A/CN.4/748, 82 (US).

¹⁵⁴ UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 150), 25. See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 151), 3 (France), 8 (Netherlands); 14 (Greece); ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 150), 74 (France), 75 (Netherlands), 76, 80 (Japan); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 150), 2 (Japan)

¹⁵⁵ UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 151), 3 (Israel); 6 (India).

¹⁵⁶ Dawidowicz, *Third Party Countermeasures* (n 62), 73; Ruys Tom, ‘Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?’ (2021) 20 *Chinese Journal of International Law* 457, 492.

¹⁵⁷ See UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (2001) (n 150) 10 (China); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 16th Meeting’ (2001) (n 151), 4 (Iran).

¹⁵⁸ See ILC, ‘Summary Records of the 52nd Session’ (2000) (n 125), 303.

¹⁵⁹ Crawford, ‘Third Report on State Responsibility’ (2000) (n 92), 102–4. Note that Crawford’s assessment

was limited and inconsistent,¹⁶⁰ and the *opinio juris* was ‘unclear’.¹⁶¹ Yet, Crawford argued that ‘there is support to argue that states ‘injured’ by a breach of [a duty imposed by a collective norm] should not be left alone to seek redress for the breach’.¹⁶² To this end, he proposed to ‘[limit] the extent to which states, not [...] directly injured by a breach of [duty owed *erga omnes*], can take action by way of countermeasures’.¹⁶³ He proposed two instances in his 2000 report where these may be allowed—on the injured state’s request (2000 Draft Article 50A);¹⁶⁴ and where no state was materially affected by the duty owed *erga omnes*’ breach as in the cases of breaches of human rights and humanitarian law of the most ‘gross and systematic character’ (2000 Draft Article 50B).¹⁶⁵ Unlike Riphagen and Arangio-Ruiz, Crawford did not prescribe a mechanism for dispute settlement concerning countermeasures, whether taken by ‘injured states’ or ‘states other than an injured state’, given that states ‘are entitled to settle their disputes by peaceful means of their own choice’.¹⁶⁶

This proposal turned out to be controversial.¹⁶⁷ Some within the ILC supported the

were limited to the following: US measures against Uganda for torture and genocide (1978); Western measures against Poland due to repression of civil and political rights (1981); measures against Argentina for its actions in the Falklands/Malvinas Islands (1982); US measures against South Africa for Apartheid (1986); measures against Iraq for its invasion of Kuwait (1990); measures against Yugoslavia for the crisis in Kosovo (1998). *See also* Arangio-Ruiz, ‘Third Report on State Responsibility’ (1991) (n 63), 7 (‘Bulk of cases [on] reprisals were taken within a [...] bilateral framework’).

¹⁶⁰ Crawford, ‘Third Report on State Responsibility’ (2000) (n 92), 105; Ni Kuei-Jung, ‘Third-State Countermeasures for Enforcing International Common Environmental Interests: The Implication and Inspiration of the ILC’s Articles on State Responsibility’ (2004) 22 *Chinese (Taiwan) Yearbook of International Law and Affairs* 1, 41. *Note* that some disagree with this assessment: Dawidowicz, *Third Party Countermeasures* (n 62), 242 (‘[The] practice is considerably more widespread and representative than the ILC had assumed’), 252 (‘[The] sheer adoption of a third-party countermeasure [...] entails recognition of the power to do so’), 266 (‘State practice does indeed indicate that third-party countermeasures are normally adopted in response to “widely acknowledged” grave breaches of [duties owed] *erga omnes (partes)*’); Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 209 (‘States not individually injured have responded against wrongful acts by taking countermeasures [...] against the responsible state’), 250 (‘[The] practice is neither exclusively western, nor lacks the required *opinio juris*, nor indeed is too selective’), 390–1; Proukaki, *Problem of Enforcement* (n 20), 207 (‘State practice is neither “sparse” nor “embryonic” [...] [There is] extensive evidence of state practice and *opinio juris* in support of a right to take countermeasures by states other than the injured’); Sicilianos, ‘Classification of Obligations’ (n 41), 1143 (‘Practice is far from being “embryonic”’).

¹⁶¹ ILC, ‘Report on the Work of the 52nd Session’ (2000) (n 112), 58; ILC, ‘Summary Records of the 52nd Session’ (2000) (n 125), 303.

¹⁶² Crawford, ‘Third Report on State Responsibility’ (2000) (n 92), 105.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*, 106, 108.

¹⁶⁵ *Ibid.*; ILC, ‘Summary Records of the 52nd Session’ (2000) (n 125), 399.

¹⁶⁶ Crawford, ‘Third Report on State Responsibility’ (2000) (n 92), 93 (‘This does not mean [...] the draft articles need make no reference to such forms of dispute settlement as may be applicable to the parties in a given case’)

¹⁶⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 22–3; ILC, ‘Summary Records of the 52nd Session’ (2000) (n 125), 399.

entitlement of ‘states other than an injured state’ to take countermeasures as ‘necessary’ given the decentralisation of the international legal system.¹⁶⁸ Others opposed the proposal on countermeasures by ‘states other than an injured states’ arguing that it presented risks to small states, that these measures constituted ‘neither the *lex lata* nor *lex ferenda*’,¹⁶⁹ and that responses to breaches of duties imposed by collective norm remain within the SC’s exclusive purview.¹⁷⁰

States’ views also diverged. Some supported, in varying degrees the competence of ‘states other than an injured state’ to enforce duties owed *erga omnes* through countermeasures. A few agreed outright that states that are only affected in their legal interests may impose countermeasures.¹⁷¹ Several viewed the prerogative as acceptable but stressed the necessity of safeguards against abuse.¹⁷² Others were more restrained and accepted the utility countermeasures at the request of an injured state,¹⁷³ or in cases of serious breaches like ‘gross and systemic human rights violations’.¹⁷⁴ Yet, many opposed permitting ‘states other than an injured state’ to enforce duties owed *erga omnes* via countermeasures.¹⁷⁵ Some argued that this

¹⁶⁸ ILC, ‘Summary Records of the 53rd Session’ (2001) I YbILC 1, 40 (Economides), 41 (Pellet), 45 (Dugard), 305 (Simma) cited in Dawidowicz, *Third Party Countermeasures* (n 62), 97–8.

¹⁶⁹ ILC, ‘Summary Records of the 53rd Session’ (2001) (n 168), 35 (Brownlie); ILC, ‘Summary Records of the 44th Session’ (1992) II(2) YbILC 1, 16–7 (Bennouna), 88 (Shi).

¹⁷⁰ ILC, ‘Summary Records of the 53rd Session’ (2001) (n 168), 30 (Sepúlveda-Amor), 54 (Tomka), 35 (Elarby).

¹⁷¹ See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 150), 27, 32; UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 151), 9 (Denmark); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 17th Meeting’ (2000) (n 150), 8 (Chile), 11 (Costa Rica). See also UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (2001) (n 150), 8 (New Zealand); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (2001) (n 150), 9 (Mongolia).

¹⁷² See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 151), 3 (France); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (2000) (n 151), 7 (Cyprus). See also UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (2001) (n 150), 5 (Finland), 6 (Morocco).

¹⁷³ See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 14th Meeting’ (2000) (n 151), 12 (Japan); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (2000) (n 151), 4 (Jordan).

¹⁷⁴ See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 17th Meeting’ (2000) (n 150), 13 (Austria); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (2000) (n 151), 4 (Slovenia).

¹⁷⁵ UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 150), 33. See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 151), 3 (Israel), 7 (Guatemala); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 16th Meeting’ (2000) (n 150), 8 (Sierra Leone); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (2000) (n 151), 11 (Cuba); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 23rd Meeting’ (2 November 2000) UN Doc A/C.6/55/SR.23, 2 (Colombia); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 14th Meeting’ (2000) (n 151), 7 (UK); 12 (Japan). See also UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 150), 93; ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 150), 79 (China); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 15th Meeting’ (2001) (n 150), 8 (Argentina).

was not supported by state practice and *opinio juris*.¹⁷⁶ Others claimed that responses to breaches of duties arising from collective norms are better formulated within international institutions.¹⁷⁷ Most highlighted the risk of abuse that these measures bring and that they could provide a further pretext for power politics in international relations.¹⁷⁸

Due to the divergent state views on the capacity of ‘states other than an injured state’ to impose countermeasures, the ILC decided on a compromise proposal involving a ‘saving clause’.¹⁷⁹ While 2001 Draft Article 49 explicitly permits ‘injured states’ to take countermeasures against the wrongful state to comply with its duties,¹⁸⁰ 2001 Draft Article 54 provides that the 2001 Draft Articles do not ‘prejudice the [competence] of [states other than an injured state] [...] to take lawful measures against [the wrongful state] [...] to ensure the [breach’s] cessation and reparation in the interest of [...] the beneficiaries of the [duty] breached’. The ILC intended this provision to represent a ‘neutral’ position considering all the positions.¹⁸¹ It is deemed a ‘saving clause’ as it ‘leaves open the question whether any state may take measures to ensure compliance with certain [duties] in the general interest’.¹⁸²

¹⁷⁶ See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (2000) (n 151), 9 (Poland), 11 (Cuba); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 19th Meeting’ (2000) (n 152), 13 (Bahrain). See also ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 150), 91 (Mexico).

¹⁷⁷ UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 151), 3 (Iran), 3 (Israel), 6 (India), UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 17th Meeting’ (2000) (n 150), 14 (Greece); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (2000) (n 151), 9 (Russia), 11 (Cuba); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 22nd Meeting’ (1 November 2000) UN Doc A/C.6/55/SR.22, 8 (Libya); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 24th Meeting’ (16 November 2000) UN Doc A/C.6/55/SR.24, 11 (Cameroon). See also UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (2001) (n 150), 5 (Finland); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 150), 4 (South Africa).

¹⁷⁸ See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 150), 27; UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 14th Meeting’ (2000) (n 151), 8 (China), 9 (Tanzania), 10 (Germany), 12 (Japan); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 151), 3 (Iran), 5 (India), 10 (Botswana); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 18th Meeting’ (2000) (n 151), 2 (Algeria), 9 (Russia). See also ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 150), 79 (China); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (2001) (n 150), 10 (China); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (2001) (n 150), 2 (Sierra Leone), 7–8 (Russia); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 16th Meeting’ (2001) (n 151), 3 (Iran), 7 (Switzerland), 8 (Algeria), 9 (Indonesia).

¹⁷⁹ Crawford James, ‘Fourth Report on State Responsibility’ (2000) II YbILC 3, 18. See UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 14th Meeting’ (2000) (n 151), 7 (UK).

¹⁸⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 129–30

¹⁸¹ Ibid, 137.

¹⁸² Ibid, 23, 139. See Tams, *Enforcing Obligations Erga Omnes* (n 160), 200; Paulus Andreas, ‘Reciprocity Revisited’ in Fastenrath Ulrich, et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 126; Villalpando Santiago, ‘Legal Dimension of the International Community: How Community Interests are Protected in International Law’ (2010) 21 *European Journal of International Law* 387, 413.

Despite being labelled as a ‘compromise’, 2001 Draft Article 54 still generated mixed reactions among states. Several deemed it as acceptable as it was ‘without prejudice to any regime that might be established to deal breaches of duties owed *erga omnes*’ and did ‘not harm the structure of the [2001] Draft Articles as a whole’.¹⁸³ Some expressed disappointment at the decision not to recognise the general competence of states to take countermeasures.¹⁸⁴ Still, others criticised the ‘savings clause’ due to the ambiguity of the term ‘lawful measures’. For some, this may still be construed as countermeasures and thus permit ‘states other than an injured state’ to levy these measures.¹⁸⁵

The term ‘lawful measures’ also sparked divergent interpretations among scholars.¹⁸⁶ Some, like Alland, claim that the term ‘lawful measures’ refers to retorsions which are inherently ‘lawful’.¹⁸⁷ However, others, like Sicilianos, assert that the term could not have referred to retorsions precisely because they are lawful and devoting a provision for this purpose is pointless.¹⁸⁸ Instead, it must refer to countermeasures which are also ‘lawful’ under 2001 Draft

¹⁸³ See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 150), 20; UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (2001) (n 150), 2 (Brazil), 6 (Finland), 8 (New Zealand), 11 (France); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 150), 2 (Japan), 10 (Singapore); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 13th Meeting’ (2001) (n 150), 4 (Italy); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (2001) (n 150), 2 (Sierra Leone); 9 (Mongolia); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 15th Meeting’ (2001) (n 150), 2 (Chile).

¹⁸⁴ UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 16th Meeting’ (2001) (n 151), 11 (Finland). Note that several scholars argue that this prerogative should be permissible (See Institut de Droit International, ‘Resolution: Obligations Erga Omnes in International Law’ (2005), article 5(b)) or is necessary (See Dawidowicz Martin, ‘Public Law Enforcement without Safeguards? Analysis of State Practice on Third-party Countermeasures & their Relationship to the UNSC’ (2006) 77(1) *British Yearbook of International Law* 333, 342; Hillgruber Christian, ‘Right of Third States to Take Countermeasures’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 274; Hutchinson D, ‘Solidarity & Breaches of Multilateral Treaties’ (1988) 59 *British Yearbook of International Law* 151, 158; O’Connell Mary, ‘Controlling Countermeasures’ in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 49; Proukaki, *Problem of Enforcement* (n 20), 2; Tams, *Enforcing Obligations Erga Omnes* (n 160), 24; Tanaka Yoshifumi, ‘Legal Consequences of Obligations Erga Omnes in International Law’ (2021) 68 *Netherlands International Law Review* 1, 17) and that safeguards exists to prevent abuse (See Proukaki, *Problem of Enforcement* (n 20), 72).

¹⁸⁵ See UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (2001) (n 150), 10 (China); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 150), 8 (Bahrain); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (2001) (n 150), 4 (Mexico), (Russia); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 15th Meeting’ (2001) (n 150), 4 (Jordan), 5 (Thailand).

¹⁸⁶ Note Focarelli Carlo, ‘International Law & Third-Party Countermeasures in the Age of Global Instant Communication’ (2016) 29 *Questions of International Law* 18, 19 (‘The [2001 Draft Articles] are basically a doctrinal product, hence they are nothing ‘legal’ at all. [Those] who spend much of their time analysing the actual or allegedly missing words, if not commas, [...] appear simply willing to show their mastery of legal speculation’).

¹⁸⁷ Alland, ‘Countermeasures of General Interest’ (n 91), 1233.

¹⁸⁸ Sicilianos, ‘Classification of Obligations’ (n 41), 1143 (‘Permitting retorsions and devoting a specific provision to the purpose is pointless, since they are in any case permitted; that countermeasures too are ‘lawful

Article 22. Still, for authors like Tomuschat, the more correct view, one that this thesis takes, is that 2001 Draft Article 54 ‘constitutes [an] example of indecisiveness’ in which the ILC ‘avoided taking a stand [on] the issue’.¹⁸⁹ While it does not incorporate the prerogative of ‘states other than an injured state’ to take countermeasures, neither does it preclude this should it be deemed acceptable in the future.¹⁹⁰ Thus, it left its resolution to ‘the further development of international law’.¹⁹¹ Simply, it is a ‘*renvoi* to customary law’ that the ILC deemed not ripe for codification.¹⁹² Nonetheless, at present, since there is no positive rule yet that provides for these states’ competence to levy these measures,¹⁹³ the imposing state’s breach of duty will not be precluded.

CHAPTER CONCLUSION

This chapter examined how the ILC accommodated the concept of duties owed *erga omnes* under the 2001 Draft Articles. It observed that the Commission, during Ago, Riphagen, and Arangio-Ruiz’ tenure, defined the ‘injured state’, following the synagllagmatic approach, as the state whose right was infringed by a breach of an international duty. However, during Crawford’s term, the ILC saw a need to distinguish between ‘directly’, ‘specially affected’ and ‘indirectly affected’ states in relation to the consequences of wrongful acts and the competence to implement responsibility. The Commission also deemed problematic the assumption that all responsibility relations are to be assimilated into classical right-duty relations. Consequently, the 2001 Draft Articles distinguished between ‘injured states’, ‘specially affected states’, and ‘states other than an injured state’. ‘Injured states’, under 2001 Draft Article 42 are states to whom the duty breached is owed. ‘Specially affected states’, under the same article, are states that have suffered particular adverse effects where the duty is owed to a collective. In contrast, in a ‘measure of progressive development’, ‘states other than an injured state’, under 2001 Draft Article 48 which follows the non-synallagmatic approach, are states that have only been

measures’, given that their wrongfulness is precluded’); Huesa Vinaixa Rosario ‘Plurality of Injured States’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 954 (‘[2001 Draft] Article 54 nevertheless preserves the (uncertain) right of any State entitled to invoke the responsibility of another State ‘to take lawful measures’); Ni, ‘Articles on State Responsibility’ (n 160), 41.

¹⁸⁹ Tomuschat Christian, ‘Reconceptualizing the Debate on Jus Cogens & Obligations Erga Omnes—Concluding Observations’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2005), 434.

¹⁹⁰ Proukaki, *Problem of Enforcement* (n 20), 87; Dawidowicz, *Third Party Countermeasures* (n 62), 108.

¹⁹¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 139.

¹⁹² Nissel Alan, ‘ILC Articles on State Responsibility: Between Self-Help & Solidarity’ (2005) 38 *New York University Journal of International Law & Policy* 355, 364.

¹⁹³ Urs, ‘Question of Standing before the ICJ’ (n 96), 5 (‘Absent a rule of international law permitting the use of countermeasures by states under [2001 Draft] Article 48’).

affected in their legal interests should a duty owed *erga omnes* or *erga omnes partes* be breached. 'States other than an injured state' are entitled to a limited range of reparations. Moreover, due to states' divergent views, their prerogative to resort to countermeasures, under 2001 Draft Article 54 was left to the 'further development of international law'. ■

PART II: STATE PRACTICE & *OPINIO JURIS* ON THE IMPLEMENTATION OF DUTIES ARISING FROM COLLECTIVE NORMS BY ‘STATES OTHER THAN AN INJURED STATE’

CHAPTER 4: METHODOLOGY

Part I examined the concept of collective norms, the legal relations they create, and the rules on the implementation of the duties they impose by ‘states other than an injured state’ under the 2001 Draft Articles. These rules, as discussed in *Chapter 3*, were considered *de lege ferenda* by the ILC when they were adopted in 2001.¹ The Commission deemed 2001 Draft Article 48 that allows ‘states other than an injured state’ to invoke a wrongful state’s responsibility as a ‘measure of progressive development’.² States’ responses to this provision also largely varied.³ Likewise, the proposal to allow ‘states other than an injured state’ to enforce responsibility via countermeasures, proved to be ‘extremely controversial’.⁴ While some states supported this proposal, others disagreed.⁵ Thus, the ILC, under 2001 Draft Article 54, left the matter to the ‘further development of international law’.⁶

Part II complements’ the doctrinal and conceptual analysis in *Part I* and ‘grounds [these] to trends in international practice’.⁷ It aims to examine, through qualitative empirical analysis, if state practice and *opinio juris* support the ILC’s conclusions under the 2001 Draft Articles and if states have since accepted as law the competence of ‘states other than an injured state’ to implement duties owed *erga omnes*.⁸ As stressed in *Chapter 2*, this prerogative cannot be

¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) II(2) YbILC 20, 127; Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 552.

² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 127.

³ See UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (15 February 2001) UN Doc A/CN.4/513, 26–9; ILC, ‘State Responsibility: Comments & Observations of Governments, 53rd Session’ (19 March 2001) UN Doc A/CN.4/515, 79–82.

⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 22–3; ILC, ‘Summary Records of the 52nd Session’ (2000) I YbILC 1, 399

⁵ See for a summary of the debates Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 94 ff; Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 241–8. See also ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 22–3; ILC, ‘Summary Records of the 52nd Session’ (2000) (n 4), 305, 336; UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 3), 20–1, 27–9, 32–5; ILC, ‘Summary Records of the 53rd Session’ (2001) I YbILC 1, 6, 30, 34–42, 44–47, 50, 52–57, 73, 107, 110, 112–113.

⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 139.

⁷ Deplano Rossana & Tsagourias Nicholas (eds), *Research Methods in International Law: A Handbook* (Elgar 2021), 3 noting Eisenberg T, ‘Origins, Nature, & Promise of Empirical Legal Studies & Response to Concerns’ (2015) 11 *University of Illinois Law Review* 1713, 1715–20.

⁸ See Paulus Andreas, ‘Reciprocity Revisited’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 128 (‘It is anybody’s

deduced from the importance of collective norms or the commonality of state interests in their protection.⁹ Instead, it must be shown that states have created a norm that provides this competence.¹⁰ The question then is if the rules under the 2001 Draft Articles have become customary.¹¹ Thus, before examining state practice and *opinio juris* in the next chapters, this chapter discusses how this thesis approaches custom, its twin elements—practice and *opinio juris*, and the method it employs to analyse the state practice and *opinio juris* on the implementation of duties owed *erga omnes* by ‘states other than an injured state’.

guess whether or not [2001 Draft] Article 48 [on duties owed] *erga omnes* has achieved the status of customary law’); Stern Brigitte, ‘A Plea for “Reconstruction” of International Responsibility Based on the Notion of Legal Injury’ in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 99 (‘[2001 Draft] Article 48 of the text finally adopted by the Commission, in the form of a declaration, lacks any clear legal status’); Ruys Tom, ‘Legal Standing & Public Interest Litigation—Are All *Erga Omnes* Breaches Equal?’ (2021) 20 *Chinese Journal of International Law* 457, 463. Note in support invocation via judicial dispute resolution: *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v UK) (Preliminary Objections) [2016] ICJ 833 (Crawford, dissenting), 1102 (‘It is now established [...] that states can be parties to disputes about [duties] in the performance of which they have no specific material interests’); Longobardo Marco, ‘Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: the Gambia v Myanmar & Beyond’ (2021) *International Community Law Review* 1, 30; Tanaka Yoshifumi, ‘Legal Consequences of Obligations *Erga Omnes* in International Law’ (2021) 68 *Netherlands International Law Review* 1, 20–4. On enforcement via countermeasures: Dawidowicz, *Third Party Countermeasures* (n 5), 242, 252, 266; Tams, *Enforcing Obligations Erga Omnes* (n 5), 209, 250, 390–1; Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 207; Sicilianos Linos-Alexander, ‘Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13(5) *European Journal of International Law* 1127, 1143; Sicilianos Linos-Alexander, *Les réactions décentralisées à l’illicite: des contre-mesures la légitime défense* (Librairie générale de droit et de jurisprudence 1990), 110–75. Note also those who argue otherwise: Nollkaemper André, ‘Change in the Law of International Responsibility’ in Besson Samantha (ed), *Theories of International Responsibility Law* (Cambridge University Press 2022), 53 (‘Claims that [states may act unilaterally to protect] community interests or shared responsibility is [customary] can rarely be backed up by well-documented practice or *opinio juris*’); Ahmadov Farid, *Right of Actio Popularis before International Courts & Tribunals* (Brill Nijhoff 2018), 34–5; Villalpando Santiago, *L’émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 12; De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 1. On invocation via judicial dispute resolution: *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422 (Xue, dissenting), 575; (Sur, dissenting), 614; *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022) (Xue, dissenting), 7. On enforcement via countermeasures: Focarelli Carlo, ‘International Law & Third-Party Countermeasures in the Age of Global Instant Communication’ (2016) 29 *Questions of International Law* 18, 18, 20; Hofer Alexandra, ‘The “Curiouser & Curiouser” Legal Nature of Non-UN Sanctions: US Sanctions against Russia’ (2018) 23 *Journal of Conflict & Security Law* 76, 97; Subedi Surya, ‘Status of Unilateral Sanctions in International Law’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 38.

⁹ Hillgruber Christian, ‘Right of Third States to Take Countermeasures’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 271. De Jesús Jose, ‘Obligations Erga Omnes as Multilateral Obligations’ (DPhil, University of Oxford 2012), 189–90.

¹⁰ Linderfalk Ulf, ‘International Legal Hierarchy Revisited—Status of Obligations Erga Omnes’ (2011) 80 *Nordic Journal of International Law* 1, 10; Hillgruber, ‘Third States & Countermeasures’ (n 9), 272.

¹¹ Hillgruber, ‘Third States & Countermeasures’ (n 9), 271–2; Voefray Francois, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 328.

I. APPROACH TO CUSTOMARY INTERNATIONAL LAW

A. General View of Customary International Law

The approaches to custom, as Special Rapporteur Wood (2013–18) observes, may be broadly classified as either ‘traditional’ or ‘modern’.¹² The ‘traditional’ approach, the ‘mainstream theory’,¹³ views custom’s emergence as a ‘process [that] weaves together [...] practice and belief’.¹⁴ It requires the concurrence of behaviour that has become general practice and the legal conviction that it has become obligatory.¹⁵ Both state practice and *opinio juris* are indispensable. The belief that a conduct ought to be law *per se* is insufficient.¹⁶ States must act

¹² Wood Michael, ‘First Report on the Formation & Evidence of Customary International Law’ (17 May 2013) UN Doc A/CN.4/663, 139; Corten Olivier, *Law Against War: Prohibition on the Use of Force in Contemporary International Law* (Hart 2010), 5 ff; Kolb Robert, ‘Selected Problems in the Theory of Customary International Law’ (2003) 50(2) *Netherlands International Law Review* 119, 121.

¹³ ILC, ‘Report on the Work of the 70th Session’ (2018) UN Doc A/73/10, 125–6; Wood, ‘First Report on Custom’ (2013) (n 12), 139 citing Voyiakis Emmanuel, ‘Customary International Law & the Place of Normative Considerations’ (2010) 55(1) *American Journal of Jurisprudence* 163, 169; Bradley Curtis & Gulati Mitu, ‘Withdrawing from International Custom’ (2010) 120 *Yale Law Journal* 202, 209; Simma Bruno & Alston Philip, ‘Sources of Human Rights Law: Custom, Jus Cogens, & General Principles’ (1988) 12 *Australian Yearbook of International Law* 82, 98. Kolb, ‘Theory of Custom’ (n 12), 123. See *SS Lotus* (France v Turkey) (Judgment) [1927] PCIJ Ser A No 10, 28; *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (Judgment) [1969] ICJ 3, 44–5; *Nuclear Tests* (Australia v France) (Judgment) [1974] ICJ 253 (Onyeama, Dillard, de Arechaga, & Waldock, dissenting), 367; *Fisheries Jurisdiction* (United Kingdom v Iceland) (Judgment) [1974] ICJ 3 (Forster, Bengzon, de Arechaga, Nagendra, Singh, & Ruda, separate opinion), 47–9; *Military & Paramilitary Activities in & against Nicaragua* (Nicaragua v US) (Merits) [1986] ICJ 14, 94–6; *Continental Shelf* (Tunisia/Libya) (Judgment) [1982] ICJ 18, 46; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ 2, 256; *Jurisdictional Immunities of the State* (Germany v Italy; Greece intervening) (Judgment) [2012] ICJ 99, 122–3; *Prosecutor v Delalić* (Judgment) (ICTY, Trial Chamber, 96-21-T, 16 November 1998), ¶302; *Rwamakuba v Prosecutor* (Decision on Interlocutory Appeal regarding Joint Criminal Enterprise) (ICTR, Appeals Chamber, 98-44-AR72.4, 22 October 2004), ¶302.

¹⁴ Kolb, ‘Theory of Custom’ (n 12), 120–1 citing de Visscher Charles, *Théories et réalités en droit international public* (4th edn, Pedone 1970), 190; Dupuy René-Jean, ‘Communauté internationale et disparités de développement’ (1979) 165 *Recueil des Cours de l’Académie de Droit International* 9, 171. Note that emphasis is placed on ‘process’ to address the apparent ‘paradox’ in the formation of custom: Linderfalk Ulf, ‘Creation of Jus Cogens—Making Sense of Article 53 of the Vienna Convention’ (2011) 71 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 360, 364–6 citing Finnis John, *Natural Law & Natural Rights* (Oxford University Press 1980), 231 ff.

¹⁵ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 138; Wood, ‘First Report on Custom’ (2013) (n 12), 139 citing Schacter Oscar, ‘New Custom: Power, *Opinio Juris*, & Contrary Practice’ in Makarczyk Jerzy (ed), *Theory of International Law* (Nijhoff 1996), 531. D’Amato Anthony, ‘Trashing Customary International Law’ (1987) 81(1) *American Journal of International Law* 101, 102; Wolfke Karol, *Custom in Present International Law* (Nijhoff 1993), 53; Akehurst Michael, ‘Custom as a Source of Law’ (1974) 47 *British Yearbook of International Law* 1, 53; Roberts Anthea, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *American Journal of International Law* 757, 758.

¹⁶ Note Kolb, ‘Theory of Custom’ (n 12), 138 (‘The *opinio*-requirement may indicate that a state believes it is acting in accordance with legally relevant criteria, for example what is desirable or emerging in law. It is not [...] acting for extra-legal reasons’); Walden Raphael, ‘Customary International Law: A Jurisprudential Analysis’ (1978) 13 *Israrel Law Review* 86, 97 (‘What is involved [in *opinio juris*] may be, not a belief that the practice is already legally binding, but a claim that it ought to be legally binding [...] Those who follow the practice, and treat it as a legal standard of behaviour, may be doing so with deliberate legislative intention’); Linderfalk, ‘Creation of Jus Cogens’ (n 14), 3647 citing Finnis, *Natural Law & Natural Rights* (n 14), 231 ff.

based on this belief.¹⁷ Equally, practice alone does not suffice. States' conduct must be accompanied by a conviction that it should be permitted, required, or prohibited.¹⁸ Simply, a putative rule without practice is not customary,¹⁹ and without *opinio juris* is not law.²⁰

The 'traditional' approach is not without criticism. From a theoretical perspective, scholars like Jennings and Henkin submit that the approach is 'doctrinally incoherent' and difficult, if not impossible, to apply in practice.²¹ Others challenge its premises. For instance, Hakimi and Ago argue that custom's formation does not function 'like a rulebook' but 'emerges more enigmatically' as a real-world sociological phenomenon.²² Similarly, McDougal and Reisman posit that custom is 'based [on] interactions [that create] legitimate expectations' among states.²³ Still, some criticise the approach's requirements. Fenwick argues that these make custom inefficient and unable to 'keep pace with [state's] changing relations which it endeavours to regulate'.²⁴ Others like Klabbers argue that its 'positivistic nature does not allow the identification of [custom with] regard to the [international community's] values'.²⁵ For these reasons, many scholars claim that there is a need to 'reinterpret [custom's] constitutive elements' and 'reframe it as a source of [...] law'.²⁶ Collectively, these may be referred to as the 'modern' approaches to custom.

¹⁷ *Military & Paramilitary Activities* [1986] (n 13), 97–8; Gaja Giorgio, 'Protection of General Interests in the International Community' (2011) 364 *Recueil des Cours de l'Académie de Droit International* 9, 36.

¹⁸ *North Sea Continental Shelf* [1969] (n 13), 44; *Jurisdictional Immunities* [2012] (n 13), 123; *Right of Passage over the Indian Territory* (Portugal v India) (Merits) [1960] ICJ 6 (Chagla, dissenting), 177.

¹⁹ Wolfke, *Custom* (n 15), 40–1.

²⁰ Dumberry Patrick, *Formation & Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016), 305.

²¹ Wood, 'First Report on Custom' (2013) (n 12), 140 *noting* Jennings Robert, 'Identification of International Law' in Cheng Bin (ed), *International Law: Teaching & Practice* (Stevens 1982), 4–6; Henkin Louis, *International Law: Politics & Values* (Nijhoff 1995), 29.

²² Hakimi Monica, 'Making Sense of Customary International Law' (2020) 118(8) *Michigan Law Review* 1487, 1512; Kolb, 'Theory of Custom' (n 12), 121 *noting* Ago Roberto, *Scienza giuridica e diritto internazionale* (Giuffrè 1950) 78 ff.

²³ Kolb, 'Theory of Custom' (n 12), 122 *noting* McDougal Myres, 'International Law, Power, & Policy: A Contemporary Conception' (1953) 82 *Recueil des Cours de l'Académie de Droit International* 1, 137 ff; Reisman Michael, 'International Law-Making: A Process of Communication' (1981) 75 *Proceedings of the ASIL Annual Meeting* 101, 101 ff.

²⁴ Wood, 'First Report on Custom' (2013) (n 12), 140 *noting* Fenwick Hudson, 'Sources of International Law' (1918) 16 *Michigan Journal of International Law* 393, 397; van Hoof Godefridness *Rethinking the Sources of International Law* (Kluwer 1983), 115; Visscher Charles, 'Reflections on the Present Prospects of International Adjudication' (1956) 50 *American Journal of International Law* 467, 472; McGinnis John, 'Comparative Disadvantage of Customary International Law' (2006) 30 *Harvard Journal of Law & Public Policy* 7, 11–2.

²⁵ Wood, 'First Report on Custom' (2013) (n 12), 140 *citing* Klabbers Jan, 'Curious Condition of Custom' (2002) 8 *International Legal Theory* 29, 34; Wouters Jan & Ryngaert Cedric, 'Impact on the Process of the Formation of Customary International Law' in Kamminga Menno & Scheinin Martin (eds), *Impact of Human Rights Law on General International Law* (Oxford University press 2009), 119.

²⁶ Wood, 'First Report on Custom' (2013) (n 12), 141.

There exists much diversity among these approaches. Generally, as Wood, Dumberry, and Kolb observe, they focus on the roles of custom's constitutive elements.²⁷ Some highlight practice.²⁸ For instance, Mendelson argues that widespread and consistent practice alone is sufficient for custom's formation.²⁹ Conversely, these views de-emphasise the role of *opinio juris*. Scholars like Kelsen, argue that *opinio juris* may be 'inferred from the constancy and uniformity of state conduct'.³⁰ Others, like Sørensen, submit that *opinio juris* is not a 'constitutive element' of custom but its result. It is because 'the norm is created that there is an *opinio juris*' rather than 'the norm is created because of an *opinio juris*'.³¹

In contrast, some deem *opinio juris* as custom's primary component.³² Authors like Cheng and Guzman argue that it is the belief that a norm is or ought to be a rule that makes it law.³³ The 'process of establishing' custom, for Baxter, only requires the demonstration of 'what states consider' as their duties.³⁴ Thus, as Lepard submits, when states' legal conviction exists, there is custom.³⁵ Practice, for Cheng, Ross, and O'Connell, only serves a subsidiary role and provides evidence for custom's existence.³⁶ In turn, this focus on *opinio juris*, for Charlesworth,

²⁷ Ibid, 141; Dumberry, *Custom in Investment Law* (n 20), 32; Kolb, 'Theory of Custom' (n 12), 121.

²⁸ Wood, 'First Report on Custom' (2013) (n 12), 141 noting D'Amato Anthony, 'Customary International Law: A Reformulation' (1998) 4 *International Legal Theory* 1, 1; Kopelmanas Lazare, 'Custom as a Means of the Creation of International Law' (1937) 18 *British Yearbook of International Law* 127, 129; Guggenheim Paul, *Les deux éléments de la coutume en droit international* (Mélanges Scelle 1950), 280. Dumberry, *Custom in Investment Law* (n 20), 299 citing International Law Association, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' (International Law Association, 2000), 31. Kolb, 'Theory of Custom' (n 12), 121 noting Mendelson Maurice, 'Formation of Customary International Law' (1999) 272 *Recueil des Cours de l'Académie de Droit International* 187, 289; Kelsen Hans, 'Théorie du droit international coutumier' (1939) 1 *Revue internationale de la théorie du droit* 253, 264 ff.

²⁹ Mendelson, 'Formation of Custom' (n 28), 289; International Law Association, 'Statement of Principles Applicable to the Formation of Custom' (n 28), 10.

³⁰ Kelsen Hans, *Principles of International Law* (Rinehart & Company 1952), 450; Kelsen, 'Théorie du droit international coutumier' (n 28), 263; International Law Association, 'Statement of Principles Applicable to the Formation of Custom' (n 28), 31.

³¹ Sørensen Max, 'Principles de droit international public' (1960) 101 *Recueil des Cours de l'Académie de Droit International* 1, 50 cited in Kolb, 'Theory of Custom' (n 12), 137.

³² See e.g. Cheng Bin, 'UN Resolutions on Outer Space: "Instant" International Customary Law?' in Cheng Bin (ed), *International Law: Teaching and Practice* (Stevens & Sons 1982), 251; Ross Alf, *A Textbook on International Law: General Part* (Longmans, Green, & Co 1947), 89; Kirgis Frederic, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 77, 149; Lepard Brian, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2012), 126.

³³ Cheng Bin, 'Epilogue' in Cheng Bin (ed), *International Law: Teaching and Practice* (Stevens & Sons 1982), 223; Guzman Andrew, 'Saving Customary International Law' (2005) 27 *Michigan Journal of International Law* 115, 153

³⁴ Baxter Richard, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 *British Yearbook of International Law* 275, 300.

³⁵ Lepard, *Customary International Law* (n 32), 126; Ziccardi P, *La costituzione dell'ordinamento internazionale* (Giuffrè 1953), 161 ff cited in Kolb, 'Theory of Custom' (n 12), 123–4.

³⁶ Cheng, 'Instant International Customary Law?' (n 32), 251; Ross, *Textbook on International Law* (n 32),

Scharf, and Schacter, makes custom a ‘more rapid and flexible source of [...] law’.³⁷ It enables the international system to respond where there is an ‘urgent need to create norms’,³⁸ or when the ‘rapidity of contemporary developments mandates quick action’.³⁹

While these modern approaches have merit, they have also met criticisms. Authors like Weil argue that these attempts at modernising custom hardly resemble custom.⁴⁰ Others like Estreicher submit that these approaches ‘undermine the authoritative force [...] of custom as a source of [...] law’.⁴¹ Still, several argue that these approaches are ‘analytically unstable’, result from ‘short-cuts’, or suffer from a ‘democratic deficit’.⁴² An analysis of these modern theories’ merits lies outside the present study’s scope. Undoubtedly, as Wood puts it, these views are ‘interesting and provocative’.⁴³ Yet, caution must be exercised as to their ‘real-world’ impact.⁴⁴ As noted above, it is the ‘traditional’ approach that has been predominantly recognised by states, courts, and scholars.⁴⁵ Thus, insisting on the existence of both practice and *opinio juris* ensures that observations made enjoy a wider range of appreciation and application.

89; O’Connell Mary, ‘Taking Opinio Juris Seriously: A Classical Approach to International Law on the Use of Force’ in Cannizzaro Enzo & Palchetti Paolo (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Nijhoff 2005), 4–16.

³⁷ Wood, ‘First Report on Custom’ (2013) (n 12), 141–2 citing Charlesworth Hillary, ‘Unbearable Lightness of Customary International Law’ (1988) 92 *American Society of International Law Proceedings* 44, 44; Scharf Michael, ‘Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change’ (2010) 43 *Cornell International Law Journal* 439, 450, 467–8; Schacter, ‘New Custom’ (n 15), 533.

³⁸ See Talmon Stefan, ‘Determining Customary International Law: ICJ’s Methodology between Induction, Deduction, & Assertion’ (2015) 26(2) *European Journal of International Law* 417, 430; Lepard, *Customary International Law* (n 32), 127 citing Cassese Antonio, *International Law* (Oxford University Press 2005), 161

³⁹ See Kolb, ‘Theory of Custom’ (n 12), 124–5.

⁴⁰ Wood, ‘First Report on Custom’ (2013) (n 12), 141 citing Weil Prosper, ‘Towards Relative Normativity in International Law?’ (1983) 77(3) *American Journal of International Law* 413, 435; Wolfke, *Custom* (n 15), 2; Abi-Saab George, ‘Custom & Treaties’ in Cassese Antonio & Weiler Joseph (eds), *Change & Stability in International Law-Making* (European University Institute 1988), 10; Jennings Robert, *What is International Law & How Do We Tell It When We See It?* (Kluwer 1983), 11; van Hoof, *Rethinking the Sources of International Law* (n 24), 86.

⁴¹ Wood, ‘First Report on Custom’ (2013) (n 12), 143 citing Estreicher Samuel, ‘Rethinking the Binding Effect of Customary International Law’ (2003) 44 *Virginia Journal of International Law* 5, 15; D’Amato, ‘Trashing Customary International Law’ (n 15); Jennings, ‘Identification of International Law’ (n 21), 6.

⁴² Wood, ‘First Report on Custom’ (2013) (n 12), 143 citing Postema Gerald, ‘Custom in International Law: A Normative Practice Account’ in Perreau-Saussine Amanda & Murphy James (eds), *Nature of Customary Law: Legal, Historical & Philosophical Perspectives* (Cambridge University Press 2007), 281–2; Simma & Alston, ‘Sources of Human Rights Law’ (n 13), 107; De Lupios Ingrid, *The Concept of International law* (Cambridge University Press 1982), 116; Bederman David, *Custom as a Source of law* (Cambridge University Press 2010), 145.

⁴³ Wood Michael, ‘Second Report on the Formation & Evidence of Customary International Law’ (22 May 2014) UN Doc A/CN.4/672, 11.

⁴⁴ Dumberry, *Custom in Investment Law* (n 20), 33; ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 126 (‘[Modern] theories have not been adopted by states or in the case law’).

⁴⁵ Wood, ‘First Report on Custom’ (2013) (n 12), 127–37; Wood, ‘Second Report on Custom’ (2014) (n 43), 8.

This thesis adheres to the ‘traditional’ view of custom—‘general practice accepted as law’.⁴⁶ As the ILC points out, mere practice, even if widespread and consistent, does not amount to law.⁴⁷ Rather, it is ‘no more than a non-binding usage’.⁴⁸ For a putative rule to be law, practice must be accompanied by the conviction that it is required or ought to be required.⁴⁹ This distinguishes duties from non-legal motivations including comity, courtesy, and convenience.⁵⁰ The importance of practice is not denied. Yet, it only ‘takes on significance if and to the extent that there is a conviction on the part of states that the legal rule exists’ or ought to exist.⁵¹ Similarly, the conviction that something is or ought to be law must be accompanied by practice.⁵² The fact that states deem a rule as customary is not sufficient.⁵³ Without practice, *opinio juris* remains a ‘mere aspiration’ and may amount to ‘nothing more than rhetoric’.⁵⁴ It is a state’s ‘visible, real, and significant’ act that ‘crystallises policy and demonstrates which of the many possible rules of law the acting state has decided to manifest’.⁵⁵

B. Approach to the Constitutive Elements

This thesis’ approach to custom’s elements also follows its classical conception. As to practice, it will examine if the conduct of implementing duties owed *erga omnes* by ‘states

⁴⁶ *North Sea Continental Shelf* [1969] (n 13), 44; ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 119 (‘Each of the constituent elements is to be separately ascertained’), 126 (‘The presence of only one element does not suffice for the identification of [custom]’); Wood Michael, ‘Third Report on the Formation & Evidence of Customary International Law’ (27 March 2015) A/CN.4/682, 5.

⁴⁷ See *North Sea Continental Shelf* [1969] (n 13), 44 (‘Acting, or agreeing to act in a certain way, does not itself demonstrate anything of a juridical nature [...] These instances of action [...] even in the aggregate [does not] suffice in themselves to constitute the *opinio juris*’). But see *Asylum* (Colombia v Peru) (Judgment) [1950] ICJ 266 (Azevedo, dissenting), 336 (‘It would be impossible to contend that unanimity and uniformity [in practice] do not bear witness to a conviction on the existence of legal duty’); *Right of Passage over the Indian Territory* [1960] (n 18) (Armand-Ugon, dissenting), 80.

⁴⁸ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 126, 138, 140.

⁴⁹ Corten Olivier, ‘Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate’ (2006) 16(5) *European Journal of International Law* 803, 816–7; Kolb, ‘Theory of Custom’ (n 12), 127.

⁵⁰ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 129; *Asylum* [1950] (n 47), 277, 286; *Lotus* [1927] (n 13), 28; *Military & Paramilitary Activities* [1986] (n 13), 108–10.

⁵¹ Corten, ‘Customary Prohibition on the Use of Force’ (n 49), 816; Dubuisson François, ‘La problématique de la légalité de l’opération “Force alliée” contre la Yougoslavie’ in Corten Olivier & Delcourt B (eds), *Droit, légitimation et politique extérieure: l’Europe et la guerre du Kosovo* (Bruylant 2001), 176; Lagerwall Anne, ‘Kosovo, Afghanistan, Irak: le retour des guerres d’agression’ in Corten O & Delcourt B (eds), *Les guerres anti terroristes* (Contradictions 2004), 90.

⁵² *Military & Paramilitary Activities* [1986] (n 13), 98.

⁵³ *Ibid.*, 97–8.

⁵⁴ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 125; Dinstein Yoram, ‘Interaction Between Customary International Law & Treaties’ (2006) 322 *Recueil des Cours de l’Académie de Droit International* 243, 294.

⁵⁵ D’Amato Anthony, *Concept of Customary International Law* (Cornell University Press 1971), 87; van Hoof, *Rethinking the Sources of International Law* (n 24), 107.

other than an injured state' has achieved some level of generality.⁵⁶ This leads to two tightly linked requirements 'neither of which should be seen in isolation'.⁵⁷ First, the practice must be sufficiently widespread and representative. Second, it must be sufficiently uniform and consistent.⁵⁸

Whether practice is widespread and representative refers to its extensiveness.⁵⁹ There is no 'precise number' to demonstrate this.⁶⁰ It is not required that all states must adopt the conduct.⁶¹ What is important is that the majority of states that had the opportunity to apply the rule have done so.⁶² The practice must also not be limited only to a few states.⁶³ This, as Corten notes, risks a 'hegemonical approach to international relations' with 'certain states proclaiming themselves as the [international community's] sole representatives'.⁶⁴ Instead, the practice must include the most varied group of states with 'different political, economic, and legal systems'.⁶⁵ Caution must also be exercised with the concept of 'specially affected' states.⁶⁶ There may be cases where the norm specifically affects certain states and their 'practice may be [...] attributed particular weight'.⁶⁷ For instance, coastal states are 'specially affected' by issues on the law of

⁵⁶ *North Sea Continental Shelf* [1969] (n 13), 25, 42; *Asylum* [1950] (n 47), 276; *Military & Paramilitary Activities* [1986] (n 13), 98.

⁵⁷ Kolb, 'Theory of Custom' (n 12), 133–4; Dumberry, *Custom in Investment Law* (n 20), 128.

⁵⁸ *North Sea Continental Shelf* [1969] (n 13), 43.

⁵⁹ *Ibid.*

⁶⁰ Mendelson, 'Formation of Custom' (n 28), 219–234 cited in Dumberry Patrick, 'Has the Fair & Equitable Treatment Standard Become a Rule of Customary International Law?' (2017) 8 *Journal of International Dispute Settlement* 165, 169; Wood, 'Second Report on Custom' (2014) (n 43), 37–8; *Fisheries Jurisdiction* [1974] (n 13) (Dillard, separate opinion), 56. See Kolb, 'Theory of Custom' (n 12), 133–4.

⁶¹ Wood, 'Second Report on Custom' (2014) (n 43), 38 citing *North Sea Continental Shelf* [1969] (n 13) (Ammoun, separate opinion), 103; (Lachs, dissenting), 229; *Nuclear Tests* [1974] (n 13) (Barwick, dissenting), 435; *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3 (Weeramantry, separate opinion), 95.

⁶² ILC, 'Report on the Work of the 70th Session' (2018) (n 13), 136; Wood, 'Second Report on Custom' (2014) (n 43), 38. See Higgins Rosalyn, *Problems & Process: International Law & How We Use It* (Clarendon 1995), 22.

⁶³ ILC, 'Report on the Work of the 70th Session' (2018) (n 13), 136

⁶⁴ Corten, 'Customary Prohibition on the Use of Force' (n 49), 820 citing Byers Michael & Chesterman Simon, 'Changing the Rules about Rules? Unilateral Intervention & the Future of International Law' in Holzgrefe J & Keohane R (eds), *Humanitarian Intervention: Ethical, Legal, & Political Dilemmas* (Cambridge University Press 2003), 194; Lagerwall, 'Kosovo, Afghanistan, Irak: le retour des guerres d'agression' (n 51), 98.

⁶⁵ *North Sea Continental Shelf* [1969] (n 13) (Lachs, dissenting), 229 ('No more can a general rule [...] be established by the fiat of one or of a few, or—as it was once claimed—by the consensus of European States only'); International Law Association, 'Statement of Principles Applicable to the Formation of Custom' (n 28), 25 ('It is not simply a question of how many states participate in the practice, but which states').

⁶⁶ See ILC, 'Report on the Work of the 70th Session' (2018) (n 13), 136 ('The term "specially affected states" should not be taken to refer to the relative power of states'); *Nuclear Weapons* [1996] (n 13) (Shi, declaration), 278; (Weeramantry, dissenting), 533.

⁶⁷ Wood, 'Second Report on Custom' (2014) (n 43), 39 citing de Visscher Charles, *Theory & Reality in Public International Law* (Princeton Centre of International Studies 1968), 149. *North Sea Continental Shelf* [1969] (n 13), 42–3; *Fisheries Jurisdiction* [1974] (n 13) (De Castro, separate opinion), 90.

the sea.⁶⁸ Yet, as the ILC observes, not all circumstances allow for this kind of selection.⁶⁹ In ‘many cases’, as in breaches of duties owed *erga omnes*, ‘virtually all states will be equally affected’.⁷⁰

For practice to be consistent and uniform, there must be regularity in states’ conduct.⁷¹ There must be a behavioural pattern that suggests states’ adherence to an emerging rule.⁷² In comparable situations, the conduct’s repetition must be apparent.⁷³ Too much discrepancy or inconsistency suggests that the supposed practice was motivated by considerations other than law.⁷⁴ Nonetheless, complete uniformity is not required.⁷⁵ Only ‘virtual’ or ‘substantial’ uniformity is sought and some ‘inconsistencies and contradictions are not necessarily fatal to a finding of “a general practice”’.⁷⁶ This is especially true when a state acts contrary to the putative rule but justifies its conduct by appealing to the exceptions or justifications.⁷⁷

It bears stressing that the ‘quality of generality’ does not only pertain to ‘how many states participate in a particular practice’.⁷⁸ Focus should also be made on the ‘reverse side of the coin’,⁷⁹ or states’ ‘abstention’ or ‘negative practice’.⁸⁰ Abstention is also central to custom’s

⁶⁸ *North Sea Continental Shelf* [1969] (n 13), 43.

⁶⁹ Wood, ‘Second Report on Custom’ (2014) (n 43), 39 citing Danilenko G, *Law-Making in the International Community* (Nijhoff 1993), 95; Mendelson, ‘Formation of Custom’ (n 28), 186.

⁷⁰ See ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 136; *Nuclear Weapons* [1996] (n 13) (Shahabuddeen, dissenting), 414.

⁷¹ Wood, ‘Second Report on Custom’ (2014) (n 43), 39; *Asylum* [1950] (n 47), 277.

⁷² *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/US)* (Judgment) [1984] ICJ 246, 290; *Italy-US Air Transport Services Agreement (Italy/US)* (Advisory Opinion) (1965) 16 RIAA 75, 100

⁷³ *North Sea Continental Shelf* [1969] (n 13), 45; Barboza Julio, ‘Customary Rule: From Chrysalis to Butterfly’ in Armas Barea Calixto, *et al.* (eds), *Liber Amicorum José María Ruda* (BRILL 2000), 7; Thirlway Hugh, *The Sources of International Law* (Oxford University Press 2014), 65.

⁷⁴ *Asylum* [1950] (n 47), 277; *Corfu Channel* (UK v Albania) (Merits) [1949] ICJ 4 (Krylove, dissenting), 128; *Barcelona Traction, Light, & Power Company* (Belgium v Spain) (Judgment) [1970] ICJ 1 (Bustamante, separate opinion), 56–7; *Fisheries Jurisdiction* (Germany v Iceland) (Judgment) [1974] ICJ 175 (Nagendra Singh, declaration), 212; *Arrest Warrant* (DRC v Belgium) (Judgment) [2002] ICJ 3 (Bula-bula, separate opinion), 117–8.

⁷⁵ Wood, ‘Second Report on Custom’ (2014) (n 43), 42 citing Fitzmaurice Gerald, ‘Law & Procedure of the International Court of Justice, 1951–54’ (1958) 34 *British Yearbook of International Law* 1, 45; Villeger Mark, *Customary International Law & Treaties: Theory & Practice of the Interrelation of Sources* (Springer 1997), 44.

⁷⁶ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 137; Wood, ‘Second Report on Custom’ (2014) (n 43), 42 citing *Military & Paramilitary Activities* [1986] (n 13), 98; *Asylum* [1950] (n 47) (Azevedo, dissenting), 336; *Right of Passage over the Indian Territory* [1960] (n 18), 40, (Spender, dissenting), 104; *North Sea Continental Shelf* [1969] (n 13) (Lachs, dissenting), 229; *Fisheries Jurisdiction* (UK v Norway) (Judgment) [1951] ICJ 116, 138.

⁷⁷ *Military & Paramilitary Activities* [1986] (n 13), 98; Higgins, *Problems & Process* (n 62), 20.

⁷⁸ Kolb, ‘Theory of Custom’ (n 12), 136.

⁷⁹ *Ibid.*, 136.

⁸⁰ Wood, ‘Second Report on Custom’ (2014) (n 43), 28 citing *Arrest Warrant* [2002] (n 74) (van den Wyngaert, dissenting), 144–5; Tomka Peter, ‘Custom & the ICJ’ (2013) 12(2) *Law & Practice of International Courts & Tribunals* 195, 210.

‘development and ascertainment’.⁸¹ Under certain circumstances, it provides evidence against the practice’s extensiveness and representativeness by showing that only a few states have adopted the conduct.⁸² Yet, the phrase ‘under certain circumstances’ highlights caution. There are various reasons for a state’s ‘refusal or failure to act’.⁸³ For instance, states may choose not to invoke another’s responsibility due to the lack of clarity in the case law,⁸⁴ absence of jurisdiction,⁸⁵ the proceedings’ complexity,⁸⁶ and political interests.⁸⁷ Similarly, many factors affect a state’s decision to impose unilateral measures including the issues regarding the competence to do so,⁸⁸ the kind of norm breached,⁸⁹ and political considerations.⁹⁰ In this regard, what needs to be shown is that a state is ‘deliberate’ in its abstention and is ‘conscious of refraining from acting’.⁹¹

The criteria for assessing practice are equally applicable to *opinio juris*. This is not surprising as practice must be accompanied by *opinio juris*.⁹² Accordingly, *opinio juris* must also be broad, representative, and consistent.⁹³ Most states, not just a few from similar backgrounds, must accept the practice as law.⁹⁴ Likewise, there must be uniformity in the

⁸¹ Wood, ‘Second Report on Custom’ (2014) (n 43), 28–9. See *Lotus* [1927] (n 13), 28–9; *Military & Paramilitary Activities* [1986] (n 13), 99; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ 66, 253; *Jurisdictional Immunities* [2012] (n 13), 135.

⁸² See ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 136.

⁸³ Wood, ‘Third Report on Custom’ (2015) (n 46), 11; ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 133. See Henry Etienne, ‘Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law’ (2017) 18 *Melbourne Journal of International Law* 1, 13, 28, 30.

⁸⁴ Tams Christian & Tzanakopoulos Antonios, ‘Barcelona Traction: ICJ as an Agent of Legal Development’ (2010) 23 *Leiden Journal of International Law* 781, 793.

⁸⁵ Frowein Jochen, ‘Reactions by Not Directly Affected States to Breaches of Public International Law’ (1994) 248 *Recueil des Cours de l’Académie de Droit International* 345, 427.

⁸⁶ Tanaka, ‘Consequences of Obligations Erga Omnes’ (n 8), 24.

⁸⁷ Tams, *Enforcing Obligations Erga Omnes* (n 5), 159; Tams Christian, ‘Individual States as Guardians of Community Interests’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 399; Ruys, ‘Legal Standing & Public Interest Litigation’ (n 8), 492.

⁸⁸ Pauwelyn Joost, ‘Enforcement & Countermeasures in the WTO’ (2000) 94(2) *American Journal of International Law* 335, 338.

⁸⁹ Dawidowicz, *Third Party Countermeasures* (n 5), 270; Tams, *Enforcing Obligations Erga Omnes* (n 5), 230.

⁹⁰ Hillgruber, ‘Third States & Countermeasures’ (n 9), 283; Nollkaemper, ‘Change in International Responsibility’ (n 8), 16; Proukaki, *Problem of Enforcement* (n 8), 206.

⁹¹ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 133.

⁹² *North Sea Continental Shelf* [1969] (n 13), 44. See *Military & Paramilitary Activities* [1986] (n 13), 109.

⁹³ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 139–40 citing *Nuclear Weapons* [1996] (n 13), 254. Lepard, *Customary International Law* (n 32), 101; Corten, ‘Customary Prohibition on the Use of Force’ (n 49), 916.

⁹⁴ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 139. See Dumberby, *Custom in Investment Law* (n 20), 29 citing de Visscher, *Théories et réalités* (n 14), 182–4.

expression of this belief.⁹⁵

As with practice, what counts is not how many states expressed their belief but ‘how [it] is received at large’.⁹⁶ The focus must not just be on states engaging in the practice and expressing their views but also on those ‘in the position to react to it’.⁹⁷ It may be that states choose to be silent. In ‘strictly defined cases’, this may evince their belief that the putative rule has become law.⁹⁸ Yet again, caution must be exercised.⁹⁹ There are various reasons for a state’s silence.¹⁰⁰ Furthermore, states are not expected to react to every assertion of putative rights and duties by others.¹⁰¹ Thus, whether silence is meaningful depends on its context.¹⁰² For instance, the state must be in a position in which it is reasonably expected to respond as in the case where its rights and interests are affected.¹⁰³ Likewise, the silence must be unambiguous for it to amount to ‘tacit agreement’ rather than mere disinterest or tolerance.¹⁰⁴ There must be a ‘consistent and undeviating attitude’ a “clear”, “definite” and “unequivocal” course of action, showing “clearly and consistently evinced acceptance”.¹⁰⁵

Other states may also express their opposition to the putative rule. As to the enforcement of duties owed *erga omnes*, several states, mostly Western ones, have asserted the competence

⁹⁵ Corten, ‘Customary Prohibition on the Use of Force’ (n 49), 816.

⁹⁶ Kolb, ‘Theory of Custom’ (n 12), 136. See Thirlway, *Sources of International Law* (n 73), 70–1; Wolfke, *Custom* (n 15), 46–7.

⁹⁷ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 129 citing *Military & Paramilitary Activities* [1986] (n 13), 109; *North Sea Continental Shelf* [1969] (n 13), 44; *Nuclear Weapons* [1996] (n 13), 254. Kolb, ‘Theory of Custom’ (n 12), 136; Corten, *Law Against War* (n 12), 21.

⁹⁸ Henry, ‘Revisionist Claims of Custom’ (n 83), 8; Wood, ‘Third Report on Custom’ (2015) (n 46), 10

⁹⁹ Corten, *Law Against War* (n 12), 21.

¹⁰⁰ Lepard, *Customary International Law* (n 32), 21, 188; Corten, *Law Against War* (n 12), 37. Note Henry, ‘Revisionist Claims of Custom’ (n 83), 32 (‘The political motivations for states’ actions or omissions are, in themselves, no sufficient cause to discard the potential legal relevance of the actions or omissions. This flows from the fact that “law and politics are not mutually exclusive concepts” [...] But this should not distract us from the fact that the political and legal idioms are separate and pursue distinct goals’)

¹⁰¹ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 153; Bos Maarten, ‘Identification of Custom in International Law’ (1982) 25 *German Yearbook of International Law* 9, 37; Henry, ‘Revisionist Claims of Custom’ (n 83), 12, 29 (‘[There is] certainly no evidence of acquiescence when the state in question has [...] communicated its views on the legal issues [...] through other means’).

¹⁰² Wood, ‘Second Report on Custom’ (2014) (n 43), 69. See Henry, ‘Revisionist Claims of Custom’ (n 83), 12, 20; Starski Paulina, ‘Silence within the Process of Normative Change & Evolution of the Prohibition on the Use of Force: Normative Volatility & Legislative Responsibility’ (2017) 4 *Journal on the Use of Force & International Law* 14, 22–3.

¹⁰³ Henry, ‘Revisionist Claims of Custom’ (n 83), 7–8; Wood, ‘Third Report on Custom’ (2015) (n 46), 12–3 citing *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, & South Ledge* (Malaysia/Singapore) (Judgment) [2008] ICJ 12, 50–1; *Gulf of Maine* [1984] (n 72), 305. Corten, *Law Against War* (n 12), 36.

¹⁰⁴ Henry, ‘Revisionist Claims of Custom’ (n 83), 4; Dumberry, *Custom in Investment Law* (n 20), 153;

¹⁰⁵ Corten, *Law Against War* (n 12), 21 citing Kohen Marcelo, ‘Use of Force by the US after the End of the Cold War, & its Impact on International Law’ in Byers Michael & Nolte Georg (eds), *US Hegemony & the Foundations of International Law* (Cambridge University Press 2003), 224.

of a ‘state other than an injured state’ and levied unilateral measures to enforce responsibility.¹⁰⁶ Others, however, have condemned these measures, albeit usually in a sweeping manner, as illegal,¹⁰⁷ and indicated their preference for collective forms of implementation.¹⁰⁸ This opposition militates against *opinio juris*’ extensiveness and shows that other states do not share the belief in the conduct’s desirability and appropriateness.¹⁰⁹

II. METHOD IN EXAMINING STATE PRACTICE & *OPINIO JURIS*

A. Approach: Qualitative & Empirical

The discussion in *Chapter 2* and above demonstrates that the determination of whether states have accepted the competence of ‘states other than an injured state’ to implement duties owed *erga omnes* cannot be made through deduction—whether by inferring from existing rules, extending the scope of their application, or appealing to these norms’ inherent qualities.¹¹⁰

¹⁰⁶ Hofer Alexandra, 'Negotiating International Public Policy through Adoption & Contestation of Sanctions' (2017) 50 *Revue Belge de Droit International* 440, 448. Note that this has not always been the case. When it comes to unilateral measures, states do not ‘often clarify the legal grounds [...] to resort to such action’ (Proukaki, *Problem of Enforcement* (n 8), 110). This is unsurprising. Due to the uncertainty in the legality of these measures, states have ‘an interest in not labelling or characterising [them]’ (Dupont Pierre-Emmanuel, 'Unilateral Sanctions as Unilateral Coercive Measures: Discussing Coercion at the UN Level' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 372).

¹⁰⁷ Barber Rebecca, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70 *International & Comparative Law Quarterly* 343, 363. See e.g. *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 56/179 UNGA (21 December 2001) UN Doc A/RES/56/179; UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (20 July 2001) UN Doc A/56/207; *Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political & Economic Compulsion* Res 57/5 UNGA (16 September 2002) UN Doc A/RES/57/5.

¹⁰⁸ See Hofer Alexandra, 'Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 *Chinese Journal of International Law* 1, 39; Henry, 'Revisionist Claims of Custom' (n 83), 17.

¹⁰⁹ Lepard, *Customary International Law* (n 32), 114 citing *Nuclear Weapons* [1996] (n 13), 255 ('The emergence [...] of a customary rule specifically prohibiting the use of nuclear weapons [...] is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other').

¹¹⁰ Talmon, 'Determining Custom' (n 38), 430 citing *Gulf of Maine* [1984] (n 72), 299 ('Customary rules [are] tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas'); Kolb, 'Theory of Custom' (n 12), 125. See Crawford James, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility' in Fastenrath Ulrich, et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 224 ('[Discussion on duties owed] *erga omnes* [have been carried out] almost entirely in the abstract, with little or no reference to earlier instances of international adjudication or state practice [and *opinio juris*]'). But see e.g. Tomuschat Christian, 'Obligations arising for States Without or Against Their Will' (1993) 241 *Recueil des Cours de l'Académie de Droit International* 195, 298; Besson Samantha, 'Community Interest in the Identification of International Law: With Special Emphasis on Treaty Interpretation & Customary Law Identification' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2017), 65 ('In practice, [...] some of those principles tend to be identified without going through the two-element identification process applicable to customary law, and hence independently from their source'); Talmon, 'Determining Custom' (n 38), 424 ff noting *Corfu Channel* [1949] (n 74), 22; *Continental Shelf (Libya/Malta) (Judgement)* [1985] ICJ 13, 33; *Arrest Warrant* [2002] (n 74), 20–1.

Instead, it must be done through induction.¹¹¹ This approach considers custom as ‘objectively identifiable’,¹¹² the existence of which can be demonstrated through a ‘systematic process of observation and empirical generalisation’.¹¹³ Only when there is evidence of sufficiently extensive and consistent practice and *opinio juris* may it be said that the rule exists. It is this approach that ‘remains loyal to the classical understanding’ of custom’s formation.¹¹⁴ Nonetheless, the process does not ‘preclude a measure of deduction as an aid’.¹¹⁵ After all, there is ‘no induction without [...] axiomatic or deductive reasoning’.¹¹⁶ Indeed, the process itself may be characterised as a ‘complex’ one requiring the ‘harmonisation’ of evidence gathered by the interpreter.¹¹⁷

That said, the examination is necessarily empirical.¹¹⁸ It requires the analysis of observable instances of state practice and *opinio juris*.¹¹⁹ Yet, it must be stressed that empirical does not imply a quantitative or statistical analysis. A qualitative examination, which this thesis employs, may also be used to draw conclusions from state practice and *opinio juris*, analyse cases with depth, and provide insight regarding the context in which rule-making takes place.¹²⁰

B. Instances Examined

Part II is divided into several chapters dealing with different norms of international law—the prohibition against force; some norms that safeguard the human person (e.g., prohibition against genocide, torture, slavery, and racial discrimination); norms that protect peoples’ rights

¹¹¹ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 126; Wood, ‘First Report on Custom’ (2013) (n 12), 141. See *Gulf of Maine* [1984] (n 72), 299 (‘Not by deduction from preconceived ideas’); Schwarzenberger Georg, *Inductive Approach to International Law* (Oceana 1965), 126–7.

¹¹² See Hakimi, ‘Customary International Law’ (n 22), 1497.

¹¹³ Talmon, ‘Determining Custom’ (n 38), 418, 420, 421 citing Schüle Adolf, ‘Methoden der Völkerrechtswissenschaft’ (1959) 3 *Berichte der Deutschen Gesellschaft für Völkerrecht* 1, 14, 19–20; de Visscher Charles, *Problèmes d’interprétation judiciaire en droit international public* (Pedone 1963), 16; Bleckmann Albert, ‘Zur Feststellung und Auslegung von Völkergewohnheitsrecht’ (1977) 37 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 504, 505; Dinstein, ‘Custom & Treaties’ (n 54), 265.

¹¹⁴ Wood, ‘First Report on Custom’ (2013) (n 12), 139.

¹¹⁵ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 126; Kolb, ‘Theory of Custom’ (n 12), 130 ff; de Visscher, *Théories et réalités* (n 14), 190. *Contra* Wood, ‘First Report on Custom’ (2013) (n 12), 139 (‘[It must] be ascertained [via induction] that is state-centred and devoid of independent normative consideration’)

¹¹⁶ Kolb, ‘Theory of Custom’ (n 12), 130.

¹¹⁷ *Ibid.*, 133.

¹¹⁸ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 126.

¹¹⁹ *Ibid.*; Talmon, ‘Determining Custom’ (n 38), 420.

¹²⁰ See Webley Lisa, ‘Qualitative Approches to Empirical Legal Research’ in Cane Peter & Kritzer Herbert (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010), 928–9, 934; Shaffer Gregory & Ginsburg Tom, ‘Empirical Turn in International Legal Scholarship’ (2012) 106(1) *American Journal of International Law* 1, 1.

(*i.e.*, respect for self-determination); and certain rules for the preservation and protection of the environment. These were selected not only because these are the areas where the ‘richest seams are still to be found’,¹²¹ but because they correspond to norms that have been widely deemed to impose duties owed *erga omnes* or *erga omnes partes*—claims that are examined at the start of each chapter. The examination of state practice and *opinio juris* in separate chapters is made not only for convenience but also because they allow any ‘different conclusions’ to be drawn depending on the relevant rule.¹²²

Each chapter analyses breaches of the duties deemed owed *erga omnes* and if states implemented these duties. The establishment of the breach is essential as without it, it becomes doubtful if there is a duty to be implemented in the first place.¹²³ The examination is limited to wrongful acts and does not delve into the regime of ‘liability’,¹²⁴ and activities which states deem undesirable but are not prohibited by law. These do not engage a state’s responsibility, and the responses of ‘indirectly affected’ states to these acts do not inform the practice that this thesis examines.

C. Conduct & Views Considered

The practices and convictions that this thesis considers are primarily those of states.¹²⁵ In a decentralised order where authority is diffusely held,¹²⁶ states continue to hold a ‘pre-eminent role’ in custom’s formation.¹²⁷ *Part II* examines the instances where states claimed the competence to implement duties owed *erga omnes* as ‘states other than an injured state’; cases where no state claimed this prerogative; and states’ reactions to claims of this capacity. The period examined begins in 1970, when the ICJ asserted in *Barcelona Traction* the existence of duties owed *erga omnes* which served as the basis for the ILC’s work and much of literature and ends in 2023, this thesis’ cut-off date.

As stressed in *Chapter 2*, this thesis distinguishes between collective and unilateral

¹²¹ Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997), xiii.

¹²² See Focarelli, ‘International Law & Third-Party Countermeasures’ (n 8), 19.

¹²³ Ibid, 18; Proukaki, *Problem of Enforcement* (n 8), 110.

¹²⁴ See ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 148 ff; ILC, ‘Report on the Work of the 58th Session’ (2006) II(2) YbILC 59, 59 ff.

¹²⁵ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 130 citing *Military & Paramilitary Activities* [1986] (n 13), 93; *Continental Shelf* [1985] (n 110), 29; *Jurisdictional Immunities* [2012] (n 13), 143. Wood, ‘First Report on Custom’ (2013) (n 12), 139; Wood, ‘Second Report on Custom’ (2014) (n 43), 16.

¹²⁶ Besson, ‘Community Interest’ (n 109), 55; Hakimi, ‘Customary International Law’ (n 22), 1495.

¹²⁷ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 130

implementation of responsibility.¹²⁸ The latter involves actions taken by organisations against their members pursuant to agreements that member states have accepted.¹²⁹ While still subject to ‘legal limitations’,¹³⁰ these actions do not necessarily require a wrongful act.¹³¹ Thus, they do not inform the practice—that of states—which this thesis evaluates.¹³²

This thesis also distinguishes implementation measures from other unilateral responses to states’ conduct wrongful or otherwise. As stressed in *Chapter 2*, implementation involves the vindication of a right that the wrongful state infringed to ‘secure the observance or performance’ of the latter’s duty.¹³³ For this reason, responses to wrongful acts that do not involve the assertion of ‘specific claims’ against wrongful states,¹³⁴ as in the case of mere protests and criticisms and ‘even calls that the state brings itself back into conformity with its [...] duties’,¹³⁵ are not considered acts of implementation. The same is true for responses to lawful conduct that states may find undesirable. While states sometimes act to induce other states to ‘desist from [a certain] behaviour’ or change their policies,¹³⁶ these responses are not, in the absence of a prior wrongful act, acts of implementation.¹³⁷ Instead, these are better seen as actions taken pursuant

¹²⁸ Dawidowicz Martin, ‘Public Law Enforcement without Safeguards? Analysis of State Practice on Third-party Countermeasures & their Relationship to the UNSC’ (2006) 77(1) *British Yearbook of International Law* 333, 349; Barber, ‘GA & Unilateral Sanctions’ (n 107), 347; Moret Erica, ‘Unilateral & Extraterritorial Sanctions in Crisis’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 19.

¹²⁹ Douhan Alena, ‘Unilateral Coercive Measures: Notion, Types, & Qualification’ (UN Doc A/HRC/48/59) 8 July 2021, 13; Ruys Tom, ‘Sanctions, Retorsions, & Countermeasures: Concepts & Legal Framework’ in Van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 40, 43.

¹³⁰ Craven Matthew, ‘Humanitarianism & the Quest for Smarter Sanctions’ (2022) 13 *European Journal of International Law* 43, 51; Orakhelashvili Alexander, ‘Sanctions & Fundamental Rights of States: EU Sanctions Against Iran & Syria’ in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 25.

¹³¹ Ruys, ‘Sanctions, Retorsions, & Countermeasures’ (n 129), 36.

¹³² See Focarelli, ‘International Law & Third-Party Countermeasures’ (n 8), 20.

¹³³ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 116.

¹³⁴ Ibid, 117; Crawford, *State Responsibility* (n 1), 541 (‘Although not defined in [2001 Draft Articles], “invocation of responsibility” refers to a formal process of claim against a state or states’).

¹³⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 117; Happold Matthew, ‘“Injured State” in the Breach of a Non-Proliferation Treaty & the Legal Consequences of such a Breach’ in Joyner Daniel & Roscini Marco (eds), *Non-Proliferation Law as a Special Regime* (Cambridge University Press 2012), 177; Scobbie Iain, ‘Invocation of Responsibility for the Breach of Obligations under Peremptory Norms of General International Law’ (2002) 13 *European Journal of International Law* 1201, 1206.

¹³⁶ Bogdanova Iryna, *Unilateral Sanctions in International Law & the Enforcement of Human Rights: Impact of the Principle of Common Concern of Humankind* (BRILL 2022), 45; Eckert Sue, ‘Evolution & Effectiveness of UN Targeted Sanctions’ in van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 58; Happold Matthew, ‘Economic Sanctions & International Law’ in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 2; Watson James, ‘World Trade Organisation & Unilateral Sanctions: Prohibited or Possible?’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart), 186.

¹³⁷ See ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 116. See also Ronzitti Natalino, ‘Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective’ in Ronzitti Natalino (ed), *Coercive*

to the foreign policy of the responding state,¹³⁸ to induce the other state to desist from a particular conduct,¹³⁹ or to act based on the responding state's 'values, interests, and objectives'.¹⁴⁰

As discussed in *Chapter 2*, implementation may involve the invocation of responsibility as in the case of judicial dispute resolution,¹⁴¹ or enforcement in the form of extra-judicial unilateral measures like countermeasures.¹⁴² For invocation via judicial dispute resolution, one of the means of implementation to which this thesis would focus, what is important to examine is the assertion by states of the competence of 'states other than an injured state'.¹⁴³ The issue is not whether courts have accepted this competence. Rather, it is whether states have 'created a norm' that allows 'states other than an injured state' to invoke responsibility.¹⁴⁴ In this regard,

Diplomacy, Sanctions, & International Law (BRILL 2016), 9 ('Do not necessarily imply that the target State has committed an international wrong, even though this is usually the case'); Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 129), 23 ('Not necessarily a reaction to a prior breach of international law').

¹³⁸ Milaninia Nema, 'Limits of Economic Sanctions under the Paradigm of International Humanitarian Law' in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, & Consequences* (Asser Press 2015), 96; Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 129), 23; Timofeev Ivan, 'Unilateral & Extraterritorial Sanctions Policy: the Russian Dimension' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 91.

¹³⁹ Bothe Michael, 'Compatibility & Legitimacy of Sanctions Regimes' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 33; Kern Alexander, *Economic Sanctions: Law & Public Policy* (Palgrave Macmillan 2009), 10; Eckert, 'Evolution & Effectiveness of UN Targeted Sanctions' (n 136), 58; Happold, 'Economic Sanctions & International Law' (n 136), 2; Joyner Daniel, 'International Legal Limits on the Ability of States to Lawfully Impose Economic/Financial Sanctions' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (BRILL 2016), 193; Watson, 'WTO & Unilateral Sanctions' (n 136), 186.

¹⁴⁰ Beaucillon Charlotte, 'Unilateral & Extraterritorial Sanctions: Definitions, State of Practice, & Contemporary Challenges' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 3; Ashley Louisa, 'Status of Unilateral Countermeasures in International Law' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 236; Mitchell Andrew, 'Sanctions & World Trade Organisation' in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 283; Douhan, 'Unilateral Coercive Measures: Notion, Types, & Qualification' (2021) (n 129), 6.

¹⁴¹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117; Crawford, *State Responsibility* (n 1), 541; de Wet Erika, 'Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction' (2013) 38 *South African Yearbook of International Law* 1, 9–10; Tams, 'Guardians of Community Interests' (n 87), 383; Allain Jean, 'Slavery & Obligations Erga Omnes' (2019) 36 *Australian Yearbook of International Law* 85, 112; Weiss Edith Brown, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *American Journal of International Law* 798, 800; Wellens Karel, 'General Observations' in Komori Teruo & Wellens Karel (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge 2016), 25.

¹⁴² ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 128 ff; Crawford, *State Responsibility* (n 1), 675; Hillgruber, 'Third States & Countermeasures' (n 9), 265; Hutchinson D, 'Solidarity & Breaches of Multilateral Treaties' (1988) 59 *British Yearbook of International Law* 151, 157; Proulx Vincent-Joël, 'Marshall Islands Judgements & Multilateral Disputes at the World Court' (2017) 111 *American Journal of International Law* (Unbound) 96, 98.

¹⁴³ See Frowein, 'Reactions by Not Directly Affected States' (n 85), 416.

¹⁴⁴ Hillgruber, 'Third States & Countermeasures' (n 9), 271–2; Annacker Claudia, 'Legal Regime of Erga

the role of tribunals is to ascertain if states have established this prerogative.¹⁴⁵

Regarding unilateral measures, another focus of this thesis, care must be taken in classifying the relevant measures. As mentioned above, enforcement measures must be distinguished from measures levied against states to induce them to ‘desist from [a certain] behaviour’,¹⁴⁶ or to act in a certain manner.¹⁴⁷ These are not levied in response to a state’s prior wrongful act and are not measures of implementation. The same goes for ‘secondary’ measures or those that ‘constrain [entities] located in or bearing the nationality of a third state, to abide by [the measures of the imposing state] although they are not subject to the jurisdiction’ of the latter.¹⁴⁸ Moreover, enforcement measures against states must also be distinguished from ‘targeted measures’ or those levied directly on individuals and entities. These measures, as will be seen in *Part II* and *Chapter 9*, fall outside the realm of state-to-state relations and consequently, the framework of implementation of state responsibility.¹⁴⁹ Finally, retorsions must be distinguished from countermeasures. Retorsions, including those levied to enforce responsibility,¹⁵⁰ are lawful.¹⁵¹ Yet, it remains to be seen if the same may be said about countermeasures taken by ‘states other than an injured state’.

Finally, this thesis also considers the materials from international organisations, tribunals, and publicists. While actors other than states ‘do not participate directly in [custom’s] creation’,¹⁵² they influence its development and provide evidence for its formation.¹⁵³ For

Omnes Obligations in International Law' (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 140. See *Obligation to Prosecute or Extradite* [2012] (n 8) (Skotnikov, separate opinion), 484; (Xue, dissenting), 576; *Application of the Genocide Convention* [2022] (n 8) (Xue, dissenting), 6.

¹⁴⁵ Ahmadov, *Actio Popularis* (n 8), 100. Compare *ibid*, 96, 88. See Picone Paolo, 'Distinction between Jus Cogens & Obligations Erga Omnes' in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 415.

¹⁴⁶ Bothe, 'Compatibility & Legitimacy of Sanctions Regimes' (n 139), 33; Eckert, 'Evolution & Effectiveness of UN Targeted Sanctions' (n 136), 58.

¹⁴⁷ Beaucillon, 'Unilateral & Extraterritorial Sanctions' (n 140), 3; Mitchell, 'Sanctions & the WTO' (n 140), 283.

¹⁴⁸ Beaucillon, 'Unilateral & Extraterritorial Sanctions' (n 140), 6; Schmidt Julia, 'Legality of Unilateral Extra-Territorial Sanctions under International Law' (2022) 27 *Journal of Conflict & Security Law* 53, 60

¹⁴⁹ Hofer, 'US Sanctions against Russia' (n 8), 78; Subedi, 'Status of Unilateral Sanctions' (n 8), 49. See Jazairy Idriss, 'Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (26 July 2017) UN Doc A/HRC/36/44, 7. Douhan, 'Unilateral Coercive Measures: Notion, Types, & Qualification' (2021) (n 129), 15. See also ILC, 'Summary Records of the 52nd Session' (2000) (n 4), 266, 271 (Crawford).

¹⁵⁰ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1) 128; Crawford, *State Responsibility* (n 1), 676.

¹⁵¹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 128.

¹⁵² Dumberry, *Custom in Investment Law* (n 20), 120.

¹⁵³ Corten, *Law Against War* (n 12), 23 citing Gray Christine, *International Law & the Use of Force* (4th edn, Oxford University Press 2018), 29. d'Aspremont Jean, 'Inclusive Law-Making & Law-Enforcement Processes for

instance, international organisations have an ‘indirect role in [custom’s] identification’.¹⁵⁴ True, their resolutions do not ‘serve as conclusive evidence of [custom’s] existence and content’.¹⁵⁵ Yet, in certain cases, they provide ‘evidence of existing or emerging law’ or ‘contribute to its development’.¹⁵⁶ Nonetheless, care must be taken in examining these materials. The organisations’ act *per se* must be separated from the ‘practice of states acting within or in relation to them’.¹⁵⁷ The latter, being attributable to states, may be considered with ‘due caution’ as primary evidence of practice and *opinio juris*.¹⁵⁸ Furthermore, it is ‘necessary to look at [the resolutions’] content and the conditions of its adoption’.¹⁵⁹ As these institutions are ‘political and not judicial’ bodies,¹⁶⁰ it must be shown that they have ‘expressed [themselves] on a legal basis’.¹⁶¹

As for international tribunals, their role arguably goes beyond dispute resolution.¹⁶² Their decisions may not be a ‘formal source of law’,¹⁶³ and they do not bind states that are not parties

an Exclusive International Legal System’ in d’Aspremont Jean (ed), *Participants in the International Legal System* (Routledge 2011), 430 cited in Dumberry, *Custom in Investment Law* (n 20), 123.

¹⁵⁴ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 132.

¹⁵⁵ *Ibid.*, 147.

¹⁵⁶ *Ibid.* citing *Nuclear Weapons* [1996] (n 13), 254–5.

¹⁵⁷ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 130.

¹⁵⁸ *Ibid.*, 130, 140. See *Military & Paramilitary Activities* [1986] (n 13), 100.

¹⁵⁹ *Nuclear Weapons* [1996] (n 13), 255.

¹⁶⁰ Corten, *Law Against War* (n 12), 37; Crawford James, ‘Multilateral Rights & Obligations in International Law’ (2006) 319 *Recueil des Cours de l’Académie de Droit International* 325, 459; Schacter Oscar, ‘In Defence of International Rules on the Use of Force’ (1986) 53 *University of Chicago Law Review* 113, 122. Note Nolte Georg, ‘International Law Commission & Community Interests’ in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2017), 108 (‘International organisations can serve the particularistic aims of certain states’).

¹⁶¹ Corten, *Law Against War* (n 12), 23, 46

¹⁶² Almeida Paula Wojcikiewicz, ‘Enhancing ICJ Procedures to Promote Fundamental Values: Overcoming the Tension between Bilateralism & Community Interests’ in Iovane Massimo, *et al.* (eds), *Protection of General Interests in Contemporary International Law* (Oxford University Press 2021), 242; Nollkaemper André, ‘International Adjudication of Global Public Goods: Substance & Procedure’ (2012) 23 *European Journal of International Law* 769, 782.

¹⁶³ Brownlie Ian, *Principles of Public International Law* (6th edn, Oxford University Press 2003), 38. See Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014), 85 citing Rosenne Shabtai, *Law & Practice of the International Court: 1920–2005*, vol I (4th edn, Nijhoff 2006), 169 (‘Its pronouncements are solely concerned with the law as it is; and [not the] speculation as to future developments in the law’); Tams & Tzanakopoulos, ‘Barcelona Traction’ (n 84), 785 (‘It may be preferable to avoid terms such as “judicial law making” and instead speak of the Court’s role as an “agent” or actor participating in the process of legal development’) citing Lauterpacht Hersh, *Development of International Law by the International Court* (Stevens 1958), 5. But see Akande Dapo, ‘Competence of International Organisations & the Advisory Jurisdiction of the International Court of Justice’ (1998) 8 *European Journal of International Law* 437, 464 (‘The ascertainment, interpretation and application of a legal rule to particular facts require [...] creativity, which in itself justifies the assertion that judges are also law-makers’); Lekhi Pranay, ‘Nuclear Problem: A Communitarian Response’ (2021) 68 *Netherlands International Law Review* 89, 94 (‘Judges have a legislative function when they identify custom’) citing Benvenisti Eyal, ‘Customary International Law as a Judicial Tool for Promoting Efficiency’ in Benvenisti

to the dispute.¹⁶⁴ Yet, given their expertise,¹⁶⁵ their opinions carry persuasive weight.¹⁶⁶ Thus, they provide ‘subsidiary means for [custom’s] determination’.¹⁶⁷ Indeed, this role of ‘elucidating and interpreting norms’ is recognised’ under the ICJ Statute Article 38(1)(d).¹⁶⁸ In many instances,¹⁶⁹ especially where the decision is ‘well-reasoned and well-researched’,¹⁷⁰ they may provide ‘evidence of law’,¹⁷¹ the ‘systematisation and [...] confirmation of the existence of a legal rule’,¹⁷² and contribute to the clarification of its contents.¹⁷³

Lastly, the ‘output of bodies’ and publicists also provide a ‘source of information and analysis’ on state practice and *opinio juris*.¹⁷⁴ Again, this is a role also recognised under ICJ Statute Article 38(1)(d).¹⁷⁵ Note that particular regard is given to the ILC which is ‘tasked [under the Charter] with the development [and codification] of international law’,¹⁷⁶ and its work on the 2001 Draft Articles.¹⁷⁷ That said, while the ‘impact and influence’ of the 2001 Draft Articles ‘have undoubtedly been significant’,¹⁷⁸ it remains a ‘doctrinal product’.¹⁷⁹ It

Eyal & Hirsch Moshe (eds), *Impact of International Law on International Cooperation* (Cambridge University Press 2004), 95, 97.

¹⁶⁴ Hernandez, *ICJ & Judicial Function* (n 163), 87.

¹⁶⁵ Ibid, 51, 92; Schwebel Stephen, *Justice in International Law: Selected Writings* (Grotius 1994), 30.

¹⁶⁶ Lepard, *Customary International Law* (n 32), 184; Wood, ‘Third Report on Custom’ (2015) (n 46), 43 See Kolb, ‘Theory of Custom’ (n 12), 128.

¹⁶⁷ Wood, ‘Third Report on Custom’ (2015) (n 46), 43; Hernandez, *ICJ & Judicial Function* (n 163), 85. See Tams & Tzanakopoulos, ‘Barcelona Traction’ (n 84), 48 (‘At best, [they are] “material” [sources] [...] whatever ‘law’ can be found in them must be anchored in a formal source to be binding and applicable’).

¹⁶⁸ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 151.

¹⁶⁹ See Wood, ‘Third Report on Custom’ (2015) (n 46), 44.

¹⁷⁰ Dumberry, ‘FET & Custom’ (n 60), 45. Note Gaja, ‘Protection of General Interests’ (n 17), 44; Geiger Rudolf, ‘Customary International law in the Jurisprudence of the ICJ: A Critical Appraisal’ in Fastenrath Ulrich (ed), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 673-92

¹⁷¹ Brownlie, *Principles of Public International Law* (n 163), 38.

¹⁷² Hernandez, *ICJ & Judicial Function* (n 163), 91; Dumberry, *Custom in Investment Law* (n 20), 46.

¹⁷³ Dumberry, *Custom in Investment Law* (n 20), 44; Tams & Tzanakopoulos, ‘Barcelona Traction’ (n 84), 784, 789.

¹⁷⁴ Dumberry, *Custom in Investment Law* (n 20), 56; ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 151; See *Paquete Habana* (1900) 20 S Ct 290 (US) (Fuller, dissenting), 700 (‘Such works are resorted to by tribunals, not for the speculations of their authors [as to] what the law ought to be, but for evidence of what the law is’).

¹⁷⁵ ILC, ‘Report on the Work of the 70th Session’ (2018) (n 13), 151.

¹⁷⁶ *UN Charter* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 13(1)(a).

¹⁷⁷ See ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 20.

¹⁷⁸ Olleson Simon, ‘Virtue of Pragmatism: Reflections on the Future of the Articles of State Responsibility’ (2022) 93 *Questions of International Law* 23, 32; Arcari Maurizio, ‘Future of the Articles on State Responsibility’ (2022) 93 *Questions of International Law* 3, 10. But note Bordin Fernando Lusa, ‘Reflection of Customary International Law: Authority of Codifications & ILC Draft Articles’ (2014) 63 *International & Comparative Law Quarterly* 535, 563; Scobbie, ‘Invocation of Responsibility’ (n 135), 1220.

¹⁷⁹ Focarelli, ‘International Law & Third-Party Countermeasures’ (n 8), 19. See Paparinskis Martins,

must be stressed that the ILC 'is not and does not claim to be infallible'.¹⁸⁰ Its premises and conclusions remain to be tested.■

'Investment Arbitration & the Law of Countermeasures' (2008) 79(1) *British Yearbook of International Law* 264, 304.

¹⁸⁰ Sartipi Hossein & Hojatzadeh Ali Reza, 'Erga-Omniesation of International Law' (2018) 2 *International Journal of Humanities & Social Science Studies* 189, 207. See Wood Michael, 'Weighing the Articles on Responsibility of International Organisations' in Ragazzi Maurizio (ed), *Responsibility of International Organisations: Essays in Memory of Sir Ian Brownlie* (Nijhoff 2013), 55, 66 ('[C]ourts [...] should approach the articles [...] with circumspection. They should [...] weigh the evidence when determining the status of particular provisions within the draft').

CHAPTER 5A: NORM AGAINST THE THREAT OR USE OF FORCE (1970–2001)

The prohibition against the threat or use of force is a fundamental rule of international law. Its importance is such that it exists under customary law,¹ and also forms the UN Charter's ('Charter') cornerstone.² Article 2(4) requires states to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the [UN's] purposes'. The rule, to recall, refers to 'force' which is broader than 'war'.³ It spans uses of force among states,⁴ from armed attacks to *de minimis* uses of force above a police measure's threshold.⁵ It also covers threats of force. A threat, in this sense, consists of a 'signalled intention to use force if certain events occur'.⁶ It is unlawful when the force contemplated by the threat is itself illegal.⁷

Yet, the norm does not deem all instances of force unlawful. Some lie outside its scope while others fall within recognised exceptions. The former covers a state's use of force in

¹ *Military & Paramilitary Activities in & against Nicaragua* (Nicaragua v US) (Merits) [1986] ICJ 14, 97.

² *Armed Activities on the Territory of the Congo* (DRC v Uganda) (Judgment) [2005] ICJ 168, 223.

³ Corten Olivier, *Law Against War: Prohibition on the Use of Force in Contemporary International Law* (Hart 2010), 51; Gray Christine, *International Law & the Use of Force* (4th edn, Oxford University Press 2018), 9–10; Kelsen Hans, 'Collective Security & Collective Self-Defence under the UN Charter' (1948) 42 *American Journal of International Law* 783, 787; Kunz Josef, 'Bellum Justum & Bellum Legale' (1951) 45 *American Journal of International Law* 528, 532.

⁴ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136, 194.

⁵ Corten, *Law Against War* (n 3), 57, 59, 65, 72, 124. See *Fisheries Jurisdiction* (Spain v Canada) (Judgment) [1998] ICJ 432, 466; *M/V Saiga (No 2)* (Saint Vincent Grenadines v Guinea) (Judgment) (1999) ITLOS Rep 10, 61–2; *Delimitation of the Maritime Boundary between Guyana & Suriname* (Guyana/Suriname) (Award) (2007) (PCA, 2004-04, 17 Sept 2007), 147.

⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ 2, 246–7. See *Corfu Channel* (UK v Albania) (Merits) [1949] ICJ 4, 35; *Military & Paramilitary Activities* [1986] (n 1), 119. Note alternative definitions provided by other scholars: Brownlie Ian, *International Law & the Use of Force by States* (Oxford University Press 1963), 364 ('[A] threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government'); Dinstein Yoram, *War, Aggression, & Self-Defence* (4th edn, Cambridge University Press 2011), 89 ('Usually, a threat of force is viewed as "a form of coercion"'); Randelzhofer Albrecht & Dörr Oliver, 'Article 2(4)' in Simma Bruno, *et al.* (eds), *Charter of the UN: Commentary*, vol 1 (Oxford University Press 2012), 218 *citing* Sadurska Romana, 'Threats of Force' (1988) 82(2) *American Journal of International Law* 239, 246–7 ('Article 2(4) requires a coercive intent directed towards specific behaviour on the part of another state'); Roscini Marco, 'Threats of Armed Force & Contemporary International Law' (2007) 54 *Netherlands International Law Review* 257, 231 ('A threat of force can be defined as an explicit or implicit promise of a future and unlawful use of armed force against one or more states, the realisation of which depends on the threatener's will').

⁷ *Nuclear Weapons* [1996] (n 6), 247; Dubuisson François & Lagerwall Anne, 'Threat of the Use of Force & Ultimata' in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 915 ff; Corten, *Law Against War* (n 3), 112 ff. See Stürchler Nikolas, *The Threat of Force in International Law* (Cambridge University Press 2007), 267. But note that some authors doubt this view of 'symmetry' between threats and uses of force such as Sadurska, 'Threats of Force' (n 6), 246 ff; Green James, 'Questioning the Peremptory Status of the Prohibition of the Use of Force,' (2011) 32 *Michigan Journal of International Law* 215, 229.

another's territory based on and conducted within the parameters of the territorial state's valid consent.⁸ Here, the territorial state's consent negates the existence of coercion and thus no force, within Article 2(4)'s meaning, is employed against the state.⁹ The latter spans SC-authorized force and self-defence. The first emanates from the SC's task of responding to threats to the peace, breaches of the peace, and acts of aggression.¹⁰ The second springs from states' prerogative to respond to armed attacks, distinguished from lesser forms of force,¹¹ attributable to another state,¹² subject to necessity,¹³ proportionality,¹⁴ and, in the case of uses of force under the Charter, notification to the SC.¹⁵

The norm against force resulted from the recognition that states' unfettered prerogative to use force endangers all states.¹⁶ The destruction caused by wars demonstrated the perils of the

⁸ *Armed Activities* [2005] (n 2), 218 ff; Kreß Claus, 'ICJ & Non-Use of Force' in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 577.

⁹ Crawford James, 'Second Report on State Responsibility' (1999) II(2) YbILC 12, ¶240(b) ('The rule relating to the non-use of force [...] embodied in Article [2(4)] [...] does not apply in [...] cases where one state has consented to the use of force on its territory by another state'); Corten, *Law Against War* (n 3), 253–4 ('Consent acts neither as a circumstance precluding wrongfulness, nor as an exception to the rule; its effect is rather to preclude [...] [the] violation of the rule as such or even that it is applicable'), 309; Helmersen Sondre, 'Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations' (2014) 56 *Netherlands International Law Review* 167, 177; Doswald-Beck Louise, 'Legal Validity of Intervention by Invitation of the Government' (1985) 56 *British Yearbook of International Law* 189, 189; Jennings Robert & Watts Arthur (eds), *Oppenheim's International Law: Volume I Peace* (9th edn, Oxford University Press 2008), 435.

¹⁰ Schrijver Nico, 'Ban on the Use of Force in the UN Charter' in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 473.

¹¹ *Military & Paramilitary Activities* [1986] (n 1), 103–4; *Oil Platforms* (Iran v USA) (Judgment) [2003] ICJ 161, 186 ff; *Armed Activities* [2005] (n 2), 221–3; *Wall* [2004] (n 4), 194.

¹² *Military & Paramilitary Activities* [1986] (n 1), 103–4; *Wall* [2004] (n 4), 194. See Corten, *Law Against War* (n 3), 401, 171–2, 196; Orakhelashvili Alexander, 'Changing Jus Cogens through State Practice? Prohibition of the Use of Force & its Exceptions' in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 171–3; Ruys Tom, *Armed Attack & Article 51* (Cambridge University Press 2010), 389–90. See Gray, *Use of Force* (n 3), 209–10. Note that some argue that self-defence justifies the force against non-state actors in the territory of another state absent attribution: Schmitt Michael & Pejic Jelena, *International Law & Armed Conflict: Exploring the Faultlines* (BRILL 2007), 113; Dinstein, *War, Aggression, & Self-Defence* (n 6), 204–8; Tsagourias Nicholas, 'Non-State Actors & the Use of Force' in d'Aspremont Jean (ed), *Participants in the International Legal System* (Routledge 2011), 329; Cassese Antonio, 'International Community's "Legal" Response to Terrorism' (1989) 38 *International & Comparative Law Quarterly* 589, 599–600; Deeks Ashley, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483, 493; Franck Thomas, 'Terrorism & the Right of Self-Defense' (2001) 91 *American Journal of International Law* 839, 840.

¹³ *Armed Activities* [2005] (n 2), 224; Gardam Judith, *Necessity, Proportionality & the Use of Force by States* (Cambridge University Press 1993), 156.

¹⁴ *Oil Platforms* [2003] (n 11), 196–7; *Armed Activities* [2005] (n 2), 223; Corten, *Law Against War* (n 3), 491–3.

¹⁵ Kreß, 'ICJ & Non-Use of Force' (n 8), 568.

¹⁶ Cannizzaro Enzo, 'Common Interests of Humankind & the Regulation of the Use of Force' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2018), 417; Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 17. See *Barcelona Traction, Light, & Power Company* (Belgium v Spain) (Judgment) [1970] ICJ 1, 32.

lack of control over individual uses of force.¹⁷ Conflicts, after all, affect not just the states involved but all others, causing economic, social, and ecological problems.¹⁸ This prompted states to recognise the necessity of peaceful coexistence and cooperation.¹⁹ In turn, this led states to reserve the competence to authorise force to the SC and ban its individual use except for self-defence.²⁰

An overwhelming majority, including the ICJ, claim that the norm against force imposes a duty owed *erga omnes*,²¹ thus permitting all states, including ‘states other than an injured state’, to demand its observance.²² *Chapters 5A* and *5B* examine this claim. They seek to determine whether states have recognised the competence of ‘states other than an injured state’ to implement the duty not to threaten or use force.

This chapter examines if states have accepted the competence of ‘states other than an injured state’ to implement the duty not to use or threaten force by the time the 2001 Draft Articles’ were adopted. First, it clarifies the scope of the duty deemed owed *erga omnes*. While some scholars limit this to aggression,²³ others claim that it includes all non-consensual uses of force not authorised by the SC nor deemed measures of self-defence.²⁴ By analysing the state practice and *opinio juris*, limited these may be, this chapter submits that it is the latter that has an *erga omnes* character. Next, it examines the state practice and *opinio juris* before the 2001 Draft Articles’ adoption related to the implementation of the duty. Finally, it observes that during this period, state practice and *opinio juris* on the competence of ‘states other than an injured state’ to implement duty imposed by the norm on force diverged. Thus, as to this norm, the ILC correctly classified the rules on implementation by ‘states other than an injured state’

¹⁷ *UN Charter* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Preamble. See Cannizzaro, ‘Regulation of the Use of Force’ (n 16), 420; Todeschini Vito, ‘Collective Security, Common Interest, & Responsibility to Protect’ in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 94; Gray, *Use of Force* (n 3), 9.

¹⁸ Simma Bruno, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours de l’Académie de Droit International* 217, 236.

¹⁹ Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 16. See *Nuclear Weapons* [1996] (n 6) (Bedjaoui, declaration), 270.

²⁰ Kelsen, ‘Collective Security & Collective Self-Defence’ (n 3), 785; Schrijver, ‘Force in the UN Charter’ (n 10), 487; Glennon Michael, ‘Limitation of Traditional Rules & Institutions Relating to the Use of Force’ in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 85.

²¹ See e.g. *Barcelona Traction* [1970] (n 16), 32.

²² See e.g. ILC, ‘Report on the Work of the 53rd Session’ (2001) II(2) YbILC 20, 127.

²³ Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997), 74, 78.

²⁴ Crawford, ‘Second Report on State Responsibility’ (1999) (n 9), 72, 99.

under the 2001 Draft Articles as ‘progressive measures’.²⁵

I. SCOPE OF THE DUTY OWED *ERGA OMNES*

Before examining the state practice and *opinio juris*, it is important to first clarify the scope of the duty deemed owed *erga omnes*—whether it is limited to the prohibition against aggression or if it includes the broader prohibition against force. ‘Aggression’, as the ICJ has made clear, is narrower than ‘force’.²⁶ GA Resolution 3314 (XXIX) on the definition of Aggression mirrors, to some extent, Article 2(4).²⁷ However, it also states in its preambular clauses that aggression constitutes the ‘most serious and dangerous form of [...] illegal [...] force’.²⁸ Thus, whether an act that qualifies as the prohibited kind of force may also be considered aggression depends on its scale and gravity.²⁹

Due to its seriousness and gravity, scholars like Ragazzi, submit that only the norm on aggression imposes duties owed *erga omnes*.³⁰ Indeed, the *dictum* in *Barcelona Traction* cites the rule ‘outlawing acts of aggression’ as the first example of a norm that imposes duties owed *erga omnes*.³¹ The ILC does the same in parts of its Commentary to the 2001 Draft Articles.³² Yet, others do not share this view. Some like Crawford and Schwebel also recognise the collective dimension and the interests that the broader prohibition against force protects and submit that the *erga omnes* status is not limited to aggression.³³ This thesis takes the latter view. While the value of the interest that a norm protects plays a role in its formation,³⁴ and although

²⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 22), 23, 127.

²⁶ *Military & Paramilitary Activities* [1986] (n 1), 101.

²⁷ De Hoogh André, ‘Jus Cogens & the Use of Armed Force’ in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 1174.

²⁸ See *Definition of Aggression* Res 3314 (XXIX) UNGA (14 December 1974) UN Doc A/RES/3314.

²⁹ De Hoogh, ‘Jus Cogens & the Use of Armed Force’ (n 27), 1174; O’Connell Mary, ‘What is Aggression? Jus ad Bellum & the ICC Statute’ (2012) 10 *Journal of International Criminal Justice* 189, 194; Helmersen, ‘Prohibition of the Use of Force’ (n 9), 188–9; Bíllkova Veronika, ‘Use of Force by Russia in Crimea’ (2015) 75 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 27, 29.

³⁰ Ragazzi, *Obligations Erga Omnes* (n 23), 78.

³¹ *Barcelona Traction* [1970] (n 16), 32.

³² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 22), 127.

³³ Crawford, ‘Second Report on State Responsibility’ (1999) (n 9), 72, 99; *Military & Paramilitary Activities in & against Nicaragua* (Nicaragua v US) (Provisional Measures) [1984] ICJ 169 (Schwebel, dissenting), 198; Palchetti Paolo, ‘Consequence for Third States as a Result of an Unlawful Use of Force’ in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 1224; Proukaki, *Problem of Enforcement* (n 19), 140.

³⁴ Hillgruber Christian, ‘Right of Third States to Take Countermeasures’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 271. See Linderfalk Ulf, ‘International Legal Hierarchy Revisited—Status of Obligations Erga Omnes’ (2011) 80 *Nordic Journal of International Law* 1, 10

the seriousness of the breach may motivate how states respond,³⁵ they do not, by themselves, determine the legal relations that a norm creates.³⁶ Moreover, as shown below, nothing in the discussions that led to the 2001 Draft Articles reveals the intent to limit the *erga omnes* character to the norm on aggression. Thus, this thesis submits that the *erga omnes* status covers the broader prohibition against all non-consensual uses of force.

A. Importance of the Norm, Seriousness of the Breach, & Legal Relations

As stressed in *Chapter 2*, the importance of the interest that a norm safeguards does not *per se* justify affording *erga omnes* status to the duty not to commit acts of aggression and not the broader duty not to threaten or use force. It may serve as a basis for the norm's formation but this, by itself, does not dictate the 'enforceability [of the duty] by every subject [in the] legal system'.³⁷ It is the states' acceptance and recognition that afford duties their *erga omnes* character.³⁸ Thus, what must be examined is if states consider the duty the norm imposes as owed *erga omnes*.

As to the seriousness of the breach—whether it amounts to aggression or force broadly—it could be argued that the instances of breach in which 'states other than an injured state' implemented the wrongful state's responsibility all involved aggression.³⁹ However, while this may indeed be the case, a closer examination of states' statements that accompanied their implementation measures suggests that what states deemed owed *erga omnes* is the broader duty not to use force. Thus, while the breach's gravity may motivate states to respond, it does not determine how the duty is owed. For instance, when the Soviet Union invaded Afghanistan in 1980, states justified their unilateral measures against the Soviet Union by claiming that it breached its duty not to use force.⁴⁰ When Argentina invaded the Falkland/Malvinas Islands in 1982, states deemed Argentina's conduct as an 'armed action',⁴¹ an illegal 'use of force',⁴² and

³⁵ Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 266, 270; Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 230.

³⁶ Hillgruber, 'Third States & Countermeasures' (n 34), 271.

³⁷ Ibid, 272. See Linderfalk, 'Legal Hierarchy Revisited' (n 34), 10

³⁸ Hillgruber, 'Third States & Countermeasures' (n 34), 271–2; De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 37; Voefray Francois, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 328.

³⁹ See Tams, *Enforcing Obligations Erga Omnes* (n 23), 230.

⁴⁰ US Department of State, 'Department of State Bulletin: Vol 80 (Jan–March 1980)' (1980), 46; UNSC, 'Verbatim Record, 2190th meeting' (7 January 1980) UN Doc S/PV.2190, 7 (Canada); UNSC, 'Verbatim Record, 2186th meeting' (5 January 1980) UN Doc S/PV.2186, 16 (New Zealand).

⁴¹ Dawidowicz, *Third Party Countermeasures* (n 35), 140.

⁴² UNSC, 'Verbatim Record, 2349th meeting' (2 April 1982) UN Docs S/PV.2349, 3 (Canada).

a ‘violation of the [Charter’s] principles’.⁴³ As to Iraq’s invasion of Kuwait in 1990, states cited Iraq’s ‘gross and indefensible violation of the Charter’,⁴⁴ ‘blatant violation of the Charter’,⁴⁵ and illegal use of force.⁴⁶ As to Russia’s invasion of Ukraine in 2022, states claimed that Russia contravened its duties under the Charter, violated international law,⁴⁷ and unlawfully employed ‘armed force on [...] Ukraine’.⁴⁸

B. *No Intent to Limit Erga Omnes Character to Aggression*

Outside states’ responses to breaches of the duty not to threaten or use force, there is marked difficulty in examining the *opinio juris* regarding its *erga omnes* character.⁴⁹ The discussions during the 2001 Draft Articles’ formation reveal little as to what duty states deemed owed *erga omnes*—whether the prohibition against force broadly or aggression only. This is understandable. As observed in *Chapter 3*, states focused on the competence of ‘states other than an injured state’ to implement breaches of duties owed *erga omnes* rather than the primary rules’ contours. However, it appears that no state claimed that only the duty not to commit aggression is owed *erga omnes*.

To recall, Ago in 1976 suggested a class of norms, then termed ‘international crimes’, that are distinct from ‘ordinary’ rules of international law (1976 Draft Article 18/1996 Draft Article 19).⁵⁰ This served as the basis for Riphagen’s definition of ‘injured states’ (1985 Draft Article 5/1996 Draft Article 40) that provided all states the competence to implement if a state commits an international crime.⁵¹ Ago did not limit the norm to aggression. Instead, he broadly defined one of the crimes as the serious breach of a duty of ‘essential importance for the maintenance of international peace and security [...] [such as] the prohibition [against] the threat or use of force’.⁵² No state contested this definition. While some were concerned with the issue of

⁴³ UNSC, ‘Verbatim Record, 2363rd meeting’ (23 May 1982) UN Docs S/PV.2363, 7 (New Zealand).

⁴⁴ UNSC, ‘Communication of Australia’ (9 August 1990) UN Doc S/21520.

⁴⁵ UNSC, ‘Verbatim Record, 2932nd meeting’ (2 August 1990) UN Docs S/PV.2932, 13 (US).

⁴⁶ UNSC, ‘Communication of Italy on behalf of EC Member States’ (2 August 1990) UN Doc S/21426.

⁴⁷ Dawidowicz, *Third Party Countermeasures* (n 35), 232, 236.

⁴⁸ Council of the EU, ‘Council Conclusions on Ukraine’ (3 March 2014) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141291.pdf>.

⁴⁹ See for an analysis on the scope of the peremptory norm: Corten, *Law Against War* (n 3), 200 ff; De Hoogh, ‘Jus Cogens & the Use of Armed Force’ (n 27); Johnston Katie, ‘Identifying the Jus Cogens Norm in the Jus Ad Bellum’ (2020) 70 *International & Comparative Law Quarterly* 29; Helmersen, ‘Prohibition of the Use of Force’ (n 9), 173; Green, ‘Peremptory Status of the Prohibition of the Use of Force’ (n 7), 220 ff.

⁵⁰ Ago Roberto, ‘Fifth Report on State Responsibility’ (1976) II(1) YbILC 3, 26

⁵¹ Riphagen Willem, ‘Fifth Report on State Responsibility’ (1984) II(1) YbILC 1, 3.

⁵² ILC, ‘Documents of the 28th Session’ (1976) II(2) YbILC 1, 54. See ILC, ‘Report on the Work of the 29th Session’ (1977) II(2) YbILC 4, 11 (‘Such as that prohibiting aggression’).

competence,⁵³ those that focused on the norms' contours recognised that the duty covered the broader prohibition against force.⁵⁴ The same may be observed from the discussions towards the end of the drafting process. Here, states' views evince the lack of intent to narrow the duty's scope to aggression.⁵⁵

II. IMPLEMENTATION BY 'STATES OTHER THAN AN INJURED STATE' BEFORE THE 2001 DRAFT ARTICLES' ADOPTION

From the discussion above, it may be argued that it is the broader duty not to threaten or use force, not only aggression, that is owed *erga omnes*. This leads to the next question that this chapter seeks to answer—whether states have accepted the competence of 'states other than an injured state' to implement the duty not to use or threaten force by the time of the 2001 Draft Articles' adoption.

Recall from *Chapter 3* that the ILC considered 2001 Draft Article 48, which provides for the competence of 'states other than an injured state' to implement duties owed *erga omnes*, a 'measure of progressive development'.⁵⁶ Furthermore, under 2001 Draft Article 54, it left the resolution of the issue concerning these states' capacity to enforce responsibility via countermeasures to the further 'development of international law'.⁵⁷ Yet, not everyone agrees with this. Some, like Tams, Olleson, and Nissel, claim that international law already supported the competence of 'states other than an injured state' to implement duties owed *erga omnes*.⁵⁸ Others, like Sicilianos, Dawidowicz, and Proukaki, assert that the ILC incorrectly concluded that the state practice and *opinio juris* on countermeasures by 'states other than an injured state'

⁵³ See e.g. UNGA, Sixth Committee, 'Summary Record of the 31st Session, 22nd Meeting' (20 October 1976) UN Doc A/C.6/31/SR.22, 3–4 (Netherlands); UNGA, Sixth Committee, 'Summary Record of the 31st Session, 30th Meeting' (1976) UN Doc A/C.6/31/SR.30, 8 (Indonesia); UNGA, Sixth Committee, 'Summary Record of the 35th Session, 45th Meeting' (14 November 1986) UN Doc A/C.6/35/SR.45, 4–5 (Germany, FR)

⁵⁴ See e.g. ILC, 'State Responsibility: Comments & Observations of Governments, 32nd Session' (1980) II(1) YbILC 87, 99 (Chile) ('It constitutes an international crime [...] including, for example, a serious breach of the international [duty] to maintain international peace and security, such as that prohibiting aggression'); ILC, 'State Responsibility: Comments & Observations of Governments, 33rd Session' (1981) II(1) YbILC 71, 73 (Czechoslovakia) ('The possibility of establishing varying degrees of responsibility for violations of [duties] according to [their] significance [...] for the strengthening and development of international peace and security').

⁵⁵ See e.g. ILC, 'State Responsibility: Comments & Observations of Governments, 50th Session' (1998) UN Doc A/CN.4/488, 99 (UK); 165 (Germany). Note ILC, 'Report on the Work of the 71st Session' (2019) UN Doc A/74/10, 190 (DRC).

⁵⁶ ILC, 'Report on the Work of the 53rd Session' (2001) (n 22), 117, 126–7.

⁵⁷ Ibid, 139.

⁵⁸ See Tams, *Enforcing Obligations Erga Omnes* (n 23), 197; Nissel Alan, 'ILC Articles on State Responsibility: Between Self-Help & Solidarity' (2005) 38 *New York University Journal of International Law & Policy* 355, 361; Olleson Simon, 'Virtue of Pragmatism: Reflections on the Future of the Articles of State Responsibility' (2022) 93 *Questions of International Law* 23, 39.

diverged.⁵⁹

This chapter submits that the ILC correctly evaluated the trend by the time of the 2001 Draft Articles' adoption. State practice and *opinio juris* since *Barcelona Traction*, the decision in which the ICJ asserted the existence of duties owed *erga omnes* and served as the basis for the work of the ILC and much of scholarship,⁶⁰ had been sporadic and divergent. As shown below, between 1970 and 2001, only in a few instances did 'states other than an injured state' implement the duty not to threaten or use force. For instance, none invoked the wrongful state's responsibility through judicial dispute resolution. Furthermore, only a few states enforced the duty through unilateral measures.

A. Arab-Israeli conflict (1973)

The 1973 Yom Kippur War ended a brief ceasefire between Israel and its Arab neighbours.⁶¹ Recall that in 1967, Israel, claiming self-defence against its Arab neighbours' mobilisation and blockade,⁶² attacked Egypt, Syria, and Jordan.⁶³ Within six days, Israel inflicted heavy losses on its opposition.⁶⁴ By the time the parties agreed on a ceasefire, Israel had captured the Gaza Strip, West Bank, Golan Heights, and Sinai Peninsula.⁶⁵ It is in this context that the conflict resumed in 1973. Israel, despite SC Resolution 242 (1967) that required it to withdraw from the 'territories occupied in the recent conflict',⁶⁶ refused to do so.⁶⁷ Following the failure of UN mediation, Egypt and Syria claimed self-defence against the continued 'Israeli aggression',⁶⁸ and breached the ceasefire to retake the Sinai Peninsula and

⁵⁹ See Sicilianos Linos-Alexander, 'Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility' (2002) 13(5) *European Journal of International Law* 1127, 1143; Dawidowicz, *Third Party Countermeasures* (n 35), 242; Proukaki, *Problem of Enforcement* (n 19), 207.

⁶⁰ ILC, 'Report on the Work of the 53rd Session' (2001) (n 22), 127. See Tams Christian & Tzanakopoulos Antonios, 'Barcelona Traction: ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781, 782.

⁶¹ Dubuisson François & Koutroulis Vaïos, 'Yom Kippur War—1973' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 189.

⁶² UNSC, 'Verbatim Record, 1348th meeting' (6 June 1967) UN Doc S/PV.1348, 14.

⁶³ Quigley John, 'Six Day War—1967' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 131; —, 'War in the Middle East' (United Press, 5 June 1967) <<https://www.upi.com/Archives/1967/06/05/War-begins-in-Mideast/5081673252491/>>.

⁶⁴ Quigley, 'Six Day War' (n 63), 131

⁶⁵ Ibid. See Bowen Jeremy, *How the 1967 War Shaped the Middle East* (St Martin's Press 2003).

⁶⁶ Res 242 UNSC (22 November 1967) UN Doc S/RES/242. But see Rostow Eugene, 'Illegality of the Arab Attack on Israel of October 6, 1973' (1974) 69 *American Journal of International Law* 276, 276–7

⁶⁷ UNSG, 'Activities of the Special Representative to the Middle East' (5 March 1971) UN Doc S/10070/Add.2, 2; UNSG, 'Report of the SG under SC Res 331' (20 April 1973) UN Doc S/10929, 31.

⁶⁸ UNSC, 'Verbatim Record, 1744th meeting' (10 October 1973) UN Doc S/PV.1744, 4–5 (Syria); UNSC, 'Verbatim Record, 1745th meeting' (11 October 1973) UN Doc S/PV.1745, 18 (Egypt).

the Golan Heights.⁶⁹ Despite attacks from multiple fronts, Israel managed to repel Egypt and Syria and reoccupied these territories.⁷⁰

Many cast doubt on the legality of the 1967 Six-Day War and the 1973 Yom Kippur War. As to the Six-Day War, despite Israel's claim,⁷¹ its Arab neighbours, as Quigley observes, did not launch any attack and none was imminent.⁷² It may be true that Israel's Arab neighbours mobilised its forces and imposed a blockade. Yet, these *per se* do not constitute an 'armed attack' to which Israel could have responded in self-defence.⁷³ As to the Yom Kippur War, although Israel continued to occupy the territories in contravention of SC Resolution 242, this does not necessarily mean that Egypt and Syria may use force to recapture these. True, a state may act in self-defence to recover territories. However, self-defence must be extant at the time force is used. It requires a degree of 'immediacy'.⁷⁴ For Ruys and Silverstre, given the prolonged passage of time that established a 'new territorial *status quo*', it could be argued that the prerogative to act in self-defence has ceased until the occupying state commits another armed attack.⁷⁵ Furthermore, occupation *per se* is not an 'armed attack'.⁷⁶ An armed attack

⁶⁹ Dubuisson & Koutroulis, 'Yom Kippur War' (n 61), 190; — —, 'Israel Battles Egypt and Syria' (United Press, 6 October 1973) <<https://www.upi.com/Archives/1973/10/06/Israel-battles-Egypt-and-Syria/3902243187593>>. See UNGA, 'UNTSO Reports on Outbreak of Hostilities' (6 October 1973) UN Doc S/7930/Add.2141, 2142.

⁷⁰ Dubuisson & Koutroulis, 'Yom Kippur War' (n 61), 191. See Res 339 UNSC (23 October 1973) UN Doc S/RES/339; Res 340 UNSC (25 October 1973) UN Doc S/RES/340.

⁷¹ UNSC, 'Verbatim Record, 1348th meeting' (1967) (n 62), 14–5. See Dinstein Yoram, 'Legal Issues of "Para-War" & Peace in the Middle East' (1970) 44 *St John's Law Review* 466, 469–70; Schwebel Stephen, 'What Weight to Conquest?' (1970) 64 *American Journal of International Law* 344, 346; Greig DW, *International Law* (Butterworths 1976), 893.

⁷² Quigley, 'Six Day War' (n 63), 141; Nakhleh Issa, 'UN & and Peace in the Middle East' in Moore John (ed), *Arab-Israeli Conflict*, vol 2 (Princeton University Press 1974), 521; Cattan Henry, *Legal Aspects of the Arab-Israeli Conflict* (Longman 1973), 13; Bassiouni M Cherif, "'Middle East': Misunderstood Conflict' (1971) 19 *University of Kansas Law Review* 375, 395. See UNGA, 'Verbatim Record, 1539th meeting' (28 June 1967) UN Doc A/PV.1539, 5 (Spain); UNGA, 'Verbatim Record, 1541st meeting' (29 June 1967) UN Doc A/PV.1541, 7–8 (Cyprus).

⁷³ Quigley, 'Six Day War' (n 63), 139–41 citing Farer Tom, 'Law & War' in Black Cyril & Falk Richard (eds), *Future of the International Legal Order: Conflict Management*, vol III (Princeton University Press 1971), 15, 66; Tunkin Gregory, *Theory of International Law*, Butler WE (tr) (Wildy, Simonds, & Hill 1974), 283; Wright Quincy, 'Legal Aspects of the Middle East Situation' (1968) 33 *Law & Contemporary Problems* 5, 27; Cattan, *Arab-Israeli Conflict* (n 72), 130.

⁷⁴ Ruys Tom & Rodriguez Silvestre, 'Military Action to Recover Occupied Land: Lawful Self-defence or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisted' (2021) 97 *International Legal Studies* 665, 683.

⁷⁵ Ibid, 675, 685 citing Yiallourides Constantinos, Ghering Markus, & Gauci Jean-Pierre, 'Use of Force in relation to Sovereignty Disputes over Land Territory' (British Institute of International & Comparative Law, 2018), ¶¶158, 163.

⁷⁶ Ruys & Rodriguez, 'Military Action to Recover Occupied Land' (n 74), 688–9 citing Special Committee on the Question of Defining Aggression, 'Summary Records of the 67th to 78th Meetings' (19 October 1970) UN Doc A/AC.134/SR.67-78; Special Committee on the Question of Defining Aggression, 'Summary Records of the 79th to 91st Meetings' (8 February 1971) UN Doc A/AC.134/SR.79-91. Kelemen Bence, 'Right to Self-defense to

entails a ‘more or less instantaneous event or a series of events happening at a particular point in time’.⁷⁷ Admittedly, occupation constitutes a continuing breach of duty.⁷⁸ Yet, as Corten suggests, it does not, in the absence of sufficient gravity, amount to an armed attack within Article 51’s meaning.⁷⁹ Finally, Egypt and Syria’s actions also arguably breached the duty to refrain from using force to solve territorial disputes and respect armistice lines.⁸⁰ A corollary to the duty not to use force, these duties, for Schachter, Wright, and Kohen, require states to peacefully settle disputes irrespective of whether a state holds a valid title over a territory.⁸¹

States’ reactions to the two conflicts were marked by division. After the 1967 Six-Day War, the Soviet Union sought SC and GA resolutions condemning Israel’s actions and supporting the Arab states.⁸² Yet, these attempts received limited support.⁸³ Several states abstained due to the uncertainty over the facts.⁸⁴ Others questioned the value of imputing blame.⁸⁵ The same is true for the 1973 Yom Kippur War. Some supported Egypt and Syria and condemned the Israeli occupation.⁸⁶ Other states simply insisted on the need to find a solution to the conflict in the region.⁸⁷

Recover Occupied Territory? A Glance at the Nagorno-Karabakh Conflict’ (2020) *Pécs Journal of International and European Law* 5, 8 (‘[Not] every act of aggression can be equated with armed attack’); Corten, *Law Against War* (n 3), 150. *Contra* Dubuissou & Koutroulis, ‘Yom Kippur War’ (n 61), 197–8; Shihata Ibrahim, ‘Destination Embargo of Arab Oil: Its Legality Under International Law’ (1974) 69 *American Journal of International Law* 591, 607–8.

⁷⁷ Ruys & Rodriguez, ‘Military Action to Recover Occupied Land’ (n 74), 689.

⁷⁸ *Ibid.*, 688.

⁷⁹ Corten, *Law Against War* (n 3), 150 (‘Occupation akin to an armed attack’) citing Res 3314 (XXIX) (n 28).

⁸⁰ *Declaration on the Principles of International Law concerning Friendly Relations & Cooperation among States* Res 2625 (XXV) UNGA (24 October 1970) A/RES/2625. See *Jus Ad Bellum—Ethiopia’s Claims* (Eritrea v Ethiopia) (Partial Award) (2005) 26 RIAA 457.

⁸¹ Ruys & Rodriguez, ‘Military Action to Recover Occupied Land’ (n 74), 694 citing Schachter Oscar, ‘Right of States to Use Armed Force’ (1983) 82 *Michigan Journal of International Law* 1620; Wright Quincy, ‘Goa Incident’ (1962) 56 *American Journal of International Law* 617, 623; Kohen Marcelo, *Possession Contestée et Souveraineté Territoriale* (Graduate Institute 1997), ¶115.

⁸² See UNSC, ‘Verbatim Record, 1348th meeting’ (1967) (n 62), 5–6; UNGA, ‘Verbatim Record, 1526th meeting’ (19 June 1967) UN Doc A/PV.1526, 6.

⁸³ UNSC, ‘Verbatim Record, 1348th meeting’ (1967) (n 62), 8 (Bulgaria), 9 (Mali); UNGA, ‘Verbatim Record, 1530th meeting’ (21 June 1967) UN Doc A/PV.1530, 15 (India); UNGA, ‘Verbatim Record, 1539th meeting’ (1967) (n 72), 5 (Spain); UNGA, ‘Verbatim Record, 1541st meeting’ (1967) (n 72), 7–8 (Cyprus); UNGA, ‘Verbatim Record, 1568th meeting’ (27 June 1967) UN Doc A/PV.1568, 9 (Zambia).

⁸⁴ Quigley, ‘Six Day War’ (n 63), 137; UNGA, ‘Verbatim Record, 1548th meeting’ (4 Jul 1967) UN Doc A/PV.1548.

⁸⁵ UNSC, ‘Verbatim Record, 1348th meeting’ (1967) (n 62), 6 (Argentina), 7 (Canada).

⁸⁶ UNSC, ‘Verbatim Record, 1743rd meeting’ (8 Oct 1973) UN Doc S/PV.1743, 6 (China); UNSC, ‘Verbatim Record, 1744th meeting’ (1973) (n 68), 14 (Indonesia), 17 (Sudan); UNSC, ‘Verbatim Record, 1745th meeting’ (1973) (n 68), 4 (Guinea), 5 (Peru); UNSC, ‘Verbatim Record, 1746th meeting’ (12 Oct 1973) UN Doc S/PV.1746, 2 (Nigeria), 3 (Kenya).

⁸⁷ UNSC, ‘Verbatim Record, 1743rd meeting’ (1967) (n 86), 2 (US); UNSC, ‘Verbatim Record, 1744th

No state took any unilateral measures against Egypt and Syria for the 1973 Yom Kippur War. As for Israel's conduct during the 1976 Six-Day War, it is worth noting that Arab League members since 1945 already had a trade boycott against Israel which they maintained.⁸⁸ It may also be noted that the Organisation of Arab Petroleum Exporting Countries ('OAPEC') reduced oil supply to the states that aided Israel albeit for its occupation of the disputed territories and not for the unlawful use of force.⁸⁹ These include Canada, Japan, the Netherlands, the UK, and the US.⁹⁰ There are varying views on the lawfulness of the boycott and oil embargo. Some, like Paust and Blaustein, assert that these amounted to economic coercion.⁹¹ Others claim that for the parties to the General Agreement on Tariffs and Trade ('GATT'), such as Kuwait and Egypt, these measures breached Article 1 which prohibits discriminatory practices.⁹² The same is true for those with bilateral trade agreements with the states against whom the measures were imposed.⁹³ Nonetheless, some scholars such as Smeets and Mitchell suggest that for GATT parties, the measures may fall under GATT Article XXI's security clause exception and be considered retorsion.⁹⁴ Similarly, Proukaki and Shihata submit that for GATT parties or those with bilateral agreements with the target states, these may be deemed countermeasures in modern parlance.⁹⁵ Although the OAPEC did not make any reference to this, it nevertheless declared that the measures were 'aimed at the liberation of the Arab territories occupied by Israel'.⁹⁶ As will be discussed in *Chapter 7*, Israel's occupation of the Palestinian territories, while not *per se* a breach of the duty not to use force, constitutes a breach of the Palestinian people's right to self-determination. The targeted states, in assisting Israel, arguably aided this

meeting' (1973) (n 68), 3 (France); UNSC, 'Verbatim Record, 1746th meeting' (1973) (n 86), 4 (Australia); UNSC, 'Verbatim Record, 1747th meeting' (21 Oct 1973) UN Doc S/PV.1747, 6 (UK).

⁸⁸ Truck Nancy, 'Arab Boycott of Israel' (1977) 55 *Foreign Affairs* 472, 474; Kontrorovich Eugene, 'Arab League Boycott & WTO Accession' (2003) 4 *Chicago Journal of International Law* 283, 286.

⁸⁹ Hillmore Peter, 'Arabs will cut and cut again in oil war' (The Guardian, 18 October 1973) <<https://www.proquest.com/historical-newspapers/arabs-will-cut-again-oil-war/docview/185723569>>.

⁹⁰ Happold Matthew, 'Economic Sanctions & International Law' in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 6; Proukaki, *Problem of Enforcement* (n 19), 123.

⁹¹ Paust Jordan & Blaustein Albert, *Arab Oil Weapon* (Oceana 1977), 71–2. See Lilich Richard, 'Economic Coercion' (1975) 51(3) *International Affairs* 358, 360 ff; Brosche Hartmut, 'Economic & Political Coercion & the UN Charter' (1974) 7 *Case Western Reserve Journal of International Law* 3, 6 ff; Jamnejad Maziar & Wood Michael, 'Principle of Non-Intervention' (2009) 22 *Leiden Journal of International Law* 345, 369.

⁹² Paust & Blaustein, *Arab Oil Weapon* (n 91), 71–2.

⁹³ Proukaki, *Problem of Enforcement* (n 19), 124.

⁹⁴ Smeets Maarten, 'Economic Sanctions & the WTO' in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 288; Mitchell Andrew, 'Sanctions & World Trade Organisation' in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 300–1.

⁹⁵ Proukaki, *Problem of Enforcement* (n 19), 124.

⁹⁶ *Ibid*, 125.

breach. Thus, it may be submitted that the imposing states, while not ‘directly affected’, sought to enforce this duty by suspending their duties to the target states to induce them to cease the wrongful act.⁹⁷

B. Turkey-Cypriot conflict (1974)

The 1974 Turkish intervention in Cyprus occurred against the background of tensions among Cyprus’ population.⁹⁸ Cyprus, under British rule, had sizeable Greek and Turkish communities. The former sought union with Greece while the latter envisioned a separate state.⁹⁹ After years of unrest, Cyprus became independent under a bi-communal regime in 1960.¹⁰⁰ The UK, Greece, and Turkey supported this through the 1960 Treaty of Guarantee where the three states guaranteed Cyprus’ independence, territorial integrity, and security. It also reserved the parties’ right, should there be a breach of duty, to intervene to re-establish the situation that the Treaty created.¹⁰¹

In 1963, the Greek Cypriot-led government proposed constitutional amendments that reduced Turkish Cypriots’ political participation. As a result, the latter withdrew from the government and set up administration in the areas under its control.¹⁰² Due to the inter-communal strife, the SC established a peacekeeping force to maintain order.¹⁰³ Yet, violence resumed in 1967 when the Greek military pressured Greek Cypriots to seek unification with Greece. In July 1974, a Greek-supported *coup d’état* deposed the Cypriot government. During the same month, Turkey landed troops in Cyprus and seized around ‘5 per cent of Cypriot territory’.¹⁰⁴ Even after the ‘military regime collapsed and was replaced by civilian administration’, Turkish forces remained and occupied ‘nearly 37 per cent’ of Cyprus.¹⁰⁵ In

⁹⁷ Ibid, 123–5; Shihata, ‘Embargo of Arab Oil’ (n 76), 130.

⁹⁸ Dörr Oliver, ‘Turkey’s Intervention in Cyprus—1974’ in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 201 *citing* Evriviades Marios, ‘Legal Dimension of the Cyprus Conflict’ (1975) 10 *Texas International Law Journal* 227, 227–31.

⁹⁹ Ker-Lindsay James & Faustman Hubert, *Government & Politics of Cyprus* (Lang 2008), 48; Trimikliniotis Nicos & Bozkurt Umut, *Beyond a Divided Cyprus: A State & Society in Transformation* (Springer 2012), 104.

¹⁰⁰ Dörr, ‘Turkey’s Intervention’ (n 98), 202.

¹⁰¹ *Treaty of Guarantee* (adopted 16 August 1960, entered into force 16 August 1960) 382 UNTS 3, arts I, IV.

¹⁰² Dörr, ‘Turkey’s Intervention’ (n 98), 202; Fellows Lawrence, ‘Turks in Cyprus say Constitution no longer exists’ (New York Times, 31 Dec 1963) <<https://www.proquest.com/historical-newspapers/turks-cyprus/docview/116331283>>.

¹⁰³ Res 186 UNSC (4 March 1964) S/RES/186.

¹⁰⁴ Dörr, ‘Turkey’s Intervention’ (n 98), 203.

¹⁰⁵ Ibid, 203. *See* Ginigers Henry, ‘Troops Enter Famagusta and Push to Split Island’ (New York Times, 16 Aug 1974) <<https://www.proquest.com/historical-newspapers/troops-enter-famagusta-push-split-island/docview/120036258>>.

February 1975, Turkey proclaimed the Turkish Cypriot state's establishment in the occupied areas.¹⁰⁶

None of the arguments put forward to justify Turkey's use of force—consent, humanitarian intervention, and self-defence—had been widely accepted.¹⁰⁷ First, as Dörr points out, it is difficult to see how Cyprus' consent in the 1960 Treaty legitimised any forcible intervention.¹⁰⁸ As Corten stresses, only contemporaneous, express, and valid consent legitimises intervention.¹⁰⁹ Furthermore, even if Cyprus' consent authorised Turkey's intervention, the latter's actions would have still been limited by the consent's parameters.¹¹⁰ It is worth noting that the Treaty only permitted actions aimed at re-establishing the *status quo* that it created and not the seizure of a territory nor the creation of an independent state.¹¹¹ As to humanitarian intervention, its status at the time, as Randelzhofer and Dörr claim, remained uncertain.¹¹² Indeed, until now, as seen in some of the cases examined below, the doctrine remains questionable and 'state practice in this respect [has always been], to the say the least, scarce and ambiguous'.¹¹³ Finally, there being no 'armed attack' against Turkey, it could have not claimed self-defence.¹¹⁴

Several states condemned Turkey's actions. States within the SC called on states 'to respect [Cyprus'] sovereignty, independence, and territorial integrity.'¹¹⁵ and expressed its 'disapproval of the [...] actions against [...] Cyprus'.¹¹⁶ The GA also called for the 'withdrawal of all foreign armed forces [...] from [...] Cyprus' and the 'cessation of all foreign interference in its affairs'.¹¹⁷

¹⁰⁶ Thomas Ann Van Wynen & Thomas AJ, 'Cyprus Crisis 1974–5' (1975) 29 *Southwestern Law Journal* 513, 518.

¹⁰⁷ See UNSC, 'Verbatim Record, 1781st Meeting' (20 July 1974) UN Doc S/PV.1781, 20–1.

¹⁰⁸ Dörr, 'Turkey's Intervention' (n 98), 206 ff. See Corten, *Law Against War* (n 3), 212–3.

¹⁰⁹ Corten, *Law Against War* (n 3), 255, 259; Kreß, 'ICJ & Non-Use of Force' (n 8), 577; Ruys Tom & Fero Luca, 'Weathering the Storm: Legality & Legal Implications of the Saudi-led Military Intervention in Yemen' (2016) 61 *International & Comparative Law Quarterly* 61, 81; Ronzitti Natalino, 'Use of Force, Jus Cogens, & State Consent' in Cassese Antonio (ed), *Current Legal Regulation of the Use of Force* (Nijhoff 1986), 162.

¹¹⁰ Kreß, 'ICJ & Non-Use of Force' (n 8), 577; Corten, *Law Against War* (n 3), 275.

¹¹¹ Dörr, 'Turkey's Intervention' (n 98), 209; Evriviades, 'Cyprus Conflict' (n 98), 261–2; St John Macdonald Ronald, 'International Law & the Conflict in Cyprus' (1981) 19 *Canadian Yearbook of International Law* 12, 5.

¹¹² Dörr, 'Turkey's Intervention' (n 98), 211; Randelzhofer & Dörr, 'Article 2(4)' (n 6), 52–5

¹¹³ Dörr, 'Turkey's Intervention' (n 98), 211. See Corten, *Law Against War* (n 3), 495 ff; Rodley Nigel, 'Humanitarian Intervention' in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 788; Gray, *Use of Force* (n 3), 25, 38 ff.

¹¹⁴ Dörr, 'Turkey's Intervention' (n 98), 210. See Corten, *Law Against War* (n 3), 212–3.

¹¹⁵ Res 353 UNSC (20 July 1974) S/RES/353.

¹¹⁶ Res 360 UNSC (16 August 1974) S/RES/360. See UNSC, 'Verbatim Record, 1781st Meeting' (1974) (n 107), 4–5 (UK), 10 (Costa Rica), 17 (Mauritius).

¹¹⁷ *Question of Cyprus* Res 3212(XXIX) UNGA (1 Nov 1974) UN Doc A/RES/3212(XXIX).

That said, the only measures levied against Turkey were retorsions by the US through a brief halt on military aid.¹¹⁸

C. Vietnamese-Cambodian conflict (1978)

Vietnam's 1978 invasion of Cambodia, then Kampuchea, grew out of the long-standing hostility between the two states. There had already been a dispute between the two concerning the Vietnam-Cambodia border, drawn during the French occupation, which Cambodia questioned.¹¹⁹ Furthermore, the two states' ruling factions, Vietnam's Communist Party and Cambodia's Khmer Rouge, had competing ideologies.¹²⁰ The split between the Soviet Union and China exacerbated the situation as Vietnam sided with the Soviets and Cambodia with China.¹²¹

Early confrontations between Vietnam and Cambodia involved minor skirmishes. However, the period between 1971 and 1978 saw an increase in both intensity and frequency. In May 1975, Cambodia seized the Vietnamese Phú Quốc island and held these for two weeks.¹²² Subsequent years also saw Cambodian incursions in the Hà Tiên, Tây Ninh, Kon Tum, and Dar Lac provinces.¹²³ Similarly, in March 1978 Cambodia attacked Châu Đốc resulting in civilian casualties.¹²⁴ Vietnam also retaliated against Cambodia. In 1977, it conducted several barrages and incursions into Cambodian territory.¹²⁵ In December 1978, it launched a full-scale offensive against Cambodia.¹²⁶ Encountering minimal resistance,¹²⁷ Vietnam, by January 1979,

¹¹⁸ See Gwertzman Bernard, 'Turkey Aid Would Resume Under Bill Voted by Senate' (New York Times, 18 December 1974) <<https://www.proquest.com/news/docview/120165666/abstract/3789FC529B104232PQ>>. See Norton-Taylor Richard, 'EEC caught out by Mediterranean Crisis' (The Guardian, 25 July 1974) <<https://www.proquest.com/historical-newspapers/eec-caught-out-mediterranean-crisis/docview/185757393>>.

¹¹⁹ Fox Gregory, 'Vietnamese Intervention in Cambodia—1978' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 242.

¹²⁰ Ibid citing Heder Stephen, 'Kampuchean-Vietnames Conflict' (1979) *Southeast Asian Affairs* 157, 157.

¹²¹ Heder, 'Kampuchean-Vietnames Conflict' (n 120), 161–6.

¹²² Kaing Guek Eav (*Duch*) (ECCC, 001/18-07-2007, 2011), ¶66; —, 'Vietnam Said to Capture An Island Off Cambodia' (New York Times, 14 June 1975) <<https://www.proquest.com/historical-newspapers/vietnam-said-capture-island-off-cambodia/docview/120380872>>.

¹²³ *Duch* (n 122), ¶67.

¹²⁴ Ibid, ¶78.

¹²⁵ Heder, 'Kampuchean-Vietnames Conflict' (n 120), 166. See —, 'Cambodia & Vietnam in Clashes on Border' (New York Times, 9 September 1977) <<https://www.proquest.com/historical-newspapers/cambodia-vietnam-clashes-on-border/docview/123188894>>; —, 'Cambodia Reports Vietnam Attack: No Invasion Expected' (New York Times, 13 April 1978) <<https://www.proquest.com/historical-newspapers/cambodia-reports-vietnam-attack/docview/123753301>>.

¹²⁶ Kamm Henry, 'Hanoi Reports "Front" Seeking to Oust Cambodia Regime' (New York Times, 4 December 1978) <<https://www.proquest.com/historical-newspapers/hanoi-reports-creation-front-seeking-oust/docview/123576272>>.

¹²⁷ Kamm Henry, 'Vietnam Speeds Cambodia Drive, Pressing Capita' (New York Times, 4 January 1979)

deposed the Khmer Rouge, installed a new government, and began its occupation of Cambodia.¹²⁸

Vietnam claimed self-defence against Cambodia's aggression.¹²⁹ Clearly, Cambodia's attacks since 1971 which included the seizure of Vietnamese territories amounted to 'armed attacks'.¹³⁰ Yet, as Fox and Franck point out, the proportionality of Vietnam's response may be questioned.¹³¹ Under one view, self-defence must be limited to actions that repel or put an end to an armed attack.¹³² However, rather than simply stopping Cambodia's incursions, Vietnam overthrew Cambodia's government, and occupied Cambodia.¹³³ Vietnam also alleged that it responded to the invitation of the Kampuchean United Front which it deemed Kampuchea's 'authentic representative'.¹³⁴ Yet, it did not show that this group had the competence to invite intervention.¹³⁵ The fact that the 'United Front' was subservient to Vietnam, as Corten notes, also diminishes the claim's credibility.¹³⁶ Finally, Vietnam also alluded to humanitarian intervention citing the Khmer Rouge's human rights violations.¹³⁷ However, states' prerogative

<<https://www.proquest.com/historical-newspapers/vietnam-speeds-cambodia-drive-pressing/docview/121001332>>.

¹²⁸ Fox, 'Vietnamese Intervention' (n 119), 243.

¹²⁹ UNSC, 'Letter from the Permanent Representative of Vietnam' (8 January 1979) UN Doc S/13011.

¹³⁰ Fox, 'Vietnamese Intervention' (n 119), 250; Murphy Sean, *Humanitarian Intervention: UN in an Evolving World Order* (University of Pennsylvania Press 1996), 103.

¹³¹ Fox, 'Vietnamese Intervention' (n 119), 251 citing Franck Thomas, *Recourse to Force* (Cambridge University Press 2002), 150 ('If Hanoi had acted in self-defence, its response was seen [...] to fail the legal test of proportionality.')

¹³² Waldock Humphrey, 'Regulation of the Use of Force by Individual States in International Law' (1952) 81 *Recueil des Cours de l'Académie de Droit International* 455, 464; *Military & Paramilitary Activities* [1986] (n 1) (Schwebel, dissenting), 367–7; *Nuclear Weapons* [1996] (n 6) (Higgins, separate opinion), 583–4. Note the other interpretations of proportionality such as the quantitative comparison of the overall effects of the 'armed attack' with the consequences of the response and the functional comparison of the damage inflicted in self-defence with the overall objective (Ruys, *Armed Attack & Article 51* (n 12), 110, 519; Cannizzaro Enzo, 'Contextualising Proportionality: Jus ad bellum & Jus in Bello in the Lebanese War' (2007) 110 *International Review of the Red Cross* 779, 783 ff; Green James, *International Court of Justice & Self-Defence in International Law* (Hart 2009), 86, 88–9); considering the 'overall objective' as the weakening of the opponent (Tams Christian & Brückner Wenke, 'Israeli Intervention in Lebanon—2006' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 686; Ruys Tom, 'Israel's Recourse to Self-Defense against Hezbollah' (2007) 43 *Stanford Journal of International Law* 265, 290).

¹³³ Corten, *Law Against War* (n 3), 485.

¹³⁴ UNGA, 'Verbatim Record, 34th Session, 62nd Meeting' (12 November 1979) UN Doc A/34/PV.62, 1197.

¹³⁵ Note Corten, *Law Against War* (n 3), 259; Ruys & Fero, 'Saudi-led Military Intervention in Yemen' (n 109), 81.

¹³⁶ Corten, *Law Against War* (n 3), 270.

¹³⁷ UNGA, 'Verbatim Record, 34th Session, 62nd Meeting' (1979) (n 134), 1195; Fox, 'Vietnamese Intervention' (n 119), 253. See Elsner Douglas, 'Humanitarian Intervention in the Post-Cold War Era' (1993) 11(1) *Boston University International Law Journal* 195, 206 ('[Vietnam was] known to harbour ambitions over Kampuchea''')

to use force against another for this reason arguably has not been established.¹³⁸ Indeed, at the time, some states explicitly rejected this claim.¹³⁹

Most states condemned Vietnam's actions. For instance, members of the Association of Southeast Asian Nations ('ASEAN') deemed the Vietnamese actions as an 'armed intervention against [Kampuchea's] independence, sovereignty and territorial integrity'.¹⁴⁰ Within the SC, states submitted a resolution that condemned Vietnam's actions although this failed due to a Soviet veto.¹⁴¹ Later, the GA also demanded Vietnam's immediate withdrawal from Cambodia.¹⁴²

A few states levied unilateral measures against Vietnam in the form of retorsions. Japan and Sweden suspended aid to Vietnam until it changed its policies in Cambodia.¹⁴³ The US maintained its restrictions on exports and financial dealings levied during the Vietnam War.¹⁴⁴ It also blocked Vietnam's membership in the International Monetary Fund ('IMF'), World Bank ('WB'), and Asian Development Bank ('ADB').¹⁴⁵ Yet, the strongest response came from China which had been hostile towards Vietnam due to the latter's alliance with the Soviet Union.¹⁴⁶ It halted economic and military aid to Vietnam and cancelled infrastructure projects in the country.¹⁴⁷ Furthermore, in a clear breach of the duty not to use force, although one that received little condemnation,¹⁴⁸ China briefly invaded Vietnam in March 1979 capturing several provinces before withdrawing.¹⁴⁹

¹³⁸ Rodley, 'Humanitarian Intervention' (n 113), 776; Dinstein, *War, Aggression, & Self-Defence* (n 6), 71; Goodman Ryan, 'Humanitarian Intervention & Pretexts for War' (2006) 100 *American Journal of International Law* 107, 111.

¹³⁹ UNSC, 'Verbatim Record, 2109th meeting' (12 January 1979) UN Doc S/PV.2109, 2 (Norway), 4 (UK); UNSC, 'Verbatim Record, 2111th meeting' (15 January 1979) UN Doc S/PV.2111, 3 (Australia).

¹⁴⁰ UNSC, 'Joint Statement of the ASEAN Foreign Ministers' (13 January 1979) UN Doc S/13027.

¹⁴¹ UNSC, 'Verbatim Record, 2112th Meeting' (15 January 1979) UN Doc S/PV.2112.

¹⁴² Res 34/22 UNGA (14 November 1979) UN Doc A/RES/34/22.

¹⁴³ Shiraishi Masaya, *Japanese Relations with Vietnam, 1951–1987* (Cornell Southeast Asia Program 1990), 103; Bryole William, *Brothers in Arms: A Journey from War to Peace* (First University of Texas Press 1996), 115. See Path Kosal, 'China's Economic Sanctions against Vietnam, 1975–1978' (2012) 212 *China Quarterly* 1040.

¹⁴⁴ Mowry David, 'Lifting the Embargo against Cuba using Vietnam as Model: Policy Paper for Modernity' (1999) 25(1) *Brooklyn Journal of International Law* 229, 244, 246; Stauch Thomas, 'United States & Vietnam: Overcoming the Past & Investing in the Future' (1994) 28(4) *International Lawyer* 995, 1008.

¹⁴⁵ Morley James & Nishihara M, *Vietnam Joins the World* (Sharp 1997), 204.

¹⁴⁶ Greer Jamieson, 'China & the Laws of War' (2006) 46 *Virginia Journal of International Law* 717, 735.

¹⁴⁷ Path, 'China's Economic Sanctions against Vietnam, 1975–1978' (n 143), 1044–5, 1048, 1054.

¹⁴⁸ MacDonald Matt, 'Punitivity & the Sino-Vietnamese War of 1979' (2016) 8(2) *Amsterdam Law Forum* 38, 47.

¹⁴⁹ Greer, 'China & the Laws of War' (n 146), 735.

D. Soviet-Afghan conflict (1979)

Many states consider the 1979 Soviet invasion of Afghanistan as an ‘attempt to force a [regime] change’.¹⁵⁰ While Afghanistan had long pursued an independent foreign policy, the internal instability caused by the April 1978 *coup* led to its dependence on the Soviet Union for military support.¹⁵¹ Under the 1978 Treaty of Friendship, the Soviet Union provided material and deployed personnel in Afghanistan.¹⁵² However, the change in Afghan leadership in September 1979 led to Soviet concerns regarding Afghanistan’s relations with Pakistan and the US.¹⁵³ In response, the Soviet Union in December 1979 invaded Afghanistan, installed a new government, and began its occupation of the country.¹⁵⁴

The Soviet Union claimed that the Afghan government consented to its conduct.¹⁵⁵ Yet Corten and Gray regard this as problematic.¹⁵⁶ As previously mentioned, while the territorial state’s consent precludes the illegality of force, the consent must be valid in the first place.¹⁵⁷ Arguably, the Soviet action rested on invalid consent. The Amin government did not request Soviet intervention.¹⁵⁸ While the new Kamal government extended an invitation to the Soviet Union, this was done after the intervention began. The rule, as Corten and Ronzitti submit, requires prior consent as an *ex-post* appeal may suggest vitiated consent.¹⁵⁹ Neither did the Treaty of Friendship authorise the Soviet intervention. Given the potential for abuse, considerable doubt remains on whether ‘forward-looking intervention treaties’ may be deemed consent for intervention.¹⁶⁰ In any case, the Treaty requires consultation and agreement before

¹⁵⁰ Nolte Georg & Barkholdt Janina, ‘Soviet Intervention in Afghanistan—1979–80’ in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 297 citing UNSC, ‘Verbatim Record, 2185th meeting’ (5 January 1980) UN Doc S/PV.2185, 15; UNSC, ‘Verbatim Record, 2187th meeting’ (6 January 1980) UN Doc S/PV.2187, 9 (Costa Rica); UNSC, ‘Verbatim Record, 2189th meeting’ (6 January 1980) UN Doc S/PV.2189, 2 (Zambia), 5 (Bangladesh); UNSC, ‘Verbatim Record, 2190th meeting’ (1980) (n 40), 9 (Chile).

¹⁵¹ Nolte & Barkholdt, ‘Soviet Intervention in Afghanistan’ (n 150), 297; Rousseau Charles, ‘Chronique des faits internationaux’ (1980) 84 *Revue générale de droit international public* 351, 826.

¹⁵² *Treaty of Friendship, Good-Neighbourliness, & Cooperation* (entered into force 27 May 1979) 1145 UNTS 332.

¹⁵³ Nolte Georg, *Eingreifen auf Einladung* (Springer 1999), 274.

¹⁵⁴ Nolte & Barkholdt, ‘Soviet Intervention in Afghanistan’ (n 150), 297.

¹⁵⁵ UNSC, ‘Verbatim Record, 2185th meeting’ (1980) (n 150), 2–3, 11.

¹⁵⁶ Gray, *Use of Force* (n 3), 92–4; Corten, *Law Against War* (n 3), 269.

¹⁵⁷ Corten, *Law Against War* (n 3), 255, 259; Kreß, ‘ICJ & Non-Use of Force’ (n 8), 57.

¹⁵⁸ Nolte & Barkholdt, ‘Soviet Intervention in Afghanistan’ (n 150), 301.

¹⁵⁹ Corten, *Law Against War* (n 3), 269; Ronzitti, ‘Use of Force, Jus Cogens, & State Consent’ (n 109), 162; Ruys & Fero, ‘Saudi-led Military Intervention in Yemen’ (n 109), 81. See Crawford, ‘Second Report on State Responsibility’ (1999) (n 9), 62–3. See Cassese Antonio, *International Law* (Oxford University Press 2005), 369.

¹⁶⁰ See Nolte & Barkholdt, ‘Soviet Intervention in Afghanistan’ (n 150), 302–3; Corten, *Law Against War* (n

taking measures to ‘ensure the ‘security, independence, and territorial integrity’ of the parties.¹⁶¹

While the Soviet Union vetoed the SC resolution condemning its actions,¹⁶² the deliberations reveal that states viewed that the Soviet Union breached its duty not to use force.¹⁶³ The GA also condemned the Soviet intervention and called for its withdrawal.¹⁶⁴ Elsewhere, the Islamic Conference deemed the ‘Soviet [...] aggression against the Afghan people [...] as a flagrant violation of international law’.¹⁶⁵ Similarly, members of the then European Economic Community (‘EEC’) deemed the Soviet action as a ‘serious violation’ of international law.¹⁶⁶

Some states also levied unilateral measures against the Soviet Union. These measures, all by Western states, mostly involved denunciations or suspensions of agreements not in conformity with their provisions and are thus countermeasures.¹⁶⁷ The US denounced the 1966 US-USSR Civil Air Transport Agreement contravening the treaty’s prior notice requirement.¹⁶⁸ It did the same to the 1975 US-USSR Agreement on the Supply of Grain—an agreement supposedly in force until 1981 without a denunciation clause;¹⁶⁹ and the 1977 US-USSR Agreement Concerning Fisheries off the Coasts of the US that required twelve months’ prior notice.¹⁷⁰ Two other states imposed similar measures. Canada suspended the 1976 Canada-

3), 257–9; Kreß, ‘ICJ & Non-Use of Force’ (n 8), 577; Ruys & Fero, ‘Saudi-led Military Intervention in Yemen’ (n 109), 81

¹⁶¹ *Treaty of Friendship, Good-Neighbourliness, & Cooperation* (n 152), art 4.

¹⁶² UNSC, ‘Draft Resolution (Bangladesh et al)’ (6 January 1980) UN Doc S/13729. See UNSC, ‘Verbatim Record, 2190th meeting’ (1980) (n 40).

¹⁶³ See e.g. UNSC, ‘Verbatim Record, 2186th meeting’ (1980) (n 40); UNSC, ‘Verbatim Record, 2187th meeting’ (1980) (n 150); UNSC, ‘Verbatim Record, 2190th meeting’ (1980) (n 40); UNSC, ‘Letter from China’s Representative’ (31 Dec 1979) UN Doc S/13717; UNSC, ‘Letter from the Charge D’Affaires of Chile’ (6 Jan 1980) UN Doc S/13728.

¹⁶⁴ *Situation in Afghanistan* Res ES-6/2 UNGA (14 January 1980) UN Doc A/RES/E-6/2.

¹⁶⁵ UNSC, ‘Letter from the Charge D’Affaires of Syria’ (21 February 1980) UN Doc S/13812.

¹⁶⁶ UNSC, ‘Letter from the Permanent Representative of Italy’ (17 January 1980) UN Doc S/13760; — —, ‘EC Response to the Afghanistan Crisis’ (EC News, 18 January 1980) <http://aei.pitt.edu/59638/1/EC_News_3.80.pdf>.

¹⁶⁷ Dawidowicz, *Third Party Countermeasures* (n 35), 129–32; Proukaki, *Problem of Enforcement* (n 19), 139–41.

¹⁶⁸ Davidson Gary, ‘United States’ Use of Economic Sanctions, Treaty Bending, & Treaty Breaking in International Aviation’ (1993) 592(2) *Journal of Air Law and Commerce* 291, 297. See Moyer Homer & Mabry Linda, ‘Export Controls as Instruments of Foreign Policy’ (1987) 15 *Law & Policy in International Business* 1, 2. See *US-USSR Civil Air Transport Agreement* (entered into force 4 November 1966) 675 UNTS 3, art 17.

¹⁶⁹ Walczak James, ‘Legal Aspects of the USSR Grain Embargo’ (1981) 10 *Denver Journal of Law & Policy* 279, 279. See *US-USSR Agreement on the Supply of Grain* (adopted 20 October 1975) 1020 UNTS 365, art IX.

¹⁷⁰ Caron David, ‘International Sanctions, Ocean Management, & the Law of the Sea: A Study of Denial of

USSR Agreement on Mutual Fisheries' Relations—an action impermissible under the agreement for another two years.¹⁷¹ New Zealand suspended a similar agreement violating the prior notice requirement.¹⁷² Yet, not every state supported these actions. The EEC showed great reluctance in imposing measures against the Soviet Union while Argentina 'rejected invitations to join in the economic coercive measures'.¹⁷³

E. Argentinian-British conflict (1982)

Argentina and the UK have had a long-standing dispute over the Falklands/Malvinas.¹⁷⁴ In April 1982, Argentina invaded the islands.¹⁷⁵ Following Argentina's rejection of the SC's demand to withdraw, the UK dispatched its armed forces to establish a 'maritime exclusion zone'.¹⁷⁶ After a month of hostilities, Argentinian forces surrendered and the UK reoccupied the islands.¹⁷⁷

Many scholars view Argentina's actions in the Falklands/Malvinas as unlawful.¹⁷⁸ Argentina claimed, among others, that it responded to the UK's 'continuous acts of aggression' in occupying islands.¹⁷⁹ However, it has not been established that the UK was illegally occupying the Falklands/Malvinas as the title over the territory remained in dispute.¹⁸⁰ Even if it were, as discussed above, occupation *per se* does not amount to an 'armed attack'.¹⁸¹ Thus, Argentina could not have resorted to self-defence against the perceived occupation by the

Access to Fisheries' (1989) 16(1) *Ecology Law Quarterly* 311, 315; *US-USSR Agreement Concerning Fisheries off the Coasts of the United States* (adopted 28 February 1977) 1069 UNTS 307, art XV.

¹⁷¹ Dawidowicz, *Third Party Countermeasures* (n 35), 132 citing *Canada-USSR Agreement on Mutual Fisheries' Relations* (adopted 19 May 1976) 1132 UNTS 139, art VII.

¹⁷² Proukaki, *Problem of Enforcement* (n 19), 139 citing *New Zealand-USSR Agreement on Fisheries* (adopted 4 April 1978) 1151 UNTS 277, art XII.

¹⁷³ Dawidowicz, *Third Party Countermeasures* (n 35), 131; Proukaki, *Problem of Enforcement* (n 19), 140.

¹⁷⁴ Henry Etienne, 'Falklands/Malvinas War—1982' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2015), 361–3.

¹⁷⁵ See UNSC, 'Verbatim Record, 2350th meeting' (3 April 1982) UN Doc S/PV/2350; UNSC, 'Verbatim Record, 2362nd meeting' (22 May 1982) UN Doc S/PV/2362.

¹⁷⁶ UNSC, 'Letter from the Permanent Representative of the UK' (24 April 1982) UN Doc S/14997.

¹⁷⁷ Henry, 'Falklands/Malvinas War' (n 174), 364.

¹⁷⁸ *Ibid.*, 372–3; Gray, *Use of Force* (n 3), 74; Corten, *Law Against War* (n 3), 143. *Contra* Aristeguieta Efraín Schacht, 'Reacción de la América latina y el Tercer Mundo en relación con el problema de las Islas Malvinas' (1984) 2 *Anuario argentino de derecho internacional* 35; Brotóns Antonio Remiro, *et al.*, *Derecho internacional* (Tirant lo Blanch 2010), 684–6.

¹⁷⁹ UNSC, 'Verbatim Record, 2345th meeting' (2 April 1982) UN Doc S/PV.2345, 6.

¹⁸⁰ *Note Transmission of Information under Article 73e of the Charter* Res 66(I) UNGA (14 December 1946) UN Doc A/RES/66(I) (the UN has classified the Falklands/Malvinas Islands as a non-self-governing territory since 1946).

¹⁸¹ Corten, *Law Against War* (n 3), 150 citing Res 3314 (XXIX) (n 28).

British. Moreover, it must be recalled that the duty to peacefully settle disputes, a corollary to the duty not to use force,¹⁸² extends to the settlement of territorial disputes.¹⁸³ Accordingly, even if Argentina may have had a good claim over the Falklands/Malvinas Islands,¹⁸⁴ its resort to force to take possession of the territory, as scholars like Henry note, breaches its duty not to use force.¹⁸⁵

States' responses to the conflict varied. States within the SC condemned Argentina's 'invasion' and demanded its withdrawal.¹⁸⁶ Most Western states followed suit. Some condemned Argentina's use of force.¹⁸⁷ A few, while recognising Argentina's territorial claims, disagreed with its conduct.¹⁸⁸ Others considered the 'invasion' an act of aggression.¹⁸⁹ Argentina encountered less hostility from the Non-Aligned Movement ('NAM'). While some, denounced its actions,¹⁹⁰ others demonstrated restraint.¹⁹¹ Still, some Latin American and Asian states supported Argentina.¹⁹²

As the ILC noted,¹⁹³ several states imposed unilateral measures against Argentina.¹⁹⁴ The

¹⁸² Randelzhofer & Dörr, 'Article 2(4)' (n 6), 203; Tomuschat Christian, 'Article 2(3)' in Simma Bruno, *et al.* (eds), *Charter of the UN: Commentary*, vol 1 (Oxford University Press 2012), 181, 188.

¹⁸³ Ruys & Rodriguez, 'Military Action to Recover Occupied Land' (n 74), 693; Yiallourides, Ghering, & Gauci, 'Force & Disputes' (n 75), ¶183. *See Jus Ad Bellum—Ethiopia's Claims* (n 80), 465. *See also* Res 2625 (XXV) (n 80); Res 1177 UNSC (26 June 1998) UN Doc S/RES/1177, ¶3.

¹⁸⁴ Note that the islands have been listed a non-self-governing territory by the UN since 1946 (Res 66(I) (n 180)).

¹⁸⁵ Henry, 'Falklands/Malvinas War' (n 174), 372. *See* Schacter Oscar, 'International Law in Theory & Practice' (1982) 178 *Recueil des Cours de l'Académie de Droit International* 9, 142; Kohen, *Possession Contestée* (n 81), ¶111.

¹⁸⁶ Res 502 UNSC (3 April 1982) S/RES/502.

¹⁸⁷ UNSC, 'Verbatim Record, 2349th meeting' (1982) (n 42), 1–2 (Ireland), 3 (Canada); UNSC, 'Verbatim Record, 2350th meeting' (1982) (n 175), 6–7 (US), 20–1 (Ireland).

¹⁸⁸ UNSC, 'Verbatim Record, 2350th meeting' (1982) (n 175), 2 (Ireland), 18 (Spain).

¹⁸⁹ UNSC, 'Verbatim Record, 2349th meeting' (1982) (n 42), 1 (France); UNSC, 'Verbatim Record, 2360th meeting' (21 May 1982) UN Doc S/PV.2360, 20–1 (Australia); UNSC, 'Verbatim Record, 2363rd meeting' (1982) (n 43), 12 (Belgium); UNSC, 'Verbatim Record, 2364th meeting' (24 May 1982) UN Doc S/PV/2364, 9 (Greece).

¹⁹⁰ UNSC, 'Verbatim Record, 2350th meeting' (1982) (n 175), 5 (Jordan), 6 (Japan); 19 (Uganda), 20 (Togo), 22 (Guyana); UNSC, 'Verbatim Record, 2364th meeting' (1982) (n 189), 3 (Zaire), 6–7 (Kenya), 8 (Liberia); UNSC, 'Verbatim Record, 2366th meeting' (25 May 1982) UN Doc S/PV.2366, 9 (India).

¹⁹¹ UNSC, 'Verbatim Record, 2350th meeting' (1982) (n 175), 5 (Brazil), 8 (Peru); UNSC, 'Verbatim Record, 2362nd meeting' (1982) (n 175), 3–4 (Uruguay), 10 (Mexico), 22 (Guatemala), 22 (Poland), 23 (China); UNSC, 'Verbatim Record, 2363rd meeting' (1982) (n 43), 3 (Honduras), 7 (Equatorial Guinea), 12–3 (Indonesia).

¹⁹² UNSC, 'Verbatim Record, 2350th meeting' (1982) (n 175), 7 (Bolivia), 8–13 (Panama), 14 (Paraguay); UNSC, 'Verbatim Record, 2362nd meeting' (1982) (n 175), 6 (Venezuela); UNSC, 'Verbatim Record, 2363rd meeting' (1982) (n 43), 10–1 (El Salvador); UNSC, 'Letter from the Permanent Mission of Viet Nam' (12 May 1982) UN Doc S/15076; UNSC, 'Statement of the Ministry of Foreign Affairs of the Lao' (18 May 1982) UN Doc A/37/227-S/15088.

¹⁹³ Crawford James, 'Third Report on State Responsibility' (2000) II(2) YbILC 12, 103.

¹⁹⁴ *See* ILC, 'Report on the Work of the 53rd Session' (2001) (n 22), 138.

US,¹⁹⁵ along with Austria, Belgium, France, the Netherlands, and West Germany,¹⁹⁶ banned arms sales to Argentina—retorsions as these did not involve any breach of duty. West Germany and New Zealand also suspended their air services agreements with Argentina.¹⁹⁷ Furthermore, the EEC,¹⁹⁸ together with Norway, Australia, Canada, and New Zealand, imposed import restrictions.¹⁹⁹ As some submit, the suspension of the air services agreement are countermeasures as these *a priori* breached the treaties' provisions on denunciations.²⁰⁰ The same is true for the import restrictions. Of course, it could be argued that the restrictions fell under GATT Article XXI's security clause exception.²⁰¹ Indeed, some such as the EEC, Australia, and Canada, took this view.²⁰² Yet, the embargo, especially those on textiles and mutton, required prior notices that the states did not observe. These remained applicable even if the security clause exemption was invoked.²⁰³

Many non-Western states also criticised these measures. The Organisation of American States ('OAS') deemed the embargo incompatible with the UN Charter and the GATT and claimed that the SC possesses the exclusive authority to impose enforcement measures.²⁰⁴ Other Latin American states such as Brazil, Cuba, Mexico, Panama, and Venezuela made similar statements.²⁰⁵ The Soviet bloc also supported this view.²⁰⁶

¹⁹⁵ —, 'US: Statements Concerning Assistance & Sales to Argentina' (1982) 21 *International Legal Materials* 682.

¹⁹⁶ Lewis Paul, 'Europeans Ending Arms to Argentina' (New York Times, 8 April 1982) <<https://www.proquest.com/newspapers/europeans-ending-arms-argentina/docview/424349583/>>.

¹⁹⁷ Dawidowicz, *Third Party Countermeasures* (n 35), 141–2.

¹⁹⁸ Proukaki, *Problem of Enforcement* (n 19), 156 citing Council of the EC, 'Council Regulation No 877/82' (16 April 1982) L/102/1; Council of the EC, 'Council Regulation No 1176/82' (18 May 1982) L/136/1.

¹⁹⁹ Dawidowicz, *Third Party Countermeasures* (n 35), 141.

²⁰⁰ Ibid, 143; Proukaki, *Problem of Enforcement* (n 19), 160.

²⁰¹ Kuyper PJ, 'Community Sanctions against Argentina: Lawfulness under Community & International Law' in O'Keefe D & HG Schermers (eds), *Essays in European Law and Integration* (Kluwer 1982), 154; Zoller Elizabeth, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational 1984), 104–5. See Boisson de Chazournes Laurence & Boutruche Théo, 'Trade Law, UN Law, & Collective Security Issues' in Bethlehem Daniel (ed), *Oxford Handbook of International Trade Law* (Oxford University Press 2009), 705–6.

²⁰² Council for Trade in Goods, 'Minutes of the Meeting' (22 June 1982) GATT Doc C/M/157, 10 (EC member states), 11 (Australia); GATT Council, 'Trade Restrictions Affecting Argentina Applied for Non-Economic Reason' (5 May 1982) GATT Doc 5319/Rev.1 (Canada).

²⁰³ Dawidowicz, *Third Party Countermeasures* (n 35), 141.

²⁰⁴ UNSC, 'Letter from the President of the Twentieth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States' (28 April 1982) UN Doc S/15008.

²⁰⁵ See UNSC, 'Verbatim Record, 2360th meeting' (1982) (n 189), 18 (Brazil) UNSC, 'Verbatim Record, 2362nd meeting' (1982) (n 175), 10 (Mexico), 13 (Cuba), 17 (Panama), 75 (Venezuela).

²⁰⁶ UNSC, 'Verbatim Record, 2362nd meeting' (1982) (n 175), 9 (Soviet Union); UNSC, 'Verbatim Record, 2363rd meeting' (1982) (n 43), 2 (Poland); UNGA, 'Verbatim Record, 37th Session, 52nd Meeting' (3 November

F. Israeli attacks in Lebanon against the PLO (1982)

Palestinians have contested Israel's presence in Palestinian territories at least since 1948. In 1964, various groups formed the Palestinian Liberation Organisation ('PLO') to reclaim these territories.²⁰⁷ By 1968, the PLO had built a sizeable presence in Southern Lebanon, and launched attacks against Israel.²⁰⁸ In response, Israel bombed Beirut's airport.²⁰⁹ Hostilities between the PLO and Israel continued throughout the 1970s. In November 1977, Israel bombarded a Lebanese town claiming that it was targeting the PLO.²¹⁰ In March 1978, several PLO members entered Israel and killed civilians.²¹¹ Again, Israel launched a large-scale operation ('Operation Litani') against the PLO in Lebanon that lasted for a few weeks.²¹² Afterwards, the UN deployed a peacekeeping force—the UN Interim Force in Lebanon ('UNIFIL')—but this did not ease the tensions. From April 1978, Israel conducted more raids against PLO bases in Lebanon.²¹³ Similarly, the PLO also attacked Israel and strengthened its forces in Southern Lebanon.²¹⁴ The 1982 attempted assassination of an Israeli ambassador by a non-PLO Palestinian nationalist provided Israel with the pretext for an offensive against the PLO.²¹⁵ Israel launched airstrikes in Southern Lebanon followed by a ground campaign. Israel

1982) UN Doc A/37/PV.52, 897 (German Democratic Republic); UNGA, 'Verbatim Record, 37th Session, 53rd Meeting' (3 November 1982) UN Doc A/37/PV.53, 908 (Bulgaria), 916 (Albania); UNGA, 'Verbatim Record, 37th Session, 54th Meeting' (4 November 1982) UN Doc A/37/PV.54, 927 (Czechoslovakia).

²⁰⁷ Palestine National Council, 'Palestinian National Charter' (1-17 July 1968) Resolutions of the PNC, arts 2, 9.

²⁰⁸ Williamson Myra, 'Operation Litani—1978' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 269. See Dinstein, *War, Aggression, & Self-Defence* (n 6), 248.

²⁰⁹ Schmidt Dana, 'Israelis Attack Beirut's Airport' (New York Times, 29 Dec 1968) <<https://www.proquest.com/historical-newspapers/israelis-attack-beirut/docview/118440929>>.

²¹⁰ —, 'Israel Attacks Sites in Southern Lebanon With Jet and Artillery' (New York Times, 9 November 1977) <<https://www.proquest.com/historical-newspapers/israel-attacks-sites-southern-lebanon-with-jet/docview/123291065>>; —, 'Israel-Lebanon Border Quiet Again' (New York Times, 11 November 1977) <<https://www.proquest.com/historical-newspapers/israel-lebanon-border-quiet-again/docview/123478821>>.

²¹¹ Brilliant Moshe, 'Fatah admits Raid' (New York Times, 12 March 1978) <<https://www.proquest.com/historical-newspapers/fatah-admits-raid/docview/123796411>>; —, 'Terrorist Offensive Against Israel' (New York Times, 12 March 1978) <<https://www.proquest.com/historical-newspapers/terrorist-offensive-against-israel/docview/123794423>>.

²¹² Williamson, 'Operation Litani' (n 208), 273.

²¹³ Williamson Myra, 'Lebanon War—1982' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 284; Farrel William, 'Israel Bombs Targets In South Lebanon' (New York Times, 13 Jul 1981) <<https://www.proquest.com/historical-newspapers/israel-bombs-targets/docview/120704801>>.

²¹⁴ Williamson, 'Lebanon War' (n 213), 284; —, 'Palestinian Shells Northern Israel' (Boston Globe, 19 July 1981) <<https://www.proquest.com/newspapers/palestinian-shells-wound-four-northern-israel/docview/294115107>>.

²¹⁵ Fisk Robert, *Pity the Nation* (Oxford University Press 1990), 197.

occupied parts of Lebanon until May 2000.²¹⁶

Israel justified its actions against the PLO in Lebanon as measures of self-defence.²¹⁷ It argued that the ‘sum total’ of PLO’s actions amounted to an ‘armed attack’.²¹⁸ It also claimed that Lebanon lost control of its southern territory and was incapable or reluctant to stop PLO’s attacks against Israel.²¹⁹ Finally, it alleged that it sought to ‘deter’ future PLO attacks.²²⁰ Scholars like Williamson submit that these did not justify Israel’s attack and subsequent occupation of Lebanon.²²¹ Even if, as Feinstein suggests, the PLO’s attacks could be deemed sufficiently ‘grave’ by applying the concept of ‘accumulation of events’,²²² they do not amount to an armed attack for self-defence purposes. Contrary to the view of some,²²³ the law on force as it stood in 1982, and arguably until now,²²⁴ required the ‘armed attack’ to be attributable to a state.²²⁵ Here, Israel failed to show that the PLO’s acts were attributable to Lebanon. Second, while Lebanon may have been incapable or reluctant to act against the PLO, this does not, as states pointed out, ‘give a green light for violation of the [...] inviolability of [...] independent states’.²²⁶ Finally, as to Israel’s claim of deterring future PLO attacks, while some have

²¹⁶ Williamson, ‘Lebanon War’ (n 213), 287.

²¹⁷ See UNSC, ‘Letter from the Permanent Representative of Israel’ (17 March 1978) UN Doc S/12607; UNSC, ‘Verbatim Record, 2071st Meeting’ (17 March 1978) UN Doc S/PV.2071.

²¹⁸ UNSC, ‘Verbatim Record, 2375th Meeting’ (6 June 1982) UN Doc S/PV.2375, 3.

²¹⁹ Ibid, 5–7 (‘Lebanon [has] a duty to prevent its territory from being used to attack other states’).

²²⁰ Ibid, 7–8 (‘To arrest the never-ending cycle of attacks [...] to deter continued terrorism’).

²²¹ See Williamson, ‘Lebanon War’ (n 213), 294 citing Gray, *Use of Force* (n 3), 145 (The use of force was ‘illegal [as] it was directed against the legitimate struggle of a people [...] to self-determination’); Grieg Donald, ‘Self-Defence & the Security Council: What does Article 51 Require?’ (1991) 40 *International & Comparative Law Quarterly* 336, 393 (arguing that the response was disproportionate); Mallison Thomas, ‘Aggression or Self-Defense in Lebanon in 1982?’ (1983) 77 *American Society of International Law Proceedings* 77 (arguing that there was no imminent armed attack).

²²² Feinstein Barry, ‘Legality of the Use of Armed Force by Israel in Lebanon’ (1985) 20 *Israel Law Review* 362, 385. See also Oil Platforms [2003] (n 11), 208 (‘Even taken cumulatively’); *Armed Activities* [2005] (n 2), 223 (‘Even if this series of deplorable attacks could be regarded as cumulative in character’). But see Tams Christian, ‘Use of Force against Terrorists’ (2009) 20 *European Journal of International Law* 359, 390; Kretzmer David, ‘Inherent Right to Self-Defence & Proportionality in Jus Ad Bellum’ (2013) 24 *European Journal of International Law* 235, 244.

²²³ See Feinstein, ‘Armed Force by Israel in Lebanon’ (n 222), 389; Levenfield Barry, ‘Israel’s Counter-Fedayeen Tactics in Lebanon’ (1982) 21 *Columbia Journal of Transnational Law* 1, 35, 45–6; Dinstein, *War, Aggression, & Self-Defence* (n 6), 248. See also O’Brien William, ‘Reprisals, Deterrence, & Self-Defense in Counterterror Operations’ (1990) 30 *Virginia Journal of International Law* 421, 472. Franck Thomas, *State Action against Threats & Armed Attacks* (Cambridge University Press 2002), 58.

²²⁴ Corten, *Law Against War* (n 3), 401, 171–2; Ruys, *Armed Attack & Article 51* (n 12), 486. See Gray, *Use of Force* (n 3), 209–10. But see Trapp Kimberly, ‘Can Non-State Actors Mount an Armed Attack?’ in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 694; Cassese, ‘International Community’s “Legal” Response to Terrorism’ (n 12), 606.

²²⁵ *Military & Paramilitary Activities* [1986] (n 1), 103–4; *Wall* [2004] (n 4), 194.

²²⁶ UNSC, ‘Verbatim Record, 2071st Meeting’ (1978) (n 217), 10 (Jordan); UNSC, ‘Verbatim Record,

accepted that a state need not wait for an actual armed attack,²²⁷ most doubt this view's legality citing the lack of imminence and potential for abuse.²²⁸

Most states condemned Israel's actions in Lebanon. States within the SC repeatedly demanded Israel's withdrawal,²²⁹ and the GA did the same characterising Israel's conduct as aggression.²³⁰ Yet, no state levied any unilateral measure against Israel. The US delayed its shipment of arms to Israel but denied that this related to Israel's conduct.²³¹ Canada deliberated on trade sanctions but levied none.²³² The Arab League, in addition to its boycott against Israel in place since 1945,²³³ considered imposing an oil embargo at the Soviet Union's suggestion but did not push through.²³⁴

G. *Iraqi-Kuwaiti conflict (1990)*

By the end of 1989, tensions had risen between Iraq and Kuwait. After waging a costly war against Iran (1980–8), Iraq became heavily indebted to Kuwait which the latter refused to forgive.²³⁵ Iraq subsequently accused Kuwait of 'economic aggression' by engaging in 'slant drilling' in oil fields at their borders and exceeding production quotas harming the Iraqi economy.²³⁶ Iraq also resurrected a long-standing territorial dispute with Kuwait.²³⁷ Finally, Iraq alleged, albeit briefly, that it received a request for assistance from the Provisional

2072nd Meeting' (17 March 1978) UN Doc S/PV.2072, 5 (France). See Gross Oren, 'Unresolved Legal Questions concerning Operation Inherent Resolve' (2017) 52 *Texas International Law Journal* 221, 252.

²²⁷ See Schwebel, 'What Weight to Conquest?' (n 71), 346; Franck, *State Action against Threats & Armed Attacks* (n 223), 105; Schacter, 'Right of States to Use Armed Force' (n 81), 1638.

²²⁸ Corten, *Law Against War* (n 3), 410, 441 ff; Gray, *Use of Force* (n 3), 251; Dinstein, *War, Aggression, & Self-Defence* (n 6), 187. See Williamson, 'Operation Litani' (n 208), 280; Henkin Louis, *How Nations Behave: Law & Foreign Policy* (Praeger 1968), 233; Brownlie, *Use of Force by States* (n 6), 25.

²²⁹ Res 508 UNSC (5 June 1982) UN Doc S/RES/508; Res 509 UNSC (6 June 1982) UN Doc S/RES/509; Res 510 UNSC (15 June 1982) UN Doc S/RES/510. See also Res 425 UNSC (19 March 1978) UN Doc S/RES/425.

²³⁰ *Question of Palestine* Res ES-7/5 UNGA (26 June 1982) UN Doc A/RES/ES-7/5.

²³¹ Gelb Leslie, 'Israel angered at US Sanctions' (New York Times, 5 September 1982) <<https://www.proquest.com/historical-newspapers/israel-angered-at-u-s-sanctions-balks-passing/docview/122009348>>.

²³² Charlotte Montgomery, 'Cabinet to weigh sanctions against Israel' (The Globe & Mail, 11 June 1982) <<https://www.proquest.com/newspapers/cabinet-weigh-sanctions-against-israel/docview/386679095>>.

²³³ Truck, 'Arab Boycott of Israel' (n 88), 474; Kontrorovich, 'Arab League Boycott & WTO Accession' (n 88), 286

²³⁴ Gruen George, 'US & Israel: Impact of Lebanon War' (1984) 83 *American Jewish Yearbook* 73, 91.

²³⁵ Greenwood Christopher, 'New World Order or Old? Invasion of Kuwait & the Rule of Law' (1992) 55(2) *Modern Law Review* 153, 154; Simons Geoff, *Iraq: from Sumer to Post-Saddam* (Palgrave Macmillan 2004), 341–2.

²³⁶ Greenwood, 'Invasion of Kuwait & Rule of Law' (n 235), 155

²³⁷ de Wet Erika, 'Gulf War—1990–91' in Ruys Tom, et al. (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2015), 456.

Government of Free Kuwait ('PGFK').²³⁸ On 2 August 1990, following the failure of negotiations, Iraq invaded Kuwait.²³⁹ Iraq quickly subdued Kuwaiti resistance and established control over Kuwait.²⁴⁰

States swiftly condemned Iraq's actions.²⁴¹ On the same day, the SC, free from the deadlock caused by the Cold War,²⁴² adopted Resolution 660 calling for Iraq's withdrawal.²⁴³ On 6 August 1990, it adopted Resolution 661 imposing sanctions on Iraq including a trade embargo.²⁴⁴ On 25 August 1990, due to reports of non-compliance by other states, the SC authorised the use of a 'certain measure of force' to 'ensure compliance with sanctions'.²⁴⁵ Finally, the SC issued an ultimatum for Iraq to withdraw and should it fail to do so, allowed states to use 'all necessary means' to oust Iraq from Kuwait.²⁴⁶ On 16 January 1991, a US-led coalition, began an aerial campaign against Iraq, followed by a ground assault on 24 February 1991.²⁴⁷ The operation succeeded and Iraq concluded a conditional ceasefire with Kuwait and coalition forces. On 3 April 1991, the SC formalised the cessation of hostilities and imposed extensive duties on Iraq including compensation for damage.²⁴⁸

None of the reasons cited by Iraq justified its invasion of Kuwait. Even if proven, 'economic aggression' cannot justify its use of force. While economic aggression, as scholars like Constantinou argue, may be deemed the prohibited kind of intervention,²⁴⁹ it is doubtful, as

²³⁸ Ibid, 456 *citing* UNSC, 'Verbatim Record, 2932nd meeting' (1990) (n 45), 11.

²³⁹ Warbrick Colin, 'Invasion of Kuwait by Iraq' (1991) 40(2) *International & Comparative Law Quarterly* 482, 483.

²⁴⁰ Ibid, 482; Finlan Alastair, *The Gulf War 1991* (Osprey 2003), 26.

²⁴¹ — —, 'Kuwait demands Arab military help' (The Globe & Mail, 3 August 1990) <<https://www.proquest.com/newspapers/kuwait-demands-arab-military-help-foreign/docview/385553054/>>; Tanner James, Seib Gerald, & Fialka John, 'Iraqi Invasion of Kuwait—Persian Gulf Crisis' (Wall Street Journal, 3 August 1990) <https://www.proquest.com/newspapers/iraqi-invasion-kuwait-persian-gulf-crisis-nations/docview/398228890>.

²⁴² See Glennon Michael, 'Why the Security Council Failed' (2003) 82 *Foreign Affairs* 16, 18–9.

²⁴³ Res 660 UNSC (6 Aug 1990) UN Doc S/RES/660. See Res 662 UNSC (9 August 1990) S/RES/662; Res 664 UNSC (18 August 1990) S/RES/664; Res 666 UNSC (13 September 1990) S/RES/666; Res 667 UNSC (16 September 1990) S/RES/667; Res 674 UNSC (29 October 1990) S/RES/674; Res 677 UNSC (28 November 1990) S/RES/677.

²⁴⁴ Res 661 UNSC (6 August 1990) UN Doc S/RES/661; Res 670 UNSC (25 September 1990) S/RES/670. See Res 669 UNSC (24 September 1990) S/RES/669.

²⁴⁵ de Wet, 'Gulf War' (n 237) *citing* Res 665 UNSC (25 August 1990) S/RES/665; Res 670 (n 244).

²⁴⁶ Res 678 UNSC (29 November 1990) S/RES/678.

²⁴⁷ de Wet, 'Gulf War' (n 237), 458; Greenwood, 'Invasion of Kuwait & Rule of Law' (n 235), 170–1.

²⁴⁸ Res 687 UNSC (3 April 1991) UN Doc S/RES/687.

²⁴⁹ Res 2625 (XXV) (n 80). See Constantinou Avra, *Right of Self-Defense under Customary International Law & Article 51* (Bruylant 2000), 36; Dempsey Paul, 'Economic Aggression & Self-Defense in International Law' (1977) 9 *Case Western Reserve Journal of International Law* 253, 264–5.

Corten and Cassese submit, if it amounts to an ‘armed attack’.²⁵⁰ As to Iraq’s claims to Kuwait’s territory, even if parts of Kuwait historically formed part of Iraq, the duty not to use force, as discussed above, precludes a state from using force to recover disputed territories.²⁵¹ Finally, the alleged invitation from the PGFK cannot legitimise Iraq’s actions. For one, Iraq failed to show that PGFK had the competence to invite intervention.²⁵² In any case, as some like Fox point out, states do not have the prerogative to forcibly intervene in the territory and affairs of another for regime change.²⁵³

As the ILC noted,²⁵⁴ some states levied unilateral measures against Iraq before SC Resolution 661. Immediately after the invasion, the US and EEC states froze Iraqi assets and imposed trade embargos.²⁵⁵ The day after, the Soviet Union, US, and Czechoslovakia banned arms exports to Iraq.²⁵⁶ Japan also levied trade restrictions.²⁵⁷ In addition, Australia, Japan, and Switzerland froze Iraq’s assets within their jurisdictions.²⁵⁸ Arguably, the freezing of Iraq’s assets may be deemed countermeasures. These involve *a priori* breaches of duties, on the imposing states’ part, under the laws on the inviolability of state property.²⁵⁹ Thus, states must

²⁵⁰ Corten, *Law Against War* (n 3), 402; Cassese Antonio, ‘Article 51’ in Cot Jean-Pierre & Pellet Alain (eds), *La Charte des Nations Unies* (Economica 2005), 1334–5.

²⁵¹ See Ruys & Rodriguez, ‘Military Action to Recover Occupied Land’ (n 74), 677.

²⁵² See Corten, *Law Against War* (n 3), 259 ff; Ruys & Fero, ‘Saudi-led Military Intervention in Yemen’ (n 109), 81. *Contra* Alexandrov Stanmir, *Self-Defense in International Law* (Kluwer 1996), 112.

²⁵³ Fox, ‘Vietnamese Intervention’ (n 119), 215. See Gray, *Use of Force* (n 3), 11; Greenwood, ‘Invasion of Kuwait & Rule of Law’ (n 235), 155–6.

²⁵⁴ Crawford, ‘Third Report on State Responsibility’ (2000) (n 193), 103.

²⁵⁵ Lauter David, ‘Bush Embargoes Trade and Freezes Iraq Assets’ (Los Angeles Times, 3 August 1990) <<https://www.proquest.com/newspapers/bush-embargoes-trade-freezes-iraq-assets/docview/420914983/>>.

²⁵⁶ Tanner, Seib, & Fialka, ‘Iraqi Invasion’ (n 241); Dobbs Michael, ‘Moscow Halts Supply of Arms to Baghdad’ (Washington Post, 3 Aug 1990) <<https://www.proquest.com/newspapers/u-s-3-other-nations-take-steps-freeze-assets/docview/408035954/>>.

²⁵⁷ Tyler Patrick, ‘US Seeks Pressure on Iraq as Arab Talks Fail’ (Washington Post, 5 August 1990) <<https://www.proquest.com/newspapers/u-s-seeks-pressure-on-iraq-as-arab-talks-fail/docview/307309523/>>.

²⁵⁸ Proukaki, *Problem of Enforcement* (n 19), 180; Dawidowicz, *Third Party Countermeasures* (n 35), 160–1.

²⁵⁹ Note that the duty requires states to ‘take all necessary and appropriate steps’ to ‘protect the subject of inviolability from physical invasion or interference with their functions and from impairment of their dignity’ (Ruys Tom, ‘Immunity, Inviolability, & Countermeasures’ in Angelet Nicolas & Ferro Luca (eds), *Cambridge Handbook of Immunities & International Law* (Cambridge University Press 2019), 690; Criddle Evan, ‘Humanitarian Financial Intervention’ (2013) 24 *European Journal of International Law* 583, 591, 597). For some, a state levying an asset freeze infringes this duty (Castellarin E, ‘Le Gel des Avoirs d’une Banque Centrale Étrangère comme Réaction Décentralisée à un Fait Internationalement Illicite: Rétorsion ou Contre-mesure?’ (2013) 25 *Hague Yearbook of International Law* 173, 179–90; Thouvenin Jean-Marc & Grandaubert Victor, ‘Material Scope of State Immunity from Execution’ in Angelet Nicolas & Ferro Luca (eds), *Cambridge Handbook of Immunities & International Law* (Cambridge University Press 2019), 38). Contrast this with the laws on state immunity from jurisdiction that impose a ‘duty not to institute proceedings [...] or not to take pre- or post-judgment coercive measures’ (Ruys, ‘Immunity, Inviolability, & Countermeasures’ (n 259), 690, 707; Ronzitti Natalino,

justify the non-performance of their duties as a response to Iraq's prior unlawful act.²⁶⁰ The trade embargos, as discussed in the 1982 Argentinian-British conflict, may be a retorsion as they may fall under GATT Article XXI. They may also be countermeasures if the GATT requirements are not met. It may however be noted that no state justified the embargos under the GATT exceptions.²⁶¹ Finally, the imposition of the arms embargo, as there was no duty breached, may be deemed a retorsion.

H. Rwandan & Ugandan intervention in the Democratic Republic of Congo (1998–2003)

The Second Congo War occurred a year after the First Congo War's conclusion. In the earlier conflict, armed groups supported by Rwanda and Uganda, along with their allies, overthrew the Democratic Republic of Congo's ('DRC') government led by Seko and installed Kabila as president.²⁶² Kabila initially allowed Rwandan and Ugandan troops to remain in the DRC.²⁶³ Yet, this, along with his 'autocratic leadership' led to divisions within the government.²⁶⁴ Kabila thus adopted a more independent policy and expelled all foreign troops from the DRC. This, along with the attacks by non-state armed groups operating from the DRC caused Uganda and Rwanda to withdraw their support for Kabila.²⁶⁵

In August 1998, Ugandan and Rwandan forces invaded the DRC beginning the five-year

'Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (BRILL 2016), 22). Since 'asset freezes' are 'not adopted in the course of judicial proceedings' (Bogdanova Iryna, *Unilateral Sanctions in International Law & the Enforcement of Human Rights: Impact of the Principle of Common Concern of Humankind* (BRILL 2022), 125) even if they are 'measures of constraint', they are not 'pre- or post-judgment measures' and thus, 'do not fall under the rules on state immunity' (Ruys, 'Immunity, Inviolability, & Countermeasures' (n 259), 707; Brunk Ingrid, 'Central Bank Immunity, Sanctions, & Sovereign Wealth Funds' (2023) 91 *George Washington University Law Review* 1, 14).

²⁶⁰ Dawidowicz, *Third Party Countermeasures* (n 35), 160–1. See on inviolability: Criddle, 'Humanitarian Financial Intervention' (n 259), 596–7; Hofer Alexandra, 'The "Curiouser & Curiouser" Legal Nature of Non-UN Sanctions: US Sanctions against Russia' (2018) 23 *Journal of Conflict & Security Law* 76, 91. On immunity: Ronzitti, 'Sanctions as Instruments of Coercive Diplomacy' (n 259), 22; Longobardo Marco, 'State Immunity & Judicial Countermeasures' (2021) 32 *European Journal of International Law* 457, 467; Moser Patricia, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations' (2012) 4 *Goettingen Journal of International Law* 809, 809. But see Bogdanova, *Unilateral Sanctions & Human Rights* (n 259), 126; Fox Hazel, 'State Immunity & Torture' (2006) 2 *European Human Rights Law Review* 142, 16.

²⁶¹ Dawidowicz, *Third Party Countermeasures* (n 35), 162.

²⁶² Okawa Phoebe, 'Congo's War: Legal Dimension of a Protracted Conflict' (2007) 77 *British Yearbook of International Law* 203, 231–3, 235; *Armed Activities* [2005] (n 2), 191–2

²⁶³ See Wippman David, 'Pro-Democratic Intervention' in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 811

²⁶⁴ Okawa, 'Congo's War' (n 262), 240.

²⁶⁵ Green James, 'Intervention by Uganda & Rwanda in the Democratic Republic of Congo—1998–2003' in Ruys Tom, et al. (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 575–6.

conflict.²⁶⁶ Before this operation, the two states, along with Burundi, already supported rebels that opposed Kabila.²⁶⁷ In the following months, other states, such as Angola, Chad, Namibia, and Zimbabwe, supported Kabila increasing the scale of the conflict.²⁶⁸ The Second Congo War only ended in July 2003 through a UN-supervised ceasefire in which belligerent states agreed to leave Congolese territory and support the creation of a transitional government.²⁶⁹

The conflict is a complex one that involves multiple states and non-state armed groups revolving around political, social, and ethnic issues.²⁷⁰ For the present analysis, focus is made on Rwanda and Uganda's breach of the duty not to use force. First, the two states alleged that the DRC consented to their presence within its territory. Yet, while the DRC consented to the presence of Rwandan and Ugandan troops after the First Congo War, the DRC, under Kabila, withdrew this consent in July 1998. Thus, as the ICJ held, no consent legitimised the intervention.²⁷¹ Neither can Rwanda nor Uganda claim self-defence. It is true that non-state armed groups operating from the DRC attacked Uganda and Rwanda. However, as the ICJ pointed out, this *per se* did not justify the use of force against the DRC as the attacks against the two states were not attributable to the DRC.²⁷² In any case, the two states' responses were not proportional.²⁷³ As the ICJ noted, the destruction caused within the DRC did not appear to be 'proportionate to the [...] transborder attacks'.²⁷⁴

The conflict elicited a neutral response from states.²⁷⁵ The GA only urged states to 'refrain from interfering in [other's] internal affairs'.²⁷⁶ Similarly, the SC merely called for the

²⁶⁶ Ibid; UNGA, 'Letter from the Permanent Representative of the DRC' (18 September 1998) UN Doc A/53/232.

²⁶⁷ Green, 'Uganda & Rwanda Intervention' (n 265), 575–6; Duke Lynne, 'Congo Says Rebels Get Rwandan Aid' (Washington Post, 7 Aug 1998) <<https://www.proquest.com/newspapers/congo-says-rebels-get-/docview/408387802>>.

²⁶⁸ Green, 'Uganda & Rwanda Intervention' (n 265), 576.

²⁶⁹ Okawa, 'Congo's War' (n 262), 203. See Res 1493 UNSC (28 July 2003) UN Doc S/RES/1493; Res 1533 UNSC (12 March 2004) UN Doc S/RES/1533.

²⁷⁰ Green, 'Uganda & Rwanda Intervention' (n 265), 576; Arimatsu Louise, 'DRC 1993–2010' in Wilmhurst Elizabeth (ed), *International Law & Classification of Conflicts* (Oxford University Press 2012), 176.

²⁷¹ *Armed Activities* [2005] (n 2), 196–9, 213.

²⁷² Ibid, 222–3 See Antonopoulos Constantine, 'Unilateral Use of Force by States' (1999) 4 *Journal of Armed Conflict Law* 117, 138–9; Green James, *ICJ & Self-Defence in International Law* (Hart 2009), 44–51.

²⁷³ Green, 'Uganda & Rwanda Intervention' (n 265), 587; Antonopoulos, 'Use of Force by States' (n 272), 138.

²⁷⁴ *Armed Activities* [2005] (n 2), 223.

²⁷⁵ Green, 'Uganda & Rwanda Intervention' (n 265), 586. Note the DRC filed ICJ cases against Uganda and Rwanda.

²⁷⁶ Res 53/1L UNGA (11 Jan 1999) UN Doc A/RES/53/1L; Res 53/160 UNGA (9 Feb 1999) UN Doc A/RES/53/160.

conflict's peaceful resolution²⁷⁷ Later, it noted the presence of Rwandan and Ugandan forces in the DRC and stressed the need to respect the latter's territorial integrity. Yet, it did not levy any measure against Uganda or Rwanda.²⁷⁸ Elsewhere, the Organisation of Africa Unity ('OAU') and the EU called for an end to the hostilities.²⁷⁹ Given this disposition,²⁸⁰ it is unsurprising that no state levied unilateral measures.

I. NATO intervention in Kosovo (1999)

The present analysis's subject occurred within the context of a series of conflicts caused by Yugoslavia's break-up. While it will only examine NATO's intervention in Kosovo, a brief discussion of the other conflicts that preceded it is provided for context.

Except in North Macedonia's case,²⁸¹ Yugoslavia forcibly responded to its breakaway states' proclamations of independence. This led to the hostilities with Slovenia (27 June–7 July 1991),²⁸² the conflict with Croatia (31 March 1991–12 November 1995),²⁸³ and the war in Bosnia (6 April 1992–14 December 1995). Due to the conflict's scale, the SC intervened in the latter and authorised states to employ 'all necessary means' in Yugoslavia to respond to the situation.²⁸⁴ After protracted negotiations, Yugoslavia signed the Dayton Accords in 1995 ending the hostilities.²⁸⁵

Yugoslavia's break-up fuelled 'nationalist aspirations' in Kosovo, then part of Serbia.²⁸⁶

²⁷⁷ UNSC, 'Statement of the SC President' (13 July 1998) UN Doc S/PRST/1998/20.

²⁷⁸ Res 1234 UNSC (13 July 1998) UN Doc S/RES/1234. *See* Res 1304 UNSC (16 June 2000) UN Doc S/RES/1304. *Note* the SC established an observation mission in 1999 (Res 1279 UNSC (30 Nov 1999) UN Doc S/RES/1279) this was later expanded to a full-blown peacekeeping mission (Res 1291 UNSC (24 Feb 2000) UN Doc S/RES/1291).

²⁷⁹ Green, 'Uganda & Rwanda Intervention' (n 265), 584–5.

²⁸⁰ *See* UNGA, 'Verbatim Record, 53rd Session, 95th Meeting' (23 March 1999) UN Doc A/53/PV.95; UNGA, 'Verbatim Record, 53rd Session, 96th Meeting' (24 March 1999) UN Doc A/53/PV.96.

²⁸¹ Tagliabue John, 'Macedonians Vote for Independence from Yugoslavia' (New York Times, 10 September 1991) <<https://www.proquest.com/newspapers/macedonians-vote-independence-yugoslavia/docview/428208567>>.

²⁸² Tagliabue John, 'Yugoslav Army Uses Force in Breakaway Republic' (New York Times, 28 June 1991) <<https://www.proquest.com/newspapers/yugoslav-army-uses-force-breakaway-republic/docview/428086344>>.

²⁸³ Weller Marc & Bethlehem Daniel (eds), *Yugoslav Crisis*, vol I (Cambridge University Press 1997), xxvi.

²⁸⁴ *See* Res 770 UNSC (13 August 1992) UN Doc S/RES/770 ('Take all measures necessary to facilitate [...] humanitarian assistance in [...] Bosnia and Herzegovina'); Res 776 UNSC (14 September 1992) UN Doc S/RES/776 (Authorising the UNPROFOR to use of 'all necessary means' to accomplish its task); Res 816 UNSC (16 April 1993) UN Doc S/RES/816 (Imposing a flight ban in the airspace of Bosnia and Herzegovina); Res 836 UNSC (4 June 1993) UN Doc S/RES/836 (Authorising the UNPROFOR to use 'necessary measures, including the use of force' in self-defence).

²⁸⁵ Klein Pierre, 'Intervention in Bosnia & Herzegovina—1992–5' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 496–7, 498.

²⁸⁶ Franchini Daniel & Tzanakopoulos Antonios, 'Kosovo Crisis—1999' in Ruys Tom, *et al.* (eds), *Use of*

The Kosovo Liberation Army ('KLA')—once a 'low-key' separatist group—attacked Yugoslav (later Serbia and Montenegro) forces ('JNA') in Kosovo.²⁸⁷ The latter responded with a 'violent campaign of repression and counterinsurgency'.²⁸⁸ Thus, began the Kosovo War. While the SC called for the cessation of hostilities and imposed an arms embargo on Serbia and Montenegro,²⁸⁹ these did not de-escalate the conflict.²⁹⁰ As the crisis deteriorated, NATO launched an aerial campaign against Serbia and Montenegro.²⁹¹ This lasted for three months until Serbia and Montenegro agreed on a peace plan that included its withdrawal from Kosovo and the deployment of a peace-keeping force.²⁹²

NATO member states justified the aerial campaign by appealing to 'humanitarian intervention' albeit in different degrees.²⁹³ Belgium stressed that the NATO intervention aimed to 'protect fundamental values' and 'prevent an impending catastrophe'.²⁹⁴ The UK argued that the operation was an 'exceptional measure to prevent an overwhelming humanitarian [crisis]'.²⁹⁵ Others took the same stance.²⁹⁶ Without providing a legal justification, the US simply stated that it participated in the campaign to protect 'thousands of innocent people' and prevent a 'wider war'.²⁹⁷

Force in International Law: A Case-Based Approach (Oxford University Press 2018), 594–5; Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons* (Oxford University Press 2000), 33.

²⁸⁷ Independent International Commission on Kosovo, *Report* (n 286), 51.

²⁸⁸ Franchini & Tzanakopoulos, 'Kosovo' (n 286), 595.

²⁸⁹ See Res 1160 UNSC (31 Mar 1998) UN Doc S/RES1160; Res 1199 UNSC (23 Sept 1998) UN Doc S/RES/1998.

²⁹⁰ Independent International Commission on Kosovo, *Report* (n 286), 71; Franchini & Tzanakopoulos, 'Kosovo' (n 286), 596; UNSG, 'Report Pursuant to SC Resolutions 1160, 1199, & 1203' (24 Dec 1998) UN Doc S/1998/1221, ¶3.

²⁹¹ Gellman Barton, 'NATO Punishes Milosevic' (New York Times, 25 March 1999) <<https://www.proquest.com/newspapers/nato-punishes-milosevic-serbs-yugoslav-targets/docview/388203053>>;

²⁹² Erlanger Steven, 'Milosevic Yields on NATO's Key Terms; 50,000 Allied Troops to Police Kosovo' (New York Times, 4 June 1999) <<https://www.proquest.com/newspapers/milosevic-yields-on-natos-key-terms-50-000-allied/docview/431194477>>. See Res 1244 UNSC (10 June 1999) UN Doc S/RES/1244.

²⁹³ Gray, *Use of Force* (n 3), 45. See Greenwood Christopher, 'Humanitarian Intervention: Kosovo' (1999) 10 *Finnish Yearbook of International Law* 168; Kritsiotis Dino, 'Kosovo Crisis & NATO's Armed Force against Yugoslavia' (2000) 49 *International & Comparative Law Quarterly* 320, 339. But see Franchini & Tzanakopoulos, 'Kosovo' (n 286), 609.

²⁹⁴ 'Verbatim Record 1999/15', *Legality of Use of Force* (Serbia & Montenegro v Belgium) (Provisional Measures) (ICJ, General List No 105, 10 May 1999), 11–3.

²⁹⁵ —, 'Statement by the Prime Minister' (HC Deb vol 328, col 161, 1999).

²⁹⁶ See UNSC, 'Verbatim Record, 3988th Meeting' (24 March 1999) UN Doc S/PV.3988, 5–6, 8; UNSC, 'Verbatim Record, 3989th Meeting' (26 March 1999) UN Doc S/PV.3989, 2.

²⁹⁷ Clinton Bill, 'Remarks' (Foreign Policy Bulletin vol 10, 1999), 63; 'Verbatim Record 1999/24', *Legality of the Use of Force* (Serbia & Montenegro v USA) (Provisional Measures) (ICJ, General List No 114, 11 May 1999), 10.

A full discussion of humanitarian intervention's legality is beyond this examination's scope. Yet, what must be stressed, as noted in previous cases, is that its status remains unsettled. Some writers, including Cassese and Greenwood, support these actions.²⁹⁸ A few states have done the same.²⁹⁹ Yet, others, like Brownlie, Corten, and Gray, along with most states,³⁰⁰ argue that unless acting in self-defence, a state is not permitted to use force in another's territory absent the latter's consent or SC authorisation.³⁰¹ Arguments suggesting that humanitarian interventions are not against a state's territorial integrity and political independence, or the UN's purposes have also been dismissed as inconsistent with the Charter's legislative history,³⁰² and by the position of most states.³⁰³ Finally, despite claims that it has emerged as a customary rule,³⁰⁴ studies on state practice and *opinio juris* suggest otherwise.³⁰⁵

Several states criticised NATO's actions. Within the SC, Russia and China condemned the operation.³⁰⁶ Others deemed the intervention as an 'unprovoked military aggression'.³⁰⁷ Russia tabled a resolution calling the intervention a 'flagrant violation' of international law but this failed.³⁰⁸ States also echoed similar views within the Commonwealth of Independent States ('CIS'), the Rio Group, and the NAM.³⁰⁹ Yet, no 'state other than an injured state' commenced

²⁹⁸ See Cassese Antonio, 'Are We Moving Towards Legitimation of Forcible Humanitarian Countermeasures?' (1999) 10 *European Journal of International Law* 23, 25; Greenwood, 'Humanitarian Intervention' (n 293), 170–1.

²⁹⁹ See Kritsiotis, 'Kosovo Crisis & NATO' (n 293), 358; Corten Olivier, 'Controversies Over the Customary Prohibition on the Use of Force: Methodological Debate' (2006) 16(5) *European Journal of International Law* 803, 810.

³⁰⁰ See Conference of Heads of the NAM, 'Final Document of the 17th Summit' (18 September 2016) NAM/2016/CoB/DOC.1/Corr.1.

³⁰¹ See Brownlie Ian, 'Memorandum Submitted to the Foreign Affairs Committee' (2000) 49 *International & Comparative Law Quarterly* 941; Corten, *Law Against War* (n 3), 495 ff; Gray, *Use of Force* (n 3), 52 ff; Rodley, 'Humanitarian Intervention' (n 113), 793–4; Paddeau Federica, 'Humanitarian Intervention & State Responsibility' (2021) 32 *European Human Rights Law Review* 649. See *Legality of the Use of Force* (Serbia & Montenegro v US) (Provisional Measures) [1999] ICJ 916, 922 ('The use of force in Yugoslavia [...] under the present circumstances [...] raises very serious issues of international law')

³⁰² Franchini & Tzanakopoulos, 'Kosovo' (n 286), 610 citing Simma Bruno, 'NATO, the UN, & the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1, 3; Brownlie, 'Memorandum Submitted to the Foreign Affairs Committee' (n 301), 885. See Chesterman Simon, *Just War or Peace? Humanitarian Intervention & International Law* (Oxford University Press 2001), 48–52, 53.

³⁰³ See Corten, *Law Against War* (n 3), 498.

³⁰⁴ Greenwood, 'Humanitarian Intervention' (n 293), 168; Kritsiotis, 'Kosovo Crisis & NATO' (n 293), 358.

³⁰⁵ Corten, *Law Against War* (n 3), 495 ff; Gray, *Use of Force* (n 3), 52 ff; Brownlie, 'Memorandum Submitted to the Foreign Affairs Committee' (n 301), 886–91; Franchini & Tzanakopoulos, 'Kosovo' (n 286), 615.

³⁰⁶ UNSC, 'Verbatim Record, 3988th Meeting' (1999) (n 296), 2–3, 12.

³⁰⁷ Ibid, 16 (India); 10–1 (Argentina). See UNSC, 'Verbatim Record, 3989th Meeting' (1999) (n 296), 10 (Ukraine), 12 (Belarus), 12 (Cuba).

³⁰⁸ UNSC, 'Draft Resolution (Belarus, India & Russian Federation)' (26 March 1999) UN Doc S/1999/328.

³⁰⁹ Franchini & Tzanakopoulos, 'Kosovo' (n 286), 605.

any action or levied any unilateral measure against NATO member states.³¹⁰ Arguably, while states deemed NATO's conduct unlawful, most accepted it 'on moral grounds' and 'justified' from an 'ethical viewpoint'.³¹¹

III. ANALYSIS OF STATE PRACTICE & *OPINIO JURIS*

The survey above is not intended to be comprehensive. In the interest of space, it did not discuss other breaches of the duty not to threaten or use force between 1970 and 2001 such as the 1981 Israeli attack on Iraq,³¹² the 1986 US attack in Libya,³¹³ the 1989 US intervention in Panama,³¹⁴ and the 1998 Eritrean-Ethiopian conflict.³¹⁵ Yet, it may be pointed out that in none of these cases did 'states other than an injured state' implement the duty not to threaten or use force.³¹⁶ These seem to suggest, as will be shown below, that at the time of the 2001 Draft Articles' adoption, states, as to this norm, had not accepted as law the competence of 'states other than an injured state' to invoke another's responsibility via judicial dispute resolution or enforce it through unilateral measures. Thus, as to the norm on force, the ILC correctly deemed 2001 Draft Article 48 a 'measure of progressive development'.³¹⁷ It also correctly '[left] the resolution' of the question of the competence of 'states other than an injured' state to levy countermeasures to the 'development of international law'.³¹⁸

³¹⁰ Note Yugoslavia (Serbia and Montenegro), as the 'injured state', commenced proceedings before the ICJ against several NATO member states. However, the Court dismissed these on jurisdictional grounds.

³¹¹ See Simma, 'NATO, the UN, & the Use of Force' (n 302), 22; Cassese, 'Legitimation of Forcible Humanitarian Countermeasures' (n 298), 25; Henkin Louis, 'Kosovo & Humanitarian Intervention' (1999) 92 *American Journal of International Law* 826.

³¹² See Quigley John, 'Israel's Destruction of Iraq's Nuclear Reactor: A Reply' (1995) 9 *Vanderbilt Journal of Transnational Law* 441; D'Amato Anthony, 'Israel's Air Strike Against the Osiraq Reactor: A Retrospective' (1996) 10 *Temple International & Comparative Law Journal* 259/

³¹³ See Kamto Maurice, 'US Strikes Against Libya—1986' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018).

³¹⁴ See Hamlin Wilbur, 'Legal Issues in the Transfer of the Canal to Panama' (1978) 19 *Harvard International Law Journal* 279; Quigley John, 'Legality of the US Invasion of Panama' (1990) 15 *Yale Journal of International Law* 287.

³¹⁵ See *Jus Ad Bellum—Ethiopia's Claims* (n 80), 466–7; Gray Christine, 'Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?' (2006) 17(4) *European Journal of International Law* 699, 700.

³¹⁶ See on Israel's attack on Iraq: Ruys Tom, 'Israel's Airstrike against Iraq's Osiraq Nuclear Reactor—1981' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 331; on the US attack on Libya: Kamto, 'US Strikes Against Libya' (n 313), 411 ff; on the US intervention in Panama: Tsagourias Nicholas, 'US Intervention in Panama—1989' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 428 ff; on the Eritrean-Ethiopian conflict: Castagnetti Luisa, 'Damages Awards of the Eritrea-Ethiopia Claims Commission: War Damages & Reparations for Violations of Jus Ad Bellum' (2009) 9 *Italian Yearbook of International Law* 279, 285; Murphy Sean, 'Eritrean-Ethiopian War—1998–2000' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 562.

³¹⁷ ILC, 'Report on the Work of the 53rd Session' (2001) (n 22), 117, 126–7.

³¹⁸ Ibid, 139. See Crawford, 'Third Report on State Responsibility' (2000) (n 193), 105; ILC, 'Summary Records of the 53rd Session' (2001) I YbILC 1, 35, 45.

A. *Invocation of Responsibility through Judicial Dispute Resolution*

The lack of instances in which ‘states other than an injured state’ invoked another’s responsibility via judicial dispute resolution is apparent. Between 1970 and 2001, no such state instituted proceedings to implement the duty not to threaten or use force.³¹⁹ Authors like Frowein submit that this may have been due to the lack of clarity in the case law, particularly of the ICJ. While the Court, in *Barcelona Traction*, asserted that the duty not to threaten or use force is owed *erga omnes*, it did not explain how these duties may be implemented,³²⁰ or discuss the nature of the legal relations these norms create.³²¹ Indeed, in the few cases during this period in which the Court referred to duties owed *erga omnes*, none involving force, the concept played ‘little or no relevance [on] the outcome’.³²²

For scholars like Gaja, Tams, and Ruys, another factor may have been the difficulty in initiating these proceedings.³²³ There is much difficulty in establishing jurisdiction as to the norm on force.³²⁴ Note that while duties owed *erga omnes* permit states to invoke another’s responsibility,³²⁵ the state must still establish jurisdiction.³²⁶ Yet, the norm on force, unlike those discussed in the next chapters, is not usually subject of compromissory clauses.³²⁷ Furthermore, many of the states that have breached the duty have not made optional clause

³¹⁹ Dawidowicz, *Third Party Countermeasures* (n 35), 40. Note that *Armed Activities* [2005] (n 2) and ‘Application’, *Legality of the Use of Force* (Serbia & Montenegro v USA) (Institution of Proceedings) (ICJ, General List No 115, 30 April 1985) were both instituted by the ‘injured state’—DRC and Yugoslavia (Serbia and Montenegro) respectively.

³²⁰ Frowein Jochen, ‘Reactions by Not Directly Affected States to Breaches of Public International Law’ (1994) 248 *Recueil des Cours de l’Académie de Droit International* 345, 406; Nollkaemper André, ‘International Adjudication of Global Public Goods: Substance & Procedure’ (2012) 23 *European Journal of International Law* 769, 784; Tams, *Enforcing Obligations Erga Omnes* (n 23), 162; Annacker Claudia, ‘Legal Regime of Erga Omnes Obligations in International Law’ (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 133; Villalpando Santiago, ‘Legal Dimension of the International Community: How Community Interests are Protected in International Law’ (2010) 21 *European Journal of International Law* 387, 410.

³²¹ See Tams Christian, ‘Individual States as Guardians of Community Interests’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 385–6.

³²² Dawidowicz, *Third Party Countermeasures* (n 35), 43.

³²³ Gaja Giorgio, ‘Protection of General Interests in the International Community’ (2011) 364 *Recueil des Cours de l’Académie de Droit International* 9, 110; Tams & Tzanakopoulos, ‘Barcelona Traction’ (n 60), 793 Ruys Tom, ‘Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?’ (2021) 20 *Chinese Journal of International Law* 457, 492. See Nollkaemper, ‘Adjudication of Global Public Goods’ (n 320), 786.

³²⁴ Tams, ‘Guardians of Community Interests’ (n 321), 385.

³²⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 22), 116, 126.

³²⁶ *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90, 102; *Armed Activities on the Territory of the Congo* (DRC v Rwanda) (Jurisdiction & Admissibility) [2006] ICJ 6, 32; *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Judgement) [2007] ICJ 43, 104.

³²⁷ Tams, *Enforcing Obligations Erga Omnes* (n 23), 195; Olleson, ‘Reflections on the Future of the Articles of State Responsibility’ (n 58), 43.

declarations as to disputes involving the norm,³²⁸ have withdrawn these declarations,³²⁹ have allowed the declaration to expire,³³⁰ or have excluded the norm in their declarations.³³¹ Indeed, even ‘injured states’ had faced difficulty in instituting cases before the ICJ. As may be seen in the cases of 2008 Russo-Georgian and 2014 Russo-Ukrainian, discussed in the next chapter, states had to resort to other norms to seize the Court’s jurisdiction. Nonetheless, it must also be stressed that in the instances in which the ICJ would have had jurisdiction over claims against the wrongful state,³³² no ‘state other than an injured state’ invoked the wrongful state’s responsibility.

B. Enforcement through Unilateral Measures

As to countermeasures by ‘states other than an injured state’, there appears to be some semblance of practice and *opinio juris* that has led some scholars to generally suggest that states have recognised this prerogative as law or that this acceptance is ‘emerging’.³³³ Yet, the survey above suggests the contrary as to the norm on force. It had not crystallised into a customary rule by 2001. As the ILC correctly concluded, state practice was limited, inconsistent, and lacked evidence of *opinio juris*.³³⁴

First, the practice was not widespread nor representative. The three instances in which ‘states other than an injured state’ imposed unilateral measures that were countermeasures involved mostly Western states—the US, the UK, EEC/EU member states, Australia, and New Zealand.³³⁵ Only in one instance did a non-Western state levy countermeasures as opposed to

³²⁸ Note that states like Egypt, Syria, Vietnam, Russia, Argentina, Iraq, and Rwanda have not lodged optional clause declarations recognising the jurisdiction of the ICJ (*See — —*, ‘Declarations recognising the ICJ’s Jurisdiction as Compulsory’ (UNTS, 2024) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1>).

³²⁹ *See e.g.* US, ‘Termination of its Optional Clause Declaration’ (7 October 1985) 1354 UNTS 452; Israel, ‘Termination of Optional Clause Declaration’ (19 November 1985) 1349 UNTS 346, UK, ‘Optional Clause Declaration’ (27 November 1963) 211 UNTS 109.

³³⁰ *See e.g.* Turkey, ‘Optional Clause Declaration’ (22 May 1967) 604 UNTS 349.

³³¹ *See e.g.* Israel, ‘Optional Clause Declaration’ (8 February 1984) 1349 UNTS 346.

³³² Note that ‘states other than an injured state’ could have invoked Uganda’s responsibility for its intervention in the DRC (*See* Uganda, ‘Optional Clause Declaration’ (3 October 1963) 479 UNTS 35). Likewise, such states could have initiated proceedings against some NATO states for the intervention in Kosovo (*See e.g.* Belgium, ‘Optional Clause Declaration’ (3 April 1958) 302 UNTS 251; Canada, ‘Optional Clause Declaration’ (10 Sept 1985) 1406 UNTS 133).

³³³ *See e.g.* Dawidowicz, *Third Party Countermeasures* (n 35), 242; Tams, *Enforcing Obligations Erga Omnes* (n 23), 209; Proukaki, *Problem of Enforcement* (n 19), 209; Sicilianos, ‘Classification of Obligations’ (n 59), 1143.

³³⁴ Crawford, ‘Third Report on State Responsibility’ (2000) (n 193), 102–4.

³³⁵ *See* Subedi Surya, ‘Status of Unilateral Sanctions in International Law’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 34 (‘Unilateral sanctions have been used by [powerful] states against

retorsions—Japan during the 1990 Iraq-Kuwait conflict. Thus, it may be said that the practice up to the 2001 Draft Articles’ adoption was not extensive. Only a small minority had imposed countermeasures as ‘states other than an injured state’ to enforce the duty not to threaten or use force. Moreover, the practice was limited to a group of states that did not include states of ‘different political, economic, and legal systems’.³³⁶

Of course, there is also the question of whether other states have the capacity to adopt the practice,³³⁷ and if the analysis should be limited to states that could levy these measures.³³⁸ Yet, arguably, most states that have diplomatic or trade relations with the wrongful states discussed above could also suspend these relations even if the effects may be less significant compared to other states. Crucially, as stressed in *Chapter 4*, limiting the analysis to a few states, such as the economically powerful ones, is counterproductive. This risks a ‘hegemonical approach to international relations’ with ‘certain states proclaiming themselves as the sole representatives of the [...] community’.³³⁹

Second, state practice was not consistent nor uniform. There was too much inconsistency suggesting that the competence of ‘states other than an injured state’ to resort to countermeasures had not become customary by 2001.³⁴⁰ The lack of regularity is evident. In comparable situations, the repetition of the conduct, even from Western states, had not been apparent. One may expect states to react similarly to serious breaches of the duty as in the case

[developing] states [...] [More powerful] states have [deemed these measures lawful], regarding them as an exercise of sovereign rights or economic diplomacy in the conduct of their foreign affairs [...] [Other] states, which have often been [targeted by these measures] have asserted that certain economic measures [...] constitute “economic coercion”’).

³³⁶ See *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (Judgment) [1969] ICJ 3 (Lachs, dissenting), 229; *Mondev International Ltd v US* (Award) (2002) (ICSID Additional Facility, 11 October 2002), ¶117.

³³⁷ See Pauwelyn Joost, ‘Enforcement & Countermeasures in the WTO’ (2000) 94(2) *American Journal of International Law* 335, 338

³³⁸ See Dawidowicz, *Third Party Countermeasures* (n 35), 247 (‘[The] very notion of third-party countermeasures is based on a legal entitlement or power’). Note ILC, ‘Report on the Work of the 70th Session’ (2018) UN Doc A/73/10, 136 (‘States that are particularly involved in the relevant activity’).

³³⁹ Corten, ‘Customary Prohibition on the Use of Force’ (n 299), 811, 819–20 citing Byers Michael & Chesterman Simon, ‘Changing the Rules about Rules? Unilateral Intervention & the Future of International Law’ in Holzgrefe J & Keohane R (eds), *Humanitarian Intervention: Ethical, Legal, & Political Dilemmas* (Cambridge University Press 2003), 194. See Corten, *Law Against War* (n 3), 24; Dubuisson François, ‘La problématique de la légalité de l’opération “Force alliée” contre la Yougoslavie’ in Corten Olivier & Delcourt B (eds), *Droit, légitimation et politique extérieure: l’Europe et la guerre du Kosovo* (Bruylant 2001), 179; Lagerwall Anne, ‘Kosovo, Afghanistan, Irak: le retour des guerres d’agression’ in Corten Olivier & Delcourt B (eds), *Les guerres anti terroristes* (Contradictions 2004), 95–7; Subedi, ‘Status of Unilateral Sanctions’ (n 335), 39–40 citing Chimni BS, ‘Customary International Law: A Third World Perspective’ (2018) 112 *American Journal of International Law* 1, 12.

³⁴⁰ *Asylum* (Colombia v Peru) (Judgment) [1950] ICJ 266, 277; *SS Lotus* (France v Turkey) (Judgment) [1927] PCIJ Ser A No 10, 21; *North Sea Continental Shelf* [1969] (n 336), 45.

of forcible territorial changes. Western states levied unilateral measures in response to the 1980 Soviet-Afghan conflict, the 1982 Falklands/Malvinas crisis, and the 1990 Gulf War. Yet, none did so in the 1974 Turkish-Cypriot conflict. The same may be observed in cases where the justification for the use of force was clearly absent. Cyprus did not invite Turkey's 1974 intervention nor did the DRC consent to the 1998 Uganda and Rwanda's use of force. Similarly, humanitarian intervention arguably did not permit the NATO states' 1999 use of force in Kosovo. Yet, unlike in the case of Vietnam in 1978, no 'state other than an injured state' enforced the wrongful state's responsibility.

The only discernible pattern of behaviour is that states tend to assert the competence of 'states other than an injured state' when 'friendly' states have been 'injured' or when 'less friendly' states were the aggressors.³⁴¹ States like the US, supported allied states like the UK and Kuwait and imposed measures against hostile states such as Vietnam, the Soviet Union, and Iraq. Similarly, the Soviet Union levied measures against Iraq. This also explains states' inaction when 'friendly' states use force against another state. No measures were taken by Western states against Israel for its attacks in Lebanon and the NATO states for their intervention in Kosovo.

Finally, there was a lack of a broad acknowledgement of the practice as law from states. Some Western states—the US and EEC/EU member states, along with allies like Japan, asserted the prerogative of 'states other than an injured state' to enforce responsibility through unilateral measures. A few did so contemporaneously with the measures they levied.³⁴² Others made individual statements to this effect. For instance, the US claimed that states 'must be prepared to act unilaterally' to 'deal with threats to peace'.³⁴³ Similarly, the EEC/EU asserted that 'every [...] state is at liberty to [...] restrict trade [to] protect its security interests'.³⁴⁴ Several states also claimed this competence in explaining their opposition to GA resolutions that broadly condemned unilateral measures.³⁴⁵ Some also enacted specific laws for the imposition

³⁴¹ Brownlie Ian, 'UN Charter & the Use of Force, 1945–1985' in Cassese Antonio (ed), *Current Legal Regulation of the Use of Force* (Nijhoff 1986), 500; Tomaševski Katarina, *Responding to Human Rights Violations: 1946–1999* (Kluwer 2000), 369.

³⁴² See Proukaki, *Problem of Enforcement* (n 19), 139.

³⁴³ UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (21 October 1999) UN Doc A/54/486, 4 (US).

³⁴⁴ Council of the EC, 'Arab Economic Boycott of Israel (A3-0239/93)' (16 November 1993) C 329/47, 48.

³⁴⁵ See e.g. UNGA, 'Verbatim Record, 53rd Session, 43rd Meeting' (26 October 1998) UN Doc A/53/PV.43, 17 (Austria on behalf of the EU), 17 (US); UNGA, 'Verbatim Record, 55th Session, 41st Meeting' (26 October 2000) UN Doc A/55/PV.41, 23 (France on behalf of the EU). *But note* UNGA, Second Committee, 'Summary Record of the 54th Session, 43rd Meeting' (26 November 1999) UN Doc A/C.2/54/SR.43, 4 (Finland on behalf of

of these measures: the US has the 1977 International Emergency Economic Powers Act ('IEEPA') that allows it to adopt unilateral measures in response to threats to peace;³⁴⁶ the EU under the 1992 Treaty of the European Union ('TEU') may implement a common foreign and security policy to promote peace and security;³⁴⁷ and Canada has the 1992 Special Economic Measures Act ('SEMA') that permits it adopt measures in response to 'grave breaches of international peace and security'.³⁴⁸

However, other states did not share this view. States' reactions to the measures against the Soviet Union for its invasion of Afghanistan and that of the Soviet bloc and NAM to the measures against Argentina for its actions in the Falklands/Malvinas Islands demonstrate that many rejected this competence. Crucially, although most states did not protest every instance of the imposition of unilateral measures including countermeasures,³⁴⁹ they nonetheless voted for GA resolutions that condemned these. Three sets of resolutions are particularly significant. The first, regularly adopted between 1983 to 1995, was entitled 'Economic measures as a means of political and economic coercion against developing countries'.³⁵⁰ Since 1997, this was entitled 'Unilateral economic measures as a means of political and economic coercion against developing countries'.³⁵¹ These broadly condemned the coercive nature of unilateral measures,³⁵² called upon the states 'to adopt [...] measures to eliminate their use against

the EU); UNGA, 'Economic Measures as a Means of Political & Economic Coercion: SG Report' (18 September 1995) UN Doc A/50/439, 5 (Japan); UNGA, 'Economic Measures as a Means of Political & Economic Coercion: SG Report' (14 October 1997) UN Doc A/52/459, 3 (Australia)

³⁴⁶ PL 95–223, *International Emergency Economic Powers Act* (1977) (US). See also PL 65-91, *Trading with the Enemy Act* (1917) (US).

³⁴⁷ *Treaty of the European Union* (adopted 7 February 1992, entered into force 1 November 1993) 1755 UNTS 1 ('To implement a common foreign and security policy including the eventual framing of a common defence policy [...] to promote peace, security and progress in Europe and in the world'); *Treaty Establishing the European Community* (adopted 25 March 1957, entered into force 1 January 1958) 294 UNTS 3, art 108.

³⁴⁸ SC 1992 c 17, *Special Economic Measures Act* (1992) (CAN), §1.

³⁴⁹ Note Henry Etienne, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law' (2017) 18 *Melbourne Journal of International Law* 1, 17, 19 ('Third states might consider it more appropriate and efficient to tackle these issues exclusively in the institutionalised fora of [...] international organisations').

³⁵⁰ See *Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 38/197 UNGA (30 December 1983) UN Doc A/RES/38/197; Res 39/210 UNGA (18 December 1984) UN Doc A/RES/39/210; Res 40/185 UNGA (17 December 1985) UN Doc A/RES/40/185; Res 41/165 UNGA (5 December 1986) UN Doc A/RES/41/165; Res 42/173 UNGA (11 December 1987) UN Doc A/RES/42/173; Res 44/215 UNGA (22 December 1989) UN Doc A/RES/44/215; Res 46/210 UNGA (20 December 1991) UN Doc A/RES/46/210; Res 48/168 UNGA (21 December 1993) UN Doc A/RES/48/168; Res 50/96 UNGA (20 December 1995) UN Doc A/RES/50/96.

³⁵¹ *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 52/181 UNGA (18 Dec 1997) UN Doc A/RES/52/181; Res 54/200 UNGA (22 Dec 1999) UN Doc A/RES/54/200.

³⁵² See also UNGA, 'Verbatim Record, 38th Session, 104th Meeting' (20 December 1983) UN Doc A/38/PV.104, 1683 (GDR); UNGA, 'Verbatim Record, 51st Session, 67th Meeting' (27 November 1996)

developing countries', and criticised these measures for not being 'authorised by the [UN's] relevant organs'.³⁵³ The second, adopted between 1996 to 2002, was entitled 'Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsion'.³⁵⁴ These called for the 'repeal of unilateral extraterritorial laws that impose sanctions' and the non-recognition of unilateral extraterritorial coercive economic measures 'imposed by any state'.³⁵⁵ The third, also annually adopted since 1996, was entitled 'Human rights and unilateral coercive measures'.³⁵⁶ These condemned unilateral measures due to their 'negative effects' on human rights.³⁵⁷

States in institutional arrangements like the NAM, Group of 77 ('G77'), and Organisation of Islamic Conference ('OIC') echoed similar views.³⁵⁸ They rejected measures that exert pressure on states or interfere in their internal affairs;³⁵⁹ stressed their negative effects on human

A/51/PV.67, 15 (Ukraine), 17 (Iran), 18 (Iraq), 19 (Cuba); UNGA, 'Verbatim Record, 53rd Session, 43rd Meeting' (1999) (n 345), 5 (Ghana), 7 (Iraq), 7 (Sudan), 11 (Qatar), 13 (North Korea), 13 (South Africa), 14 (Namibia), 15 (Malaysia), 15 (Nigeria); UNGA, 'Verbatim Record, 54th Session, 87th Meeting' (22 December 1999) A/54/PV.87, 22 (North Korea); UNGA, Second Committee, 'Summary Record of the 54th Session, 43rd Meeting' (1999) (n 345), 4 (Armenia); UNGA, Third Committee, 'Summary Record of the 51st Session, 47th Meeting' (21 November 1996) UN Doc A/C.3/51/SR.47, 18 (China); UNGA, Third Committee, 'Summary Record of the 51st Session, 52nd Meeting' (26 November 1996) UN Doc A/C.3/51/SR.52, 4 (Iraq)

³⁵³ See also UNGA, 'Verbatim Record, 41st Session, 119th Meeting' (10 December 1986) A/41/PV.119, 41 (Honduras); UNGA, 'Verbatim Record, 46th Session, 79th Meeting' (8 January 1992) A/46/PV.79, 63 (Honduras); UNGA, 'Verbatim Record, 51st Session, 67th Meeting' (1998) (n 352), 11 (Libya); 17 (Iran); UNGA, Third Committee, 'Summary Record of the 51st Session, 47th Meeting' (1996) (n 352), 18 (China); UNGA, 'Verbatim Record, 53rd Session, 43rd Meeting' (1999) (n 345), 5 (Ghana), 8 (Iran), 10 (Burkina Faso), 18 (Argentina); UNGA, 'Verbatim Record, 54th Session, 87th Meeting' (1998) (n 352), 8 (Russia).

³⁵⁴ See *Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion* Res 51/22 UNGA (27 November 1996) UN Doc A/RES/51/22; Res 53/10 UNGA (26 October 1998) UN Doc A/RES/53/10; Res 55/6 UNGA (26 October 2000) UN Doc A/RES/55/6.

³⁵⁵ See also UNGA, 'Verbatim Record, 51st Session, 67th Meeting' (1998) (n 352), 11 (Libya), 13 (France), 13 (Malaysia), 20 (Ireland on behalf of the EU), 20 (Turkey), 21 (Australia), 22 (Canada), 22 (New Zealand); UNGA, 'Verbatim Record, 53rd Session, 43rd Meeting' (1999) (n 345), 5 (India), 7 (Cuba), 23 (Austria on behalf of the EU); UNGA, 'Verbatim Record, 55th Session, 41st Meeting' (2000) (n 345), 22 (France on behalf of the EU), 25 (Japan)

³⁵⁶ See *Human Rights & Unilateral Coercive Measures* Res 51/103 UNGA (12 December 1996) UN Doc A/RES/51/103; Res 52/120 UNGA (12 December 1997) UN Doc A/RES/52/120; Res 53/141 UNGA (9 December 1998) UN Doc A/RES/53/141; Res 54/172 UNGA (17 December 1998) UN Doc A/RES/54/172; Res 55/110 UNGA (4 December 2000) UN Doc A/RES/55/110.

³⁵⁷ See also UNGA, 'Verbatim Record, 38th Session, 104th Meeting' (1982) (n 352), 1683 (German Democratic Republic); UNGA, 'Verbatim Record, 51st Session, 67th Meeting' (1998) (n 352), 19 (Cuba); UNGA, Third Committee, 'Summary Record of the 51st Session, 52nd Meeting' (1996) (n 352), 3 (Iran); UNGA, 'Verbatim Record, 53rd Session, 43rd Meeting' (1999) (n 345), 5 (India), 10 (Burkina Faso).

³⁵⁸ See Conference of Heads of the NAM, 'Final Document of the 12th Summit' (3 September 1998) UN Doc S/1998/1071; G77 Foreign Ministers, 'Declaration Adopted at the 21st Meeting' (26 September 1997); G77 Foreign Ministers, 'Declaration Adopted at the 22nd Meeting' (25 September 1998); G77 Foreign Ministers, 'Declaration Adopted at the 23rd Meeting' (24 September 1999); OIC, 'Resolution 15/8-P(IS)' (11 December 1997).

³⁵⁹ Conference of Heads of the NAM, 'Final Document of the 12th Summit' (n 358), 13, 21, 51; G77 Foreign Ministers, 'Declaration Adopted at the 21st Meeting' (n 358); G77 Foreign Ministers, 'Declaration Adopted at the 22nd Meeting' (n 358), ¶11; G77 Foreign Ministers, 'Declaration Adopted at the 23rd Meeting' (n 358), ¶60;

rights;³⁶⁰ criticised the extra-territorial nature of some measures;³⁶¹ and condemned actions based on power politics, hegemony, and unilateralism.³⁶² For similar reasons—coercion and intervention,³⁶³ unlawful exercise of extra-territorial jurisdiction,³⁶⁴ negative effects on human rights,³⁶⁵ and unilateralism,³⁶⁶ states also condemned these measures in their individual statements and responses to the UN Secretary-General's requests for comments.

That said, these views need to be nuanced to 'precisely understand' the kind of measures condemned.³⁶⁷ It appears that states deem unilateral measures, including countermeasures, illegal for two primary reasons: they breach international law duties and they are 'not authorised by the relevant' UN organs.³⁶⁸ First, the 'unqualified proposition' that these measures breach international law, more specifically, norms on coercion and intervention, jurisdiction, and human rights, may not be entirely accurate.³⁶⁹ To begin with, contrary to states' claims, these measures do not necessarily amount to the prohibited kind of intervention or coercion. As

³⁶⁰ Conference of Heads of the NAM, 'Final Document of the 12th Summit' (n 358), 122–3.

³⁶¹ Ibid, 17, 52, 83; OIC, 'Resolution 15/8-P(IS)' (n 358);

³⁶² Conference of Heads of the NAM, 'Final Document of the 12th Summit' (n 358), 20.

³⁶³ See e.g. UNGA, 'Economic Measures as a Means of Political & Economic Coercion' (1995) (n 345), 3 (Cuba), 4 (Iraq); UNGA, 'Economic Measures as a Means of Political & Economic Coercion' (1997) (n 345), 3 (Cuba), 5 (Gambia), 6 (Iran), 8 (Venezuela); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (1999) (n 343), 2 (Cuba); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (17 August 2000) UN Doc A/55/300, 3 (Iran), 3 (Libya), 7 (Mali); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2 November 1998) UN Doc A/53/293, 3 (Ecuador).

³⁶⁴ See e.g. UNGA, 'Economic Measures as a Means of Political & Economic Coercion' (1997) (n 345), 3 (Belarus), 5 (Cuba), 5 (Libya), 7 (Mexico), 8 (Venezuela); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion' (2000) (n 363), 2 (Benin), 3 (Libya); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (1999) (n 343), 3 (Cuba), 4 (Paraguay).

³⁶⁵ See e.g. UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (4 January 1995) UN Doc E/CN.4.1996/45, 2; UNGA, 'Economic Measures as a Means of Political & Economic Coercion' (1995) (n 345), 5 (Ecuador); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (1998) (n 363), 2 (Morocco), 3 (Cuba), 7 (Iran); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (12 August 1999) UN Doc A/54/222, 2 (Ecuador), 2 (Jamaica); UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 December 1999) UN Doc E/CN.4/2000/46, 2 (Congo), 4 (Iraq), 4 (Russia), 7 (Yugoslavia); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion' (2000) (n 363), 3 (Iran).

³⁶⁶ See e.g. UNGA, 'Economic Measures as a Means of Political & Economic Coercion' (1995) (n 345), 4 (Ecuador), 4 (Estonia); UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (1995) (n 365), 4 (Argentina); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (1999) (n 343), 3 (Mexico), 3 (Malta); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion' (2000) (n 363), 7 (Mexico), 7 (Yemen); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (1998) (n 363), 4 (Iran).

³⁶⁷ Barber Rebecca, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70 *International & Comparative Law Quarterly* 343, 359.

³⁶⁸ Hofer Alexandra, 'Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 *Chinese Journal of International Law* 1, 17.

³⁶⁹ See Barber, 'GA & Unilateral Sanctions' (n 367), 359.

discussed in *Chapter 2*, the prohibited kind of intervention involves ‘interference [which is] forcible or dictatorial’ in a state’s *domaine réservé* that ‘deprives it of control over the matter in question’.³⁷⁰ Likewise, coercion ‘ought to be confined’ to ‘circumstances where the target [state] has [not] committed [any] [breach of duty]’ and ‘where the [imposing state] seeks to compel the target in a sphere of the target’s discretion through extreme forms of pressure’.³⁷¹ Yet, the duty not to threaten or use force is not a matter that falls solely under a state’s *domaine reserve*.³⁷² Thus, measures enforcing its responsibility do not necessarily amount to intervention or coercion.³⁷³

In contrast, the claim that the imposition of some measures constitutes an unlawful exercise of extra-territorial jurisdiction may have merit. The measures that most states imposed are deemed ‘primary’—they apply to those ‘located in, or originating from the [imposing state’s] jurisdiction’,³⁷⁴ and restrict them from engaging with the target states.³⁷⁵ Yet, a few, like the US, have also enacted ‘secondary’ measures or those that ‘constrain [entities] located in or bearing [a third state’s] nationality, to abide by [the measures] although they are not subject to the [imposing state’s] jurisdiction’.³⁷⁶ Without a proper basis for exercising extra-territorial jurisdiction, secondary sanctions, are arguably unlawful. They amount to an overreach of jurisdiction,³⁷⁷ and ‘impinge on [third states’] rights to regulate their own citizens and companies’.³⁷⁸

³⁷⁰ Jennings & Watts (eds), *Oppenheim's International Law* (n 9), 434; Ronzitti, ‘Sanctions as Instruments of Coercive Diplomacy’ (n 259), 5. See *Military & Paramilitary Activities* [1986] (n 1), 108, 126.

³⁷¹ Damrosch Lori, ‘Enforcing International Law through Non-Forcible Measures’ (1997) 269 *Recueil des Cours de l'Académie de Droit International* 9, 55; *Military & Paramilitary Activities* [1986] (n 1), 108.

³⁷² Barber, ‘GA & Unilateral Sanctions’ (n 367), 352.

³⁷³ Crawford, ‘Third Report on State Responsibility’ (2000) (n 193), 93. See Milanovic Mark, ‘Revisiting Coercion as an Element of Prohibited Intervention in International Law’ (2023) 117 *American Journal of International Law* 601, 622; Tzanakopoulos Antonios, ‘Right to be Free from Economic Coercion’ (2015) 4 *Cambridge Journal of International & Comparative Law* 616, 619–20.

³⁷⁴ Moret Erica, ‘Unilateral & Extraterritorial Sanctions in Crisis’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 22

³⁷⁵ Subedi, ‘Status of Unilateral Sanctions’ (n 335), 47; Beaucillon Charlotte, ‘Unilateral & Extraterritorial Sanctions: Definitions, State of Practice, & Contemporary Challenges’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 119–20.

³⁷⁶ Beaucillon, ‘Unilateral & Extraterritorial Sanctions’ (n 375), 6; Schmidt Julia, ‘Legality of Unilateral Extra-Territorial Sanctions under International Law’ (2022) 27 *Journal of Conflict & Security Law* 53, 60

³⁷⁷ Schmidt, ‘Unilateral Extraterritorial Sanctions’ (n 376), 65; Ruys Tom, ‘Sanctions, Retorsions, & Countermeasures: Concepts & Legal Framework’ in Van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 29; Douhan Alena, ‘Secondary Sanctions, Civil, & Criminal Penalties for Circumvention of Sanctions Regimes & Overcompliance with Sanctions’ (15 July 2021) UN Doc A/HRC/51/33, 4; Jazairy Idriss, ‘Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights’ (5 July 2019) UN Doc A/HRC/42/46, 14.

³⁷⁸ Meyer Jeffrey, ‘Second Thoughts on Secondary Sanctions’ (2009) 30 *University of Pennsylvania Journal*

The claim regarding human rights will be further discussed in *Chapter 9*. For now, what needs to be stressed is that while unilateral measures may negatively affect the individuals in the targeted state, this *per se* does not imply a breach of the imposing state's human rights duties.³⁷⁹ Of course, human rights have a 'double nature'—states owe them not only to other states but also to individuals.³⁸⁰ Yet, they remain, as authors like Dawidowicz and Tzanakopoulos submit, territorial.³⁸¹ They only apply, according to the ICJ, in areas where states exercise jurisdiction.³⁸² Thus, in the absence of rules to the contrary, a state does not owe duties to individuals outside its jurisdiction and does not necessarily infringe on their rights if the measure that the state levies negatively affects them.³⁸³

The second claim clarifies the *opinio juris* on the competence of 'states other than an injured state' to levy countermeasures. Arguably, most states are not entirely opposed to enforcement measures. While states condemned unilateral measures, many supported or did not oppose the measures pursuant to the international organisations' decisions against their members.³⁸⁴ This

of *International Law* 905, 932–3; Ruys Tom & Ryngaert Cedric, 'Secondary Sanctions: A Weapon out of Control? Legality of, & European Responses to, US Secondary Sanctions' (2020) *British Yearbook of International Law* 1, 4.

³⁷⁹ See Dawidowicz, *Third Party Countermeasures* (n 35), 337; Milaninia Nema, 'Limits of Economic Sanctions under the Paradigm of International Humanitarian Law' in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, & Consequences* (Asser Press 2015), 100; Crawford, 'Third Report on State Responsibility' (2000) (n 193), 88, 96. *But see* Jazairy Idriss, 'Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (29 Aug 2017) UN Doc A/72/370, 15–6; Douhan, 'Secondary Sanctions, Civil, & Criminal Penalties for Circumvention of Sanctions Regimes & Overcompliance with Sanctions' (2021) (n 377), 16; Joyner Daniel, 'International Legal Limits on the Ability of States to Lawfully Impose Economic/Financial Sanctions' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (BRILL 2016), 201–2.

³⁸⁰ Crawford, 'Third Report on State Responsibility' (2000) (n 193), 30.

³⁸¹ See Dawidowicz, *Third Party Countermeasures* (n 35), 338; Tzanakopoulos Antonios, 'Mechanisms to Assess & Mitigate Adverse Human Rights Impact of Unilateral Sanctions' (Workshop on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Geneva) (23 May 2014), 2; Craven Matthew, 'Humanitarianism & the Quest for Smarter Sanctions' (2022) 13 *European Journal of International Law* 43, 54–5 *citing* Meron Theodor, 'Extraterritoriality of Human Rights Treaties' (1995) 89 *American Journal of International Law* 78, 78. Akande Dapo, Akhavan Payam, & Bjorge Erik, 'Economic Sanctions, International Law, & Crimes Against Humanity' (2021) 115 *American Journal of International Law* 493, 505–8; Milaninia, 'Economic Sanctions & International Humanitarian Law' (n 379), 98–9 *citing* Wall [2004] (n 4), 179–80. *But see* broadly referring to human rights: Jazairy Idriss, 'Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (10 August 2015) UN Doc A/HRC/30/45, 6; Subedi, 'Status of Unilateral Sanctions' (n 335), 47–8; Joyner, 'Limits on Economic/Financial Sanctions' (n 379), 201 *citing* Melzer N, *Targeted Killings in International Law* (Oxford University Press 2008), 138. On economic, social, and cultural rights: Jazairy, 'Negative Impact of Unilateral Coercive Measures on Human Rights' (2017) (n 379), 16 ('Even if the sanctioning state exercised no formal jurisdiction or control over the population concerned'); Douhan, 'Secondary Sanctions, Civil, & Criminal Penalties for Circumvention of Sanctions Regimes & Overcompliance with Sanctions' (2021) (n 377), 16 ('[ICESCR duties] are expressed without any restriction linked to territory or jurisdiction')

³⁸² Wall [2004] (n 4), 180.

³⁸³ Dawidowicz, *Third Party Countermeasures* (n 35), 338 *citing* Crawford, 'Third Report on State Responsibility' (2000) (n 193), 84. Tzanakopoulos, 'Human Rights Impact of Unilateral Sanctions' (n 381), 2.

³⁸⁴ Barber, 'GA & Unilateral Sanctions' (n 367), 358.

suggests that in contrast with a few states, that view their ‘role in the international community’ as one of leadership,³⁸⁵ many states ‘fear [that they] will be overruled by such unilateral acts’.³⁸⁶ Thus, as authors like Hofer observe, these states continue to require collective decisions for the imposition of enforcement measures,³⁸⁷ and prefer collective measures.³⁸⁸ Conversely, what they appear to condemn are the unilateral measures taken by the ‘minority of the powerful states’ purporting to act on the community’s behalf.³⁸⁹

Based on the discussion above, the measures most states consider to be ‘not in accordance with international law’ must be those that are not retorsions and are not countermeasures taken by the ‘injured state’. Retorsions, to recall, do not involve breaches of duties. They are ‘unfriendly’ but legal actions.³⁹⁰ Countermeasures, at least those taken by the ‘injured state’,³⁹¹ preclude the measures’ wrongfulness.³⁹² The impugned measures are arguably those that involve *a priori* breaches but whose wrongfulness cannot be precluded. These include those not

³⁸⁵ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 368), 40. See UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (1999) (n 345), 17 (US).

³⁸⁶ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 368), 41. See Ruys, ‘Immunity, Inviolability, & Countermeasures’ (n 259), 709 (‘Scholars overlook the deeply entrenched opposition to unilateral sanctions [from much] of the [...] community’); Cai Congyan, ‘China’s Position & Practice concerning Unilateral Sanctions’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 72 (‘Realpolitik explains why most unilateral sanctions are imposed by powerful states and [...] most developing states are critical of [these]’).

³⁸⁷ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 368), 17 (‘[Unilateral measures] are argued to be illegal because they do not emanate from [SC] decision; hence [...] not multilateral’). See e.g. UNGA, ‘Economic Measures as a Means of Political & Economic Coercion’ (1995) (n 345), 4 (Estonia); UN CHR, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (1995) (n 365), 4 (Argentina); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (1998) (n 363), 4 (Iran); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (1999) (n 343), 3 (Mexico), 3 (Malta); UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion’ (2000) (n 363), 7 (Mexico), 7 (Yemen).

³⁸⁸ Hofer Alexandra, ‘Negotiating International Public Policy through Adoption & Contestation of Sanctions’ (2017) 50 *Revue Belge de Droit International* 440, 447 (‘Developing [states] [...] appear [to prefer] multilateral sanctions’); 466 (‘They appear to have a preference for UN sanctions [and regional organisations]’); Henry, ‘Revisionist Claims of Custom’ (n 349), 17 (‘Third states might consider it more appropriate and efficient to tackle these issues exclusively in the institutionalised fora of the competent international organisations’).

³⁸⁹ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 368), 39 (‘Developing [states] are criticising the fact that a minority of powerful states is undermining the multilateral system’); Hofer, ‘Adoption & Contestation of Sanctions’ (n 389), 446 (‘Majority of the international community’s desire to, if not prohibit, then at least regulate resort to [unilateral measures] and restrict their use’).

³⁹⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 22), 128.

³⁹¹ *Ibid.*, 128–31.

³⁹² *Ibid.*, 75–6; Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 685; *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa (Naulilaa)* (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1025; *Responsibility of Germany arising out of acts committed after 31 July 1914* (Portugal v Germany) (Award) (1930) 2 RIAA 1056, 1056–7; *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 55..

in response to wrongful acts;³⁹³ not levied against the wrongful state but on third states,³⁹⁴ or directly against individuals or entities;³⁹⁵ or measures that go beyond the limits of countermeasures such as those that are not proportional,³⁹⁶ or breach human rights duties.³⁹⁷ Finally, perhaps crucially, they also mean countermeasures imposed by ‘states other than an injured state’. There being no positive rule yet that provides for these states’ competence to levy these measures,³⁹⁸ the imposing state’s breach of duty will not be precluded.

CHAPTER CONCLUSION

This chapter examined if states have accepted the competence of ‘states other than an injured state’ to implement the *duty not to threaten or use force* at the time of the 2001 Draft Articles’ adoption. First, it clarified the scope of the duty claimed to be owed *erga omnes*. While some restrict the *erga omnes* status to the prohibition against aggression, others argue that it covers the broader prohibition against non-consensual uses of force not authorised by the SC nor justified as a measure of self-defence. Conceptually, the importance of the interests that the norm protects *per se* does not justify limiting the *erga omnes* status to the prohibition against aggression. While this may serve as the basis for its formation, it does not, by itself, dictate its enforceability. The latter remains a function of the legal relations created by the norm which, in turn, is a function of states’ intent. To this end, a brief survey of state practice and *opinio juris* shows that what states deemed as owed *erga omnes* is the prohibition against the threat or use of force.

This chapter then analysed the state practice and *opinio juris* on the implementation of the duty not to threaten or use force before the 2001 Draft Articles’ adoption. A survey of breaches

³⁹³ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 22), 130 citing *Gabčíkovo-Nagymaros* [1997] (n 392), 55; *Naulilaa* (n 392), 1027; *Cysne* (n 392), 1056–7.

³⁹⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 22), 130.

³⁹⁵ ILC, ‘Summary Records of the 52nd Session’ (2000) I YbILC 1, 266, 271; Crawford, ‘Third Report on State Responsibility’ (2000) (n 193), 84; Hofer, ‘US Sanctions against Russia’ (n 260), 89.

³⁹⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 22), 134; *Naulilaa* (n 392), 1028; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 448.

³⁹⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 22), 131–3; Dawidowicz, *Third Party Countermeasures* (n 35), 337.

³⁹⁸ See Urs Priya, ‘Obligations Erga Omnes & the Question of Standing before the International Court of Justice’ (2021) 34 *Leiden Journal of International Law* 1, 5 (‘Absent a rule of international law permitting the use of countermeasures by states under [2001 Draft] Article 48’); Alland Denis, ‘Countermeasures of General Interest’ (2002) 13 *European Journal of International Law* 1220, 1233. But see Sicilianos, ‘Classification of Obligations’ (n 59), 1143; Huesa Vinaixa Rosario ‘Plurality of Injured States’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 954; Ni Kuei-Jung, ‘Third-State Countermeasures for Enforcing International Common Environmental Interests: The Implication and Inspiration of the ILC’s Articles on State Responsibility’ (2004) 22 *Chinese (Taiwan) Yearbook of International Law and Affairs* 1, 41.

of the duty between 1970 and 2001 and the actions that states took to implement this duty suggests that states have not accepted as law the competence of ‘states other than an injured state’ to implement the duty owed *erga omnes*. During this period, no ‘state other than an injured state’ invoked the wrongful states’ responsibility through judicial proceedings. Similarly, only in a few instances did ‘states other than an injured state’ enforce the duty through countermeasures. In these few cases, the states that imposed these unilateral measures were predominantly Western states. Others considered these measures unlawful. This suggests that state practice is limited, inconsistent, and lacks evidence of *opinio juris*. Thus, the chapter submits that as to the norm on force, the ILC correctly considered 2001 Draft Article 48 as a ‘progressive measure’ and appropriately left the issue posed under 2001 Draft Article 54 to the further ‘development of international law’.■

CHAPTER 5B: NORM AGAINST THE THREAT OR USE OF FORCE (2001–23)

Chapter 5A submitted that given the divergent state practice and *opinio juris* before 2001, the ILC, as to the norm against force, correctly considered 2001 Draft Article 48 a progressive measure,¹ and correctly reserved its position on countermeasures by ‘states other than an injured state in 2001 Draft Article 54.’² This chapter turns its attention to the state practice and *opinio juris* after the 2001 Draft Articles’ adoption to determine if states have since accepted the competence of ‘states other than an injured state’ to implement the duty not to use or threaten force. It observes that between 2001 and 2023, the state practice and *opinio juris* on this competence remain sporadic and divergent. Thus, this chapter submits that as to the norm against force, 2001 Draft Article 48 remains a progressive measure while the status of 2001 Draft Article 54 remains unsettled.³

I. IMPLEMENTATION BY ‘STATES OTHER THAN AN INJURED STATE’ AFTER THE 2001 DRAFT ARTICLES’ ADOPTION

A. US-led invasion of Afghanistan (2001)

Following Al Qaeda’s 11 September 2001 attacks, the US accused the Afghan government of ‘sponsoring and sheltering’ persons responsible for the attacks and demanded that it surrender them.⁴ The Afghan government rejected this demand.⁵ In response, on 7 October, a US-led coalition invaded Afghanistan and ousted its government.⁶ The US justified its invasion as a measure of self-defence. It claimed that it had ‘clear and compelling information that Al Qaeda’ had a ‘central role in the attacks’, that it posed an ‘ongoing threat’ to the US, that the Afghan government supported Al Qaeda by allowing ‘parts of Afghanistan [...] to be used [...] as a base of operation’, and that despite demands, the government refused to change its policy.⁷

¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) II(2) YbILC 20, 117, 126–7.

² Ibid, 139.

³ *But see* regarding invocation via judicial dispute resolution: *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v UK) (Preliminary Objections) [2016] ICJ 833 (Crawford, dissenting), 1102; Longobardo Marco, ‘Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: the Gambia v Myanmar & Beyond’ (2021) *International Community Law Review* 1, 30. On enforcement via countermeasures: Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 252, 266; Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 390–1; Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 207.

⁴ Bush George W, ‘Address to a Joint Session of Congress and the American People’ (The White House, 20 September 2011) <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.htm>>.

⁵ Chandrasekaran Rajiv, ‘Taliban Rejects US Demand, Vows a “Showdown of Might”’ (Washington Post, 22 September 2001) <<https://www.proquest.com/docview/409226024/>>.

⁶ Balz Dan, ‘US, Britain Launch Airstrikes Against Targets in Afghanistan’ (Washington Post, 8 October 2001) <<https://www.proquest.com/newspapers/u-s-britain-launch-airstrikes-against-targets/docview/409167232>>.

⁷ UNSC, ‘Letter from the Permanent Representative of the USA’ (7 October 2001) UN Doc S/2001/946. *See*

Several authors deem the US' action lawful. Some, like Ratner and Franck, argue that self-defence allows states to use force against states that harbour non-state armed groups.⁸ Others, such as Murphy and Di Rattalma submit that Al Qaeda's actions are attributable to Afghanistan.⁹ In contrast, Corten, Byers, and Moir argue that the law as it stood in 2001, and perhaps until now, did not permit states to use force, as a measure of self-defence, against states in which a non-state armed group operates unless the group's conduct is attributable to the territorial state.¹⁰ Yet, Al Qaeda was not 'controlled by the [Afghan government] [and] nor [was it] acting on [Afghanistan's] behalf'.¹¹ Furthermore, the government did not 'explicitly endorse the terrorist attacks'.¹² Thus, without a sufficient link between Al Qaeda and the Afghan government, the US cannot justify its use of force as self-defence. Indeed, for similar reasons, states condemned the actions, as discussed in the previous chapter, of Israel in Lebanon. Similar operations such as the 1985 Israeli attack in Tunis,¹³ 1986 US strikes in Libya,¹⁴ 1991 Turkish incursions in Iraq,¹⁵ 1998 Rwanda and Uganda's intervention in the DRC,¹⁶ and the 1998 US attack in Sudan also faced similar responses.¹⁷

115 Stat 224, *Joint Resolution Authorising the US Armed Force against those Responsible for the Recent Attacks against the US* (2001) (USA).

⁸ Ratner Steven, 'Ius ad Bellum & Ius in Bello after September 11' (2002) 96 *American Journal of International Law* 905, 906; Franck Thomas, 'Terrorism & the Right of Self-Defense' (2001) 91 *American Journal of International Law* 839.

⁹ Murphy Sean, 'Terrorism & the Concept of "Armed Attack" in Article 51' (2003) 43 *Harvard International Law Journal* 41, 50; Di Rattalma Marco, 'War in Afghanistan, Self-Defence, & Questions of Attribution' (2003) 13 *Italian Yearbook of International Law* 59, 74; Abraham Garth & Hopkins Kevin, 'Bombing for Humanity: American Response to the 11 September Attacks & the Plea of Self-Defence' (2002) 119 *South African Law Journal* 783, 79–800. See Dinstein Yoram, *War, Aggression, & Self-Defence* (4th edn, Cambridge University Press 2011), 236–7.

¹⁰ Corten Olivier, *Law Against War: Prohibition on the Use of Force in Contemporary International Law* (Hart 2010), 171–2; Byers Michael, 'Intervention in Afghanistan—2001' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 632 ff; Moir Lindsay, 'Israeli Airstrikes in Syria—2003 & 2007' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 670; *Military & Paramilitary Activities in & against Nicaragua* (Nicaragua v US) (Merits) [1986] ICJ 14, 103–4.

¹¹ Byers, 'Intervention in Afghanistan' (n 10), 632; Stahn Carsten, 'International Law at a Crossroads? Impact of September 11' (2002) 62 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 183, 214.

¹² Byers, 'Intervention in Afghanistan' (n 10), 632.

¹³ Res 573 UNSC (4 October 1985) UN Doc S/RES/573.

¹⁴ Res 41/38 UNGA (20 November 1986) UN Doc A/RES/41/38.

¹⁵ Corten, *Law Against War* (n 10), 460.

¹⁶ Green James, 'Intervention by Uganda & Rwanda in the Democratic Republic of Congo—1998–2003' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 584–5; *Armed Activities on the Territory of the Congo* (DRC v Uganda) (Judgment) [2005] ICJ 168, 196–9, 213.

¹⁷ Byers, 'Intervention in Afghanistan' (n 10), 632; Gray Christine, *International Law & the Use of Force* (4th edn, Oxford University Press 2018), 197.

Compared to its actions in Iraq two years later ('Operation Iraqi Freedom'),¹⁸ states largely tolerated the US-led invasion.¹⁹ Some went as far as to argue for its lawfulness.²⁰ Thus, no 'state other than an injured state' levied any unilateral measure against the US. After the attacks, the SC reaffirmed the 'inherent right of individual or collective self-defence' under the Charter'; asked states 'to bring to justice' those responsible for the 9/11 attacks; and called on states to 'prevent and suppress terrorist acts'.²¹ After the invasion of Afghanistan began, US allies also invoked collective self-defence and joined in the US action.²² Other states also supported the US within the GA.²³ Indeed, only a few states opposed the US claim.²⁴

The support received by the US arguably does not suggest a change in the rule on self-defence against non-state armed groups.²⁵ Indeed, states' responses to later instances of force such as the 2006 Israeli-Lebanon conflict and the 2008 Russo-Georgian conflict support this view. The ICJ also confirmed this in the *Wall* advisory opinion and *Armed Activities* decision when it stated that to be considered an armed attack, a non-state armed group's conduct must be attributable to a state.²⁶ Thus, while many states tolerated or supported the US-led invasion of Afghanistan, this must be considered within the 'emotional climate that followed the [9/11]

¹⁸ See e.g. UNSC, 'Verbatim Record, 4726th Meeting' (26 March 2003) UN Doc S/PV.4726, 15 (Kuwait), 25 (Poland), 26 (Singapore), 34 (South Korea).

¹⁹ Byers, 'Intervention in Afghanistan' (n 10), 628.

²⁰ Ibid, 628–30; Corten, *Law Against War* (n 10), 461. See Dinstein, *War, Aggression, & Self-Defence* (n 9), 207.

²¹ Res 1368 UNSC (12 Sept 2001) UN Doc S/RES/2001; Res 1373 UNSC (28 Sept 2001) UN Doc S/RES/1373.

²² See UNSC, 'Letter from the Chargé d'affaires of the UK' (7 October 2001) UN Doc S/2001/947; UNSC, 'Letter from the Chargé d'affaires of Canada' (24 October 2001) UN Doc S/2001/1005; UNSC, 'Letter from the Permanent Representative of France' (23 November 2001) UN Doc S/2001/1103; UNSC, 'Letter from the Permanent Representative of Australia' (23 November 2001) UN Doc S/2001/1104; UNSC, 'Letter from the Permanent Representative of Germany' (29 November 2001) UN Doc S/2001/1127; UNSC, 'Letter from the Permanent Representative of the Netherlands' (6 December 2001) UN Doc S/2001/1171.

²³ See UNGA, 'Verbatim Record, 56th Session, 12th Meeting' (1 Oct 2001) UN Doc A/56/PV.12, 24 (Croatia), 14–5 (Norway); UNGA, 'Verbatim Record, 56th Session, 13th Meeting' (1 Oct 2001) UN Doc A/56/PV.13, 4–5 (Morocco); UNGA, 'Verbatim Record, 56th Session, 14th Meeting' (2 Oct 2001) UN Doc A/56/PV.14, 6–7 (Ireland), 12–3 (Iceland); UNGA, 'Verbatim Record, 56th Session, 17th Meeting' (2 Oct 2001) UN Doc A/56/PV.17, 13 (Ethiopia); UNGA, 'Verbatim Record, 56th Session, 18th Meeting' (4 Oct 2001) UN Doc A/56/PV.18, 21–3 (Canada).

²⁴ See UNSC, 'Verbatim Record, 4726th Meeting' (2003) (n 18), 7 (Malaysia on behalf of the NAM); 8–9 (Arab League), 10–1 (Algeria), 13–4 (Yemen), 16–8 (Libya), 19–20 (Indonesia), 24 (India); 28 (Brazil), 30 (Vietnam); UNSC, 'Verbatim Record, 4726th Meeting (Resumption)' (27 March 2003) UN Doc S/PV.4726 (Resumption), 26 (Russia), 28 (China); UNGA, 'Verbatim Record, 56th Session, 13th Meeting' (2001) (n 23), 15 (Cuba); UNGA, 'Verbatim Record, 56th Session, 12th Meeting' (2001) (n 23), 21 (Belarus); UNGA, 'Letter from the Permanent Representative of Qatar' (11 October 2001) UN Doc A/56/462–S/2001/962.

²⁵ Corten Olivier, 'Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' (2006) 16(5) *European Journal of International Law* 803, 818; Byers, 'Intervention in Afghanistan' (n 10), 638.

²⁶ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136, 194; *Armed Activities* [2005] (n 16), 222.

attacks and the nearly unanimous political opposition to the Taliban regime'.²⁷

B. Israeli attacks in Lebanon (2006)

Despite Israel's withdrawal from Lebanon in 2000,²⁸ tensions between Israel and Hezbollah remained high.²⁹ By this time, Hezbollah had built a strong presence in Lebanon, participated in government,³⁰ and despite SC demands, refused to disarm.³¹ There were also outbreaks of hostilities between Israel and Hezbollah notwithstanding the presence of a UN peacekeeping force.³²

In July 2006, Hezbollah fired rockets into Israel and attacked a patrol killing three soldiers and capturing two.³³ In response, Israel bombarded Hezbollah targets in Lebanon,³⁴ and launched a ground offensive against Hezbollah.³⁵ Hezbollah reacted by firing more rockets into Israel.³⁶ The hostilities lasted for more than thirty days until Israel and Lebanon accepted SC Resolution 1701's (2006) terms which called for a halt in Israeli offensives and the disarmament of non-state armed groups in Lebanon.³⁷

Israel justified its actions as measures of self-defence.³⁸ Yet, whether it could do so remains to be seen. First, as discussed above, international law does not appear to allow force against non-state actors in another state's territory without the territorial state's consent or absent

²⁷ Corten, 'Customary Prohibition on the Use of Force' (n 25), 818.

²⁸ UNSG, 'Letter from the Permanent Representative of Israel' (31 May 2000) UN Doc S/2000/512.

²⁹ UNSC, 'Report of the SG on the UN Interim Force in Lebanon' (21 July 2006) UN Doc S/2006/560.

³⁰ Dakroub Hussein, 'Hezbollah Wins Easy Victory In Elections in Southern Lebanon' (Washington Post, 6 June 2005) <<https://www.proquest.com/newspapers/hezbollah-wins-easy-victory-elections-southern/docview/409950309>>.

³¹ Res 1559 UNSC (2 September 2004) UN Doc S/RES/1559.

³² UNSG, 'Letter from the Permanent Representative of Israel' (2000) (n 28), ¶16. See Macleod Hugh, 'Israelis exchange fire with Hezbollah' (The Independent, 4 February 2006) <<https://www.proquest.com/newspapers/israelis-exchange-fire-with-hezbollah-disputed/docview/310946528>>; Wilson Scott, 'Violence Flares across Israel-Lebanon Border' (Washington Post, 29 May 2006) <<https://www.proquest.com/newspapers/violence-flares/docview/410105104>>.

³³ O'Loughlin Ed, 'Hezbollah captures two Israeli soldiers' (The Age, 13 July 2006) <<https://www.proquest.com/newspapers/hezbollah-captures-two-israeli-soldiers-north/docview/363792185>>.

³⁴ Shadid Anthony, 'Israel, Hezbollah Vow Wider War' (Washington Post, 15 July 2006) <<https://www.proquest.com/newspapers/israel-hezbollah-vow-wider-war-at-least-66-dead/docview/410025333>>.

³⁵ Wilson Scott & Cody Edward, 'Israel, Hezbollah Intensify Ground Conflict in Lebanon' (Washington Post, 21 July 2006) <<https://www.proquest.com/newspapers/israel-hezbollah-intensify-ground-conflict/docview/410016074>>.

³⁶ Shadid Anthony, 'Hezbollah Sends Rockets Farther Beyond Border' (Washington Post, 16 July 2006) <<https://www.proquest.com/newspapers/israel-intensifies-assault-on-beirut-hezbollah/docview/410062448>>;

³⁷ Res 1701 UNSC (11 August 2006) UN Doc S/RES/1701. See —, 'Israel approves UN cease-fire pact' (13 August 2006) <<https://www.nytimes.com/2006/08/13/world/africa/13iht-mideast.2465487.html>>.

³⁸ UNSC, 'Letters from the Permanent Representative of Israel' (12 July 2006) UN Doc A/60/937-S/2006/515.

attribution of the non-state actor's conduct.³⁹ Hezbollah's attacks between 2000 and 2006 cumulatively may have been sufficiently grave to be an 'armed attack' had it been attributable to a state.⁴⁰ Yet, as Tams and Brückner point out, these are not attributable to Lebanon.⁴¹ Lebanon did not carry out the attacks nor endorse Hezbollah's actions. While Hezbollah participated in the Lebanese government, this did not make the Hezbollah's acts Lebanon's under the rules of attribution.⁴² Second, even if Israel may exercise self-defence, its response must still be proportional.⁴³ As Gray submits, Israel's 'massive use of force' in Lebanon was clearly 'disproportionate [even] if seen as a response to the past attacks of Hezbollah [...] taken cumulatively'.⁴⁴ Similarly, Tams and Brückner argue that Israel's attacks against targets with no military value including civilian targets cannot be deemed proportional.⁴⁵

States had mixed reactions to Israel's actions. Some defended Israel's resort to self-defence.⁴⁶ Others deemed its actions as 'aggression'.⁴⁷ Still, a few, while recognising Israel's prerogative of self-defence questioned its proportionality.⁴⁸ No state took unilateral measures

³⁹ Wall [2004] (n 26), 194; *Armed Activities* [2005] (n 16), 222; Corten, *Law Against War* (n 10), 171–2; Corten Olivier, "'Unwilling or Unable' Test: Has It Been & Could It Be Accepted?" (2016) 29 *Leiden Journal of International Law* 777, 797–8; Moir, 'Israeli Airstrikes in Syria' (n 10), 670. *But see* Hakimi Monica, 'Defensive Force Against Non-State Actors: State of Play' (2015) 91 *International Legal Studies* 1, 13 *citing* Deeks Ashley, "'Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483, 488; Reisman Michael & Armstrong Andrea, 'Past & Future of the Claim of Pre-emptive Self-Defence' (2006) 100 *American Journal of International Law* 525, 540.

⁴⁰ Tams Christian & Brückner Wenke, 'Israeli Intervention in Lebanon—2006' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 681. *See* Levenfield Barry, 'Israel's Counter-Fedayeen Tactics in Lebanon' (1982) 21 *Columbia Journal of Transnational Law* 1, 41. *But see* Cannizzaro Enzo, 'Contextualising Proportionality: Jus ad bellum & Jus in Bello in the Lebanese War' (2007) 110 *International Review of the Red Cross* 779, 783.

⁴¹ Tams & Brückner, 'Israeli Intervention in Lebanon' (n 40), 681.

⁴² *Ibid.*, 681.

⁴³ Trapp Kimberly, 'Necessity, Proportionality, & Self-Defence against Non-State Actors' (2007) 56 *International & Comparative Law Quarterly* 141, 146; Green James, *ICJ & Self-Defence in International Law* (Hart 2009), 86.

⁴⁴ Gray, *Use of Force* (n 17), 227.

⁴⁵ Tams & Brückner, 'Israeli Intervention in Lebanon' (n 40), 687.

⁴⁶ UNSC, 'Verbatim Record, 5489th Meeting' (14 July 2006) UN Doc S/PV.5489, 10 (US), 15 (Denmark), 17 (Greece), 17 (France); UNSC, 'Verbatim Record, 5493rd Meeting' (21 July 2006) UN Doc S/PV.5493, 2 (Russia), 6 (UK), 8 (Ghana), 12 (France), 23 (Norway), 27 (Australia), 28 (Turkey), 39 (Canada), 41 (Guatemala).

⁴⁷ UNSC, 'Verbatim Record, 5489th Meeting' (2006) (n 46), 11 (Qatar), 11 (China); UNSC, 'Verbatim Record, 5493rd Meeting' (2006) (n 46), 13 (Syria), 20 (Saudi Arabia), 24 (Jordan), 26 (Arab League); 30 (Iran), 36 (Venezuela), 37 (Cuba), 38 (Sudan), 43 (United Arab Emirates), 44 (Pakistan). *See* Conference of Heads of the NAM, 'Final Document of the 14th Summit' (16 September 2006) UN Doc A/61/472-S/2006/780, 142. *See also* —, 'Arab League Head: Mideast peace process "dead"' (CNN, 15 July 2006) <<https://edition.cnn.com/2006/WORLD/meast/07/15/arab.league/>>.

⁴⁸ Tams & Brückner, 'Israeli Intervention in Lebanon' (n 40), 687 *citing* UNSC, 'Verbatim Record, 5488th Meeting' (13 July 2006) UN Doc S/PV.5488, 4 (Peru), 5 (UK); UNSC, 'Verbatim Record, 5489th Meeting' (2006) (n 46), 14 (Peru), 15 (Denmark), 16 (Slovakia); UNSC, 'Verbatim Record, 5493rd Meeting' (2006) (n 46), 7

against Israel. Arguably, as in the 2001 US invasion of Afghanistan, this was because Israel suffered an attack that was conducted by Hezbollah and made possible by Lebanon's inaction. Indeed, while several states condemned Hezbollah's actions and demanded that it cease its attacks against Israel,⁴⁹ others called on Lebanon to exercise its authority over the areas controlled by Hezbollah.⁵⁰

C. Eritrean-Djibouti crisis (2008)

Eritrea and Djibouti's border, drawn by France and Italy in 1935, has been the source of tension between the two African states.⁵¹ While both made attempts towards delimitation, none were successful.⁵² Before 2008, Eritrea and Djibouti had already clashed over border and security issues.⁵³ In 1996, Eritrea attempted to 'seize control of the [contested] Ras Doumeira' region.⁵⁴ In 1999, Eritrea accused Djibouti of aiding Ethiopia during the 1999 Eritrean-Ethiopian conflict while Djibouti accused Eritrea of supporting Djiboutian rebels in Ras Doumeira.⁵⁵

In 2008, tensions again flared between Eritrea and Djibouti. In March, Eritrean troops reportedly crossed the border, occupied Ras Doumeira, and fortified the area.⁵⁶ Between April and June, several diplomatic efforts were made to defuse the situation but these failed and hostilities erupted in early June.⁵⁷ Based on reports, Eritrean troops deserted their positions and crossed into Djibouti to seek asylum.⁵⁸ Djibouti also refused Eritrea's demand for the troops'

(Denmark), 16 (EU), 23 (Norway), 27 (Australia), 39 (Canada). *See also* —, 'EU accuses Israel of "disproportionate force"' (NBC, 14 July 2006) <<https://www.nbcnews.com/id/wbna13841307>>

⁴⁹ UNSC, 'Verbatim Record, 5489th Meeting' (2006) (n 46), 7 (Russia), 8 (Ghana), 9 (Argentina), 10 (US), 11 (China), 11 (Japan), 12 (UK), 13 (Congo), 13 (Tanzania), 16 (Slovakia), 17 (Greece), 17 (France). UNSC, 'Verbatim Record, 5493rd Meeting' (2006) (n 46), 7 (Denmark).

⁵⁰ UNSC, 'Verbatim Record, 5489th Meeting' (2006) (n 46), 17 (France), 9 (Argentina).

⁵¹ UNSC, 'Report of the Fact-Finding Mission on the Djibouti-Eritrea Crisis' (6 August 2008) UN Doc S/2008/602, 4; Harbom Lotta & Wallenstein Peter, 'Armed Conflicts, 1946–2008' (2009) 46(4) *Journal of Peace Research* 577, 581.

⁵² UNSC, 'Report of the Fact-Finding Mission on Djibouti-Eritrea' (2008) (n 51), 4–5; Bereketab Redie, 'Morality of the UN Security Council Sanctions against Eritrea' (2013) 56(2) *African Studies Review* 145, 150.

⁵³ Bereketab, 'UNSC Sanctions against Eritrea' (n 52), 150; —, 'Horn of Africa Neighbours clash' (Al Jazeera, 10 June 2008) <<https://www.aljazeera.com/news/2008/6/10/horn-of-africa-neighbours-clash>>.

⁵⁴ UNSC, 'Report of the Fact-Finding Mission on Djibouti-Eritrea' (2008) (n 51), 5.

⁵⁵ —, 'Horn of Africa Neighbours clash' (n 53).

⁵⁶ UNSC, 'Report of the Fact-Finding Mission on Djibouti-Eritrea' (2008) (n 51), 5; —, 'Djibouti seeks UN intervention in border dispute with Eritrea' (BBC Monitoring Africa, 7 May 2008) <<https://www.proquest.com/wire-feeds/djibouti-seeks-un-intervention-border-dispute/docview/458525640>>.

⁵⁷ UNSC, 'Report of the Fact-Finding Mission on Djibouti-Eritrea' (2008) (n 51), 6.

⁵⁸ *Ibid*; —, 'Djibouti, Eritrean forces clash at border' (BBC Monitoring, 11 June 2008) <<https://www.proquest.com/wire-feeds/djibouti-eritrean-forces-clash-at-border/docview/452598836>>.

return.⁵⁹ Thereafter, Eritrean forces fired at Djibouti troops.⁶⁰ The conflict lasted for several days but due to pressure, Djibouti withdrew from the border. However, Eritrea continued to occupy Ras Doumeira.⁶¹

Determining if either state breached their duty not to use force is difficult.⁶² Eritrea refused entry to the UN-established fact-finding mission.⁶³ Thus, any analysis of legality rested on independent reports, statements from Djibouti and Eritrea, and inferences from their subsequent actions. Djibouti's claims coincided with the mission's findings. That is, Eritrea crossed the border, occupied the Ras Doumeira area, and attacked Djibouti forces.⁶⁴ For its part, Eritrea alleged Djibouti launched an unprovoked attack.⁶⁵ Despite the conflicting accounts, several states considered Djibouti's report more plausible and deemed Eritrea the wrongful state. Indeed, Eritrea's refusal to withdraw from Ras Doumeira and fortification of the area appeared to demonstrate its intent to occupy the area.⁶⁶

No state took unilateral measures against Eritrea. The SC called for its withdrawal from the Ras Doumeira but Eritrea refused this demand.⁶⁷ Several African states lobbied for sanctions against Eritrea. The Intergovernmental Authority on Development ('IGAD') submitted a request to the African Union ('AU') which endorsed this to the SC.⁶⁸ In turn, the SC adopted Resolution 1907 which imposed an arms embargo, travel restrictions, and asset freezes against Eritrea.⁶⁹

D. Russo-Georgian conflict (2008)

Much complexity revolves around the legality of the uses of force during the 2008 Russo-Georgian conflict. For instance, there is the question of whether Georgia's attack on South Ossetia falls within the purview of the norm against force given that the latter has not been

⁵⁹ UNSC, 'Report of the Fact-Finding Mission on Djibouti-Eritrea' (2008) (n 51), 6.

⁶⁰ Ibid, 6–7; Hassan Omar & Kimball Jack, 'Nine dead in Djibouti-Eritrea border clashes' (Reuters, 12 June 2008) <<https://www.reuters.com/article/us-eritrea-djibouti-idUSL1236173020080612>>.

⁶¹ UNSC, 'Report of the Fact-Finding Mission on Djibouti-Eritrea' (2008) (n 51), 6–7.

⁶² Note that the incident may be classified as a 'minor use of force' or a 'border incident' (Corten, *Law Against War* (n 10), 403 citing *Jus Ad Bellum—Ethiopia's Claims* (Eritrea v Ethiopia) (Partial Award) (2005) 26 RIAA 457, 465–6).

⁶³ UNSC, 'Report of the Fact-Finding Mission on Djibouti-Eritrea' (2008) (n 51), 2.

⁶⁴ UNSC, 'Verbatim Record, 5924th Meeting' (24 June 2008) UN Doc S/PV.5924, 3–6.

⁶⁵ Ibid, 7.

⁶⁶ See e.g. Ibid, 8 (France), 10 (Burkina Faso), 10 (Russia), 17 (Arab League).

⁶⁷ Res 1862 UNSC (14 January 2009) UN Doc S/RES1862.

⁶⁸ Bereketeab, 'UNSC Sanctions against Eritrea' (n 52), 146.

⁶⁹ Res 1907 UNSC (23 December 2009) UN Doc S/RES/1907.

recognised as a state.⁷⁰ This examination focuses on Russia's actions as this was the subject of discussions among states in responding to the conflict and the one that undoubtedly falls within the scope of the norm.

Georgia-Russia relations had been tense since Saakashvili was elected Georgia's President in 2004.⁷¹ Saakashvili, sought control over South Ossetia and Abkhazia and 'accused Russia of supporting separatists' in both regions.⁷² He also sought closer ties with Western states and vied for NATO aid and membership.⁷³ Before the 2008 conflict broke out, Russia announced that it was adjusting its policy towards Abkhazia and South Ossetia to 'support Russian citizens and the local population against Georgia's aggressive intentions'.⁷⁴ In turn, Georgia accused Russia of intending to 'annex Abkhazia and South Ossetia'.⁷⁵ Thereafter, Russia increased the size of its peacekeeping force—established under ceasefire agreements that Georgia signed with Abkhazia and South Ossetia—in South Ossetia. In response, Georgia demanded that Russia end its participation in the peacekeeping force.⁷⁶

⁷⁰ See Corten, *Law Against War* (n 10), 158; Council of the EU, 'Report of the Independent International Fact-Finding Mission on the Conflict in Georgia vol I' (2009), 22–3.

⁷¹ Gray, *Use of Force* (n 17), 438.

⁷² Gray Christine, 'Conflict in Georgia—2008' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 713–4. See Osborn Andrew, 'Russia steps up blockade on Georgia' (The Independent, 3 October 2006) <<https://www.proquest.com/newspapers/russia-steps-up-blockade-on-georgia/docview/311067208>>; —, 'Georgia accuses Russia of military build-up' (Financial times, 13 November 2007) <<https://www.proquest.com/newspapers/georgia-accuses-russia-military-build-up/docview/250060422>>. Note that the Soviet Union's dissolution led to pressure for the 'further subdivision' of its former republics. In Georgia, separatists in Abkhazia and South Ossetia, sought independence from the newly-formed state (Gray, 'Conflict in Georgia' (n 72), 712; Cornell Svante, *Autonomy & Conflict: Entno-Territoriality & Separatism in the South Caucasus* (Uppsala University Department of Peace & Conflict Research 2001), 186, 189. See UNSG, 'Report of the SG concerning the situation in Abkazia' (7 October 1993) UN Doc S/26551) Hostilities between Georgian forces and separatists broke out when Abkhazia and South Ossetia attempted to secede (See UNSG, 'Letter from the Permanent Representative of the Russian Federation' (21 June 1994) UN Doc S/1994/732) These conflicts lasted until Russia brokered ceasefires between Georgia and South Ossetia in 1992 (*Agreement on Principles of Settlement of the Georgian-Ossetian Conflict* (adopted 24 June 1992) and between Georgia and Abkhazia in 1993 (*Agreement on a Ceasefire in Abkhazia and Arrangements to Monitor its Observance* (adopted 7 July 1993) These agreements created buffer zones and established a CIS peacekeeping force. Yet, hostilities continued between Georgia and Abkhazia (UNSC, 'Verbatim Record, 5349th Meeting' (21 July 2006) UN Doc S/PV.5349; Res 1716 UNSC (15 April 2007) UN Doc S/RES/1716) and between Georgia and South Ossetia (—, 'Georgia intent on "establishing order" in South Ossetia' (BBC Monitoring, 31 May 2004) <www.proquest.com/wire-feeds/georgia-intent-on-establishing-order>).

⁷³ Baker Peter, 'President of Georgia Gets Warm Embrace' (Washington Post, 6 July 2006) <<https://www.proquest.com/newspapers/president-georgia-gets-warm-embrace-bush-calls/docview/410013914>>.

⁷⁴ UNSC, 'Letter from the Permanent Representative of Russia' (11 August 2008) UN Doc S/2008/545. See UNSC, 'Report of the SG on the situation in Georgia' (23 July 2008) UN Doc S/2008/480; UNSC, 'Report of SG on the Situation in Georgia' (3 October 2008) UN Doc S/2008/631.

⁷⁵ Gray, 'Conflict in Georgia' (n 72), 713–4 citing UNSC, 'Letter from the Permanent Representative of Georgia' (25 March 2008) UN Doc S/2008/197.

⁷⁶ UNSC, 'Report of the SG on the situation in Georgia: July' (2008) (n 74), 2, 14. See Council of the EU, 'Report of the Independent International Fact-Finding Mission on the Conflict in Georgia vol II' (2009), 199 ff.

Based on reports, Georgia attacked Tskhinvali in South Ossetia on 7 August 2008.⁷⁷ Note that contrary to Georgia's claims, neither South Ossetia nor Russia conducted any attack against Georgia.⁷⁸ In response, Russia sent its forces to South Ossetia to repel Georgian forces.⁷⁹ It also bombed Tbilisi and briefly occupied the Georgian cities of Gori and Poti.⁸⁰ Furthermore, it aided the Abkhaz forces creating a second front against Georgia.⁸¹ The conflict ended on 12 August 2008 when Georgia and Russia agreed on an EU-brokered ceasefire.⁸² By this time, Georgia had been driven out of South Ossetia and Abkhazia which Russia subsequently recognised as independent states.⁸³

Russia provided two justifications for its actions in Georgia. First, it claimed that it sought to protect its nationals abroad.⁸⁴ Yet, as scholars like Randelzhofer, Nolte, and Gray submit, it is doubtful if international law considers this as an exception to the norm against force.⁸⁵ While

⁷⁷ Council of the EU, 'Report on the Conflict in Georgia vol I' (n 70), 2; Council of the EU, 'Report on the Conflict in Georgia vol II' (n 76), 209.

⁷⁸ See UNSC, 'Verbatim Record, 5952nd Meeting' (8 August 2008) UN Doc S/PV.5952. See Halpin Tony, 'Georgia pounds Russian-backed rebels' (The Times, 8 August 2008) <<https://www.proquest.com/newspapers/georgia-pounds-russian-backed-rebels/docview/319929854>>; Walker Shaun, 'Georgia launches offensive in South Ossetia' (The Independent, 8 August 2008) <<https://www.proquest.com/newspapers/georgia-launches-offensive-south-ossetia/docview/311530078>>.

⁷⁹ — —, 'Russia Sends Its Forces Into Georgia' (New York Times, 9 August 2008) <<https://www.proquest.com/historical-newspapers/russia-georgia-clash-over-breakaway-region/docview/89715075>>; Clover Charles, 'Georgia says Russia at War' (Financial Times, 9 August 2008) <<https://www.proquest.com/newspapers/georgia-says-russia-at-war/docview/250107945>>.

⁸⁰ Barnard Anne, 'Russia Broadens Military Campaign as All-Out War Threatens Georgia' (New York Times, 10 August 2008) <<https://www.proquest.com/newspapers/russia-broadens-military-campaign-as-all-out-war/docview/433917792>>; Chazan Guy, 'Russia Briefly Seizes Georgian Port' (Wall Street Journal, 19 August 2008) <<https://www.wsj.com/articles/SB121913118324652571>>; Chivers CJ, 'Russia Pulls the Bulk of Its Forces Out of Georgia' (New York Times, 22 August 2008) <<https://www.nytimes.com/2008/08/23/world/europe/23georgia.html>>.

⁸¹ Schwirtz Michael, Barnard Anne, & Kramer Andrew, 'Russian Forces Capture Military Base in Georgia' (New York Times, 11 August 2008) <<https://www.nytimes.com/2008/08/12/world/europe/12georgia.html>>; McElroy Damien & Blomfield Adrian, 'Georgia: Russia fighting on several fronts as Georgian troops withdraw to defend Tbilisi' (The Telegraph, 11 August 2009) <<https://www.telegraph.co.uk/news/worldnews/europe/georgia/2541051/Georgia-Russia-fighting-on-several-fronts-as-Georgian-troops-withdraw-to-defend-Tbilisi.html>>.

⁸² UNSC, 'Verbatim Record, 5961st Meeting' (19 August 2008) UN Doc S/PV.5961, 2 ff.

⁸³ UNSC, 'Verbatim Record, 5969th Meeting' (19 August 2008) UN Doc S/PV.5969, 8–9; UNSC, 'Reports of SG on the Situation in Georgia' (18 May 2009) UN Doc S/2009/254, 3.

⁸⁴ UNSC, 'Letter from the Permanent Representative of Russia' (2008) (n 74); Council of the EU, 'Report on the Conflict in Georgia vol I' (n 70), 21–2.

⁸⁵ See Randelzhofer Albrecht & Nolte Georg, 'Article 51' in Simma Bruno, *et al.* (eds), *Charter of the UN: Commentary* (Oxford University Press 2012), 1413; Gray, 'Conflict in Georgia' (n 72), 723 citing Corten Olivier, *Le droit contre la guerre* (Pedone 2014), 659; Ruys Tom, 'Protection of Nationals Doctrine' (2008) 13 *Journal of Conflict & Security Law* 233. But see Green James, 'Passportization, Peacekeepers, & Proportionality' in Green James & Waters Christopher (eds), *Conflict in the Caucasus* (MacMillan 2010), 54, 60; Dinstein, *War, Aggression, & Self-Defence* (n 9), 231 ff; Eichensehr Kristen, 'Defending Nationals Abroad' (2008) 48 *Virginia Journal of International Law* 451, 468.

some states had claimed the right to use force, within the Charter's meaning, to protect their citizens abroad, these instances had been met with condemnation or silence not amounting to acquiescence.⁸⁶ Moreover, doubts linger on whether Russia, which conducted an extensive operation to issue passports to ethnic Russians in South Ossetia, possessed a 'genuine link' to those it considered as its nationals.⁸⁷ As Gray points out, Russia's issuance of passports to ethnic Russians in South Ossetia', coupled with its military operations in South Ossetia and subsequent recognition of South Ossetia as an independent state, support Georgia's claim that Russia supported South Ossetia's secession.⁸⁸ Second, Russia also invoked self-defence claiming Georgia attacked its troops stationed in South Ossetia as part of the peacekeeping force.⁸⁹ Yet, even if Georgia attacked Russian troops,⁹⁰ and assuming that the attack on Russia's peacekeeping force may be considered an 'armed attack',⁹¹ its response must still be proportional. Arguably, the bombardment and subsequent occupation of Georgian cities by Russia were disproportional.⁹²

Compared to Russia's invasion of Ukraine discussed below, states' responses to the Russo-Georgian conflict were restrained.⁹³ While there were talks of sanctions within the EU,⁹⁴ none materialised.⁹⁵ No 'state other than an injured state' levied unilateral measures against Russia. Instead, states limited themselves to statements of condemnation—actions which are not measures of implementation.⁹⁶ Some, like France, merely called for de-escalation of the

⁸⁶ Gray, *Use of Force* (n 17), 166; Ruys, 'Protection of Nationals Doctrine Revisited' (n 85), 253 ff.

⁸⁷ Council of the EU, 'Report on the Conflict in Georgia vol II' (n 76), 147 ff, 287 ff.

⁸⁸ Gray, 'Conflict in Georgia' (n 72), 724

⁸⁹ UNSC, 'Letter from the Permanent Representative of Russia' (2008) (n 74).

⁹⁰ Note Council of the EU, 'Report on the Conflict in Georgia vol II' (n 76), 252 ('The controversial fact of a Georgian attack on the Russian peacekeeping base is still an open issue')

⁹¹ Note Gray, 'Conflict in Georgia' (n 72), 724 ('The crucial issue was whether Russia's national troops retained their national character despite being part of a peacekeeping force').

⁹² Ibid, 725–6; Council of the EU, 'Report on the Conflict in Georgia vol I' (n 70), 22–3.

⁹³ Note Georgia, as the 'injured state', instituted several proceedings against Russia: 'Application', *Application of the ICERD* (Georgia v Russia) (ICJ, General List No 140, 12 August 2008); *Georgia v Russia* (Judgment) (ECtHR, App No 38263/08, 13 December 2011).

⁹⁴ Tran Mark & Traynor Ian, 'EU threatens sanctions against Russia' (The Guardian, 29 August 2008) <<https://www.theguardian.com/world/2008/aug/28/eu.russia>>. See —, 'Russia's Medvedev Threatens To Hit Back At Sanctions' (Dow Jones Institutional News, 31 August 2008) <<https://www.proquest.com/wire-feeds/russias-medvedev-threatens-hit-back-at-sanctions/docview/2244182787>>.

⁹⁵ Harding Luke, 'EU backs off from threat of sanctions over Georgia' (The Guardian, 30 August 2008) <<https://www.proquest.com/newspapers/georgia-moscow-accuses-west-double-standards-nato/docview/244276816>>. Note that the EU created an independent fact-finding mission 'to secure a peaceful and lasting solution to the conflicts in Georgia': Council of the EU, 'Council Decision 2008/901/CFSP' (2 December 2008) L 323/66.

⁹⁶ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117 ('A state does not invoke [another's]

hostilities.⁹⁷ A few questioned Russia's claims of protecting its nationals abroad.⁹⁸ Others delved into the necessity and proportionality of Russia's response.⁹⁹ Finally, after Russia recognised South Ossetia and Abkhazia as independent states, some deemed Russia's actions an attempt to redraw international boundaries.¹⁰⁰

E. US-led threats and attacks in Syria (2013, 2017, 2018)

By February 2011, the protests in the Arab world known as the 'Arab Spring' reached Syria.¹⁰¹ Syria forcibly responded to these protests—a move that several states condemned,¹⁰² and hostilities followed between the government and armed opposition groups.¹⁰³ By 2012, the crisis in Syria evolved into a multi-faceted conflict involving states intervening at the Al-Assad government's request,¹⁰⁴ states providing material support for Syrian rebels,¹⁰⁵ and states acting against extremist groups in Syria.¹⁰⁶ This analysis, due to limitations on space, focuses on the second—specifically, the US-led threats of attacks against Syria in 2013 and actual strikes in 2017 and 2018.

responsibility [when it] merely criticises that state, [...] calls for [the duty's] observance, or even reserves its rights to protest').

⁹⁷ UNSC, 'Verbatim Record, 5952nd Meeting' (2008) (n 78), 5. *See* 6 (China), 6 (Greece), 7 (South Africa), 7–8 (Indonesia), 8 (Vietnam), 8 (Libya), 8 (Burkina Faso), 9 (Finland, on behalf of OSCE); UNSC, 'Verbatim Record, 5953rd Meeting' (10 August 2008) UN Doc S/PV.5953, 10 (France), 12 (Italy), 14 (Burkina Faso).

⁹⁸ UNSC, 'Verbatim Record, 5952nd Meeting' (2008) (n 78), 6–7 (Croatia).

⁹⁹ UNSC, 'Verbatim Record, 5953rd Meeting' (2008) (n 97), 6 (US), 11 (UK), 13 (Croatia), 14 (Costa Rica).

¹⁰⁰ UNSC, 'Verbatim Record, 5969th Meeting' (2008) (n 83), 9 (France), 12 (UK), 14 (US). *See* 10 (Italy), 11 (Panama), 12 (Costa Rica), and 13 (Indonesia).

¹⁰¹ Lagerwall Anne, 'Threats of & Actual Military Strikes against Syria—2013 & 2017' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 828; HRC, 'Report of the Commission of Inquiry on the Syria' (23 November 2011) UN Doc A/HRC/S-17/2/Add.1, 8.

¹⁰² —, 'Arab Nations Condemn Syria as Violence Mount' (Dow Jones Institutional News, 8 August 2011) <<https://www.proquest.com/wire-feeds/wsj-arab-nations-condemn-syria-as-violence-mounts/docview/2150349115>>. *See* UNSC, 'Statement of the SC President' (3 July 2011) UN Doc S/PRST/2011/16.

¹⁰³ Albayrak Ayla, 'Turkey Is Adding to Pressure on Damascus' (Wall Street Journal, 5 October 2011) <<https://www.wsj.com/articles/SB10001424052970204524604576610781937462842>>; —, 'Fresh violence hits Syrian town' (Al Jazeera, 30 April 2011) <<https://www.aljazeera.com/news/2011/4/30/fresh-violence-hits-syrian-town>>; —, 'UN: Both sides in Syria are violating the truce' (CBS News, 1 May 2012) <<https://www.cbsnews.com/news/un-both-sides-in-syria-are-violating-the-truce/>>.

¹⁰⁴ *See* Borger Julian, 'Russian military presence in Syria poses challenge to US-led intervention' (The Guardian, 24 December 2012) <<https://www.theguardian.com/world/2012/dec/23/syria-crisis-russian-military-presence>>; Payne Ed & Starr Barbara, 'Russia launches first airstrikes in Syria' (CNN, 1 October 2015) <<https://edition.cnn.com/2015/09/30/politics/russia-syria-airstrikes-isis/index.html>>.

¹⁰⁵ *See* Gray, *Use of Force* (n 17), 113–4; Miller Greg & DeYoung Karen, 'Secret CIA effort in Syria faces large funding cut' (Washington Post, 12 June 2015) <https://www.washingtonpost.com/world/national-security/lawmakers-move-to-curb-program-to-train-syrian-rebels/2015/06/12/b0f45a9e-1114-11e5-adee-e82f8395c032_story.html>.

¹⁰⁶ *See* Corten Olivier, 'Military Operations Against the "Islamic State"' (ISIL or Da'esh)—2014' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2014).

In 2013, the US, UK, and France began considering an armed intervention in Syria after Syria reportedly launched a chemical attack against civilians in Ghouta.¹⁰⁷ These states previously threatened military actions against Syria should it employ chemical weapons. The US stated that this crosses a ‘red line’ to which it would respond.¹⁰⁸ The UK and France made similar statements.¹⁰⁹ Yet, due to the perceived difficulty on the US’ part in procuring Congressional authorisation for military action and Syria’s proposal for the ‘monitoring and destruction of its chemical arsenal’, the US, UK, and France backed down from their threats.¹¹⁰

Reports of more chemical attacks followed.¹¹¹ Some states sought an SC resolution for sanctions against Syria but Russia and China vetoed this.¹¹² In 2017, after the SC failed to act on the chemical attack in Khan Sheikhun,¹¹³ the US, without SC authorisation, launched missiles against Syrian military infrastructure inflicting heavy losses.¹¹⁴ In 2018, another attack was reported in Douma to which the US, UK, and France responded by launching airstrikes against Syria.¹¹⁵

For scholars like Lagerwall, Gray, and Henderson, the three states breached their duty not to threaten or use force against Syria.¹¹⁶ The three states’ statements in 2013 clearly fall within Article 2(4)’s concept of ‘threats’. The threats were aimed at Syria to adopt a certain conduct.¹¹⁷

¹⁰⁷ Lagerwall, ‘Military Strikes against Syria’ (n 101), 830. See UNSG, ‘Report of the UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syria’ (16 September 2013) UN Doc A/67/997-S/2013/55, 8.

¹⁰⁸ Office of the Press Secretary, ‘Remarks by the President to the White House Press Corps’ (20 August 2012) <<https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>>.

¹⁰⁹ — —, ‘Britain & France Join the US in Warning Syria’ (New York Times, 23 August 2012) <<https://www.proquest.com/blogs-podcasts-websites/britain-france-join-u-s-warning-syria/docview/2215721549>>

¹¹⁰ Lagerwall, ‘Military Strikes against Syria’ (n 101), 830–1. *Note* Res 2118 SC (27 Sept 2013) UN Doc S/RES/2118.

¹¹¹ See Res 2314 UNSC (31 Oct 2016) UN Doc S/RES/2314; Res 2319 UNSC (17 Nov 2016) UN Doc S/RES/2319.

¹¹² See UNSC, ‘Verbatim Record, 7893rd Meeting’ (28 February 2017) UN Doc S/PV.7893

¹¹³ See UNSC, ‘Verbatim Record, 7915th Meeting’ (5 April 2017) UN Doc S/PV.7915.

¹¹⁴ Bulos Nabih, ‘Trump order Airfiled Strike in response to Gas Attack “Horror”’ (Los Angeles Times, 7 April 2018) <<https://www.proquest.com/newspapers/u-s-strikes-syria-missiles-pound-trump-orders/docview/1884698941>>

¹¹⁵ Cohen Zachary & Liptak Kevin, ‘US, UK and France launch Syria strikes targeting Assad’s chemical weapons’ (CNN, 14 April 2018) <<https://edition.cnn.com/2018/04/13/politics/trump-us-syria/index.html>>

¹¹⁶ See Lagerwall, ‘Military Strikes against Syria’ (n 101), 839–47, 851–3; Gray, *Use of Force* (n 17), 117; Henderson Christian, ‘UK Government’s Legal Opinion on Forcible Measures in response to the Use of Chemical Weapons by Syria’ (2015) 64 *International & Comparative Law Quarterly* 179, 194.

¹¹⁷ Lagerwall, ‘Military Strikes against Syria’ (n 101), 840–1. See Stürchler Nikolas, *The Threat of Force in International Law* (Cambridge University Press 2007), 259; Roscini Marco, ‘Threats of Armed Force & Contemporary International Law’ (2007) 54 *Netherlands International Law Review* 257, 235.

They were precise and direct with the ‘signalled intention’ to use force ‘if certain events occur’,¹¹⁸ or unless their demands were met.¹¹⁹ These threats’ lawfulness, however, depends on whether the ‘envisioned force’ was also lawful.¹²⁰ The US, UK, and France, in varying degrees, appealed to humanitarian intervention to justify the threats,¹²¹ and actual strikes against Syria.¹²² Yet, as observed above, the status of this remains uncertain. Most states have rejected this concept,¹²³ and many scholars like Corten and Lagerwall doubt if it constitutes an exception to the norm against force.¹²⁴

States’ reactions to the threats and attacks varied. As to the 2013 threats, the EU stated that a ‘strong response is crucial to make clear’ that the use of chemical weapons is unacceptable.¹²⁵ Arab League members also called for ‘necessary’ measures against the chemical attack’s perpetrators.¹²⁶ In contrast, some states stressed the illegality of unilateral interventions.¹²⁷ Others highlighted the need for multilateral approaches to the situation in Syria.¹²⁸ The same is

¹¹⁸ Lagerwall, ‘Military Strikes against Syria’ (n 101), 839–40 citing *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ 2, 246.

¹¹⁹ ILC, ‘Report on the Work of the 41st Session’ (1989) II YbILC 68, 68.

¹²⁰ *Nuclear Weapons* [1996] (n 118), 246. See *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States & the Protection of their Independence & Sovereignty* Res 2131 (XX) UNGA (21 December 1965) UN Doc A/RES/2131; *Declaration on the Principles of International Law concerning Friendly Relations & Cooperation among States* Res 2625 (XXV) UNGA (24 October 1970) A/RES/2625.

¹²¹ See UNGA, ‘Verbatim Record, 68th Session, 5th Meeting’ (24 September 2013) UN Doc A/68/PV.5, 32 (France); UNSC, ‘Verbatim Record, 8233rd Meeting’ (14 April 2018) UN Doc S/PV.8233, 5–6 (US), 6–7 (UK), 9 (France); SJ Res 21, *Joint resolution to authorise the limited and specified use of the United States Armed Forces against Syria* (2013).

¹²² Trump Donald, ‘Statement on Syria’ (The White House, 6 April 2017) <<https://www.whitehouse.gov/the-press-office/2017/04/06/statement-president-trump-syria>>; UNSC, ‘Verbatim Record, 7919th Meeting’ (7 April 2017) UN Doc S/PV.7919, 5 (UK), 9 (France).

¹²³ Coordinating Bureau of the NAM, ‘Statement: 4th Informal Meeting, 59th GA Plenary Session’ (27 January 2005); G77 Heads of States, ‘Declaration of the South Summit’ (14 April 2000) UN Doc A/55/74, ¶11; Islamic Conference of Foreign Ministers, ‘Final Communiqué: 27th Session’ (27 June 2000).

¹²⁴ Corten, *Law Against War* (n 10), 548 ff; Lagerwall, ‘Military Strikes against Syria’ (n 101), 844.

¹²⁵ European Union, ‘Remarks by EU High Representative following the informal meeting of EU Foreign Ministers’ (7 September 2013) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/138691.pdf>.

¹²⁶ — —, ‘Arab League blames Syria’s Assad for chemical attack’ (Reuters, 28 August 2013) <<https://www.reuters.com/article/us-syria-crisis-league-idUSBRE97Q0NI20130827>>

¹²⁷ UNGA, ‘Verbatim Record, 68th Session, 5th Meeting’ (2013) (n 121), 10 (Brazil), 32 (Mozambique); UNGA, ‘Verbatim Record, 68th Session, 6th Meeting’ (24 Sept 2013) UN Doc A/68/PV.6, 7 (Paraguay), 13 (Iran), 21 (Sweden); UNGA, ‘Verbatim Record, 68th Session, 7th Meeting’ (24 Sept 2013) UN Doc A/68/PV.7, 11 (Argentina).

¹²⁸ UNGA, ‘Verbatim Record, 68th Session, 5th Meeting’ (2013) (n 121), 18 (Turkey), 24 (Chile), 27 (Bulgaria), 32 (Mozambique), 46 (Monaco), 50 (South Africa), 52 (Ukraine); UNGA, ‘Verbatim Record, 68th Session, 6th Meeting’ (2013) (n 127), 2 (Costa Rica), 4 (Austria), 9 (Latvia); UNGA, ‘Verbatim Record, 68th Session, 8th Meeting’ (25 September 2013) UN Doc A/68/PV.8, 1 (Estonia), 10 (Peru), 14 (Timor Leste); 30 (Antigua & Barbuda).

true for the actual strikes. US-allied states defended the attacks in 2017,¹²⁹ and 2018.¹³⁰ However, other states condemned the operations and deemed them acts of aggression.¹³¹ As most Western states supported the US, the UK, and France's actions against Syria, it is unsurprising that no 'state other than an injured state' levied unilateral measures against the three states.

F. Russo-Ukrainian conflict (2014–)

In February 2014, Ukraine ousted President Yanukovich for his forceful response to protests against his pro-Russia policies.¹³² Thereafter, Yanukovich fled to Russia.¹³³ In March,

¹²⁹ See e.g. Armstrong Kerrie, "'Australian government strongly supports'" US Syria strike' (SBS News, 7 April 2017) <<https://www.sbs.com.au/news/australian-government-strongly-supports-us-syria-strike-turnbull>>; Leblanc Daniel & Carbert Michelle, 'Canada supports US strike against Syria' (Globe & Mail, 7 April 2017) <<https://www.theglobeandmail.com/news/politics/canada-statement-us-strike-syria/article/34626797>>; — —, 'Merkel, Hollande voice support for US strike' (RTE, 7 April 2014) <<https://www.rte.ie/news/world/2017/0407/866002-syria-airstrike-reaction/>>; — —, 'Israeli leaders offer wall-to-wall praise for US strike on Syria' (Times of Israel, 7 April 2014) <<https://www.timesofisrael.com/netanyahu-praises-message-of-resolve-in-us-strike-on-syria/>>; — —, 'Japan supports US missile strike in Syria' (Japan Today, 7 April 2017) <<https://japantoday.com/category/politics/japan-supports-u-s-missile-strike-in-syria>>; — —, 'Saudi Arabia says fully supports US military strikes in Syria' (Jerusalem Post, 7 April 2017) <<https://www.jpost.com/Breaking-News/Saudi-Arabia-says-fully-supports-US-military-strikes-in-Syria-486404>>; UNSC, 'Verbatim Record, 7919th Meeting' (7 April 2017) UN Doc S/PV.7919, 4 (Italy), 16 (Ukraine).

¹³⁰ See e.g. Prime Minister of Canada, 'Statement by the Prime Minister on airstrikes in Syria' (13 April 2018) <<https://pm.gc.ca/en/news/statements/2018/04/14/statement-prime-minister-airstrikes-syria>>; — —, 'Germany backs airstrikes in Syria as "necessary and appropriate"' (DW, 13 April 2018) <<https://www.dw.com/en/germany-backs-airstrikes-in-syria-as-necessary-and-appropriate/a-43386145>>; — —, 'European leaders back Syria airstrikes; China against' (Associated Press, 15 April 2018) <<https://apnews.com/article/53bac45e36c548e88aa5448d795c931a>>; — —, 'Turkey's Erdogan welcomes Western attack on Syria, says operation a message to Assad' (Reuters, 14 April 2018) <<https://www.reuters.com/article/us-mideast-crisis-syria-turkey-idUSKBN1HL0W9>>; UNSC, 'Verbatim Record, 7921st Meeting' (12 April 2017) UN Doc S/PV.7921, 11 (Poland).

¹³¹ See e.g. Robinson Julian, 'Putin calls US strikes against Syria "aggression against sovereign country"' (Russian News Agency, 7 April 2017) <<https://tass.com/politics/939920>>; — —, 'Iran's Rouhani says Trump abetting Syria "terrorists"' (SBS News, 8 April 2017) <<https://www.sbs.com.au/news/iran-s-rouhani-says-trump-abetting-syria-terrorists>>; Sengupta Somini, MacFarquhar Neil, & Steinhauer Jennifer, 'US Airstrikes in Syria: Fallout Around the World' (New York Times, 7 April 2017) <<https://www.nytimes.com/2017/04/07/us/politics/trump-syria-airstrikes.html>>; UNSC, 'Verbatim Record, 7919th Meeting' (7 April 2017) UN Doc S/PV.7919, 7 (Senegal), 13 (Kazakhstan); UNSC, 'Verbatim Record, 7921st Meeting' (2017) (n 130), 14 (China); UNSC, 'Verbatim Record, 8233rd Meeting' (2018) (n 121), 3–5 (Russia), 10 (China), 10 (Kazakhstan), 14 (Bolivia), 15 (Kuwait), 17 (Equatorial Guinea).

¹³² Cullison Alan & Marson James, 'Ukraine Erupts in Bloody Protests' (Wall Street Journal, 19 February 2014) <<https://www.proquest.com/newspapers/ukraine-erupts-bloody-protests-at-least-18-killed/docview/1499505081>>. See Buckley Neil, Hille Kathrin, & Olearchyk Roman., 'Russian deal with Ukraine blow to EU' (Financial times, 18 December 2013) <<https://www.proquest.com/newspapers/russian-deal-with-ukraine-blow-eu/docview/1478035568>>; Olearchyk Roman & Weaver Courtney, 'Outlook for Yanukovich looks more precarious' (Financial times, 12 December 2013) <<https://www.proquest.com/newspapers/outlook-yanukovich-looks-more-precarious/docview/1476528249>>

¹³³ — —, 'How it Unfolded: Revolution in Ukraine' (Financial Times, 24 February 2014) <<https://www.proquest.com/newspapers/how-unfolded/docview/1510311309>>; Hille Kathrin, 'Risks abound as Putin weighs next move' (Financial Times, 24 February 2014) <<https://www.proquest.com/newspapers/risks-abound-as-putin-weighs-next-move/docview/1510311363>>.

based on accounts, Russian units in Sevastopol under an agreement with Ukraine occupied government installations and participated in armed activities in support of pro-Russian militias.¹³⁴ Russia initially claimed that the Russian military members fighting in Ukraine were volunteers. However, it later admitted that it deployed these units to aid pro-Russian forces.¹³⁵ Acting on the US' advice, Ukraine did not respond to the situation in Crimea.¹³⁶ On 11 March 2014, Crimea declared independence from Ukraine.¹³⁷ A few days later, it voted in a referendum to join Russia, and the latter annexed Crimea.¹³⁸

Pro-Russian militia activities were also reported in Donetsk and Luhansk.¹³⁹ In April 2014, Donetsk and Luhansk also declared their independence.¹⁴⁰ Ukraine responded by mobilising its troops. While initially successful, it suffered losses after Russia aided the separatist forces.¹⁴¹ Despite third-party mediated ceasefires and efforts on a peace plan,¹⁴² the hostilities continue—Crimea remains under Russian occupation while separatists maintain control of Donetsk and Luhansk.¹⁴³

¹³⁴ Billkova Veronika, 'Use of Force by Russia in Crimea' (2015) 75 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 27, 32; O'Connell Mary, 'Crisis in Ukraine—2014' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 855–6. See —, 'Russia's Aggression: Putin ignites the world's condemnation with each move against Ukraine' (New York Times, 3 March 2014) <<https://www.proquest.com/historical-newspapers/russias-aggression/docview/1941461660>>; Gumuchian Marie-Louise, Smith-Spark Laura, & Formanek Ingrid, 'Gunmen seize government buildings in Ukraine's Crimea, raise Russian flag' (CNN, 27 February 2014) <<https://edition.cnn.com/2014/02/27/world/europe/ukraine-politics/>>; UNSC, 'Verbatim Record, 7125th Meeting' (3 March 2014) UN Doc S/PV.7125, 13 (Ukraine).

¹³⁵ Billkova, 'Use of Force by Russia in Crimea' (n 134), 34; O'Connell, 'Crisis in Ukraine' (n 134), 858; Tancredi Antonello, 'Russian Annexation of the Crimea: Use of Force' (2015) 6 *Questions of International Law* 5, 6.

¹³⁶ Smale Alison & Erlanger Steven, 'Ukraine Mobilizes Reserve Troops, Threatening War' (New York Times, 1 March 2014) <<https://www.nytimes.com/2014/03/02/world/europe/ukraine.html>>; Rogin Josh & Lake Eli, 'US Told Ukraine to Stand Down as Putin Invaded' (Bloomberg, 21 August 2015) <<https://www.bloomberg.com/opinion/articles/2015-08-21/u-s-told-ukraine-to-stand-down-as-putin-invaded>>.

¹³⁷ —, 'Crimea's parliament votes for independence from Ukraine' (Telegraph, 11 March 2014) <<https://www.proquest.com/newspapers/crimeas-parliament-votes-independence-ukraine/docview/1506179643>>.

¹³⁸ —, 'Crimea Referendum: Votes "Back Russia Union"' (BBC, 16 March 2014) <<http://www.bbc.com/news/world-europe-26606097>>; —, 'Putin signs Russia-Crimea treaty' (BBC, 18 March 2014) <<https://www.bbc.com/news/world-europe-26630062>>.

¹³⁹ —, 'Pro-Russia Protesters Storm Donetsk Offices' (NBC, 17 March 2014); —, 'Protesters in Luhansk in eastern Ukraine say they will ask Russia for help' (BBC Monitoring, 9 March 2014) <<https://www.proquest.com/wire-feeds/protesters-luhansk-eastern-ukraine-say-they-will/docview/1505099313>>.

¹⁴⁰ —, 'Ukraine separatists declare independence' (Al Jazeera, 12 May 2014) <<https://www.aljazeera.com/news/2014/5/12/ukraine-separatists-declare-independence>>.

¹⁴¹ O'Connell, 'Crisis in Ukraine' (n 134), 856; —, 'Ukraine crisis: "Column from Russia" crosses border' (BBC, 25 August 2014) <<https://www.bbc.com/news/world-europe-28924945>>.

¹⁴² O'Connell, 'Crisis in Ukraine' (n 134), 856.

¹⁴³ Corten Olivier, 'Russian intervention in the Ukrainian Crisis: was Jus Contra Bellum "confirmed rather than weakened"?' (2015) 2 *Journal on the Use of Force & International Law* 17, 19.

In March 2021, Russia began a military build-up near its Ukrainian border followed by another between October 2021 to February 2022 in Russia and Belarus.¹⁴⁴ At first, Russia denied plans to attack Ukraine.¹⁴⁵ Yet, Putin also threatened military action against Ukraine unless NATO pledges not to admit Ukraine.¹⁴⁶ On 21 February 2022, Putin announced Russia's recognition of Donetsk and Luhansk as independent states and that it was sending 'peacekeepers' to these areas.¹⁴⁷ Three days later, Russia began a 'special military operation' with the stated aim of protecting Russia from Ukraine and Donetsk and Luhansk's peoples from genocide.¹⁴⁸ It launched airstrikes against Ukraine followed by a massive ground assault.¹⁴⁹ Its advances stalled due to Ukrainian resistance bolstered by Western aid.¹⁵⁰ It failed in the north,¹⁵¹ but captured territories in the south and east.¹⁵² Russia annexed Donetsk, Kherson, Luhansk, and Zaporizhzhia after holding referendums.¹⁵³ In September 2022,¹⁵⁴ and in June

¹⁴⁴ — —, 'Russia planning massive military offensive against Ukraine' (Washington Post, 3 December 2021) <https://www.washingtonpost.com/national-security/russia-ukraine-invasion/2021/12/03/98a3760e-546b-11ec-8769-2f4ecd7a2ad_story.html>; — —, 'Putin attacked Ukraine after insisting for months there was no plan to do so' (CBS News, 24 February 2022) <<https://www.cbsnews.com/news/russia-ukraine-putin-invasion-after-denials-now-says-no-occupation-plan/>>.

¹⁴⁵ Taylor Adam, 'Russia's attack on Ukraine came after months of denials it would attack' (Washington Post, 24 February 2022) <<https://www.washingtonpost.com/world/2022/02/24/ukraine-russia-denials/>>.

¹⁴⁶ — —, 'Russia demands NATO roll back from East Europe and stay out of Ukraine' (Reuters, 18 December 2021) <<https://www.reuters.com/world/russia-unveils-security-guarantees-says-western-response-not-encouraging-2021-12-17/>>; Roth Andrew, 'Putin warns of possible military response over "aggressive" NATO' (The Guardian, 22 December 2021) <<https://www.theguardian.com/world/2021/dec/21/putin-warns-of-possible-military-response-to-aggressive>>.

¹⁴⁷ — —, 'Russian President Putin Statement on Ukraine' (C-SPAN, 21 February 2022) <<https://www.c-span.org/video/?518097-2/russian-president-putin-statement-ukraine>>.

¹⁴⁸ — —, 'Transcript: Vladimir Putin's Televised Address on Ukraine' (Bloomberg, 24 February 2022) <<https://www.bloomberg.com/news/articles/2022-02-24/full-transcript-vladimir-putin-s-televised-address-to-russia-on-ukraine-feb-24>>

¹⁴⁹ — —, 'Russian forces launch full-scale invasion of Ukraine' (Al Jazeera, 24 February 2022) <<https://www.aljazeera.com/news/2022/2/24/putin-orders-military-operations-in-eastern-ukraine-as-un-meets>>.

¹⁵⁰ See Bartolini Giulio, 'Provision of Belligerent Materials in the Russia-Ukraine Conflict: Beyond the law of neutrality?' (2023) 99 *Questions of International Law* 3, 3.

¹⁵¹ Kramer Andrew, 'Kyiv's suburbs go quiet as Russian forces move out' (New York Times, 2 April 2022) <<https://www.nytimes.com/live/2022/04/02/world/ukraine-russia-war#kyivs-suburbs-go-quiet-as-russian-forces-move>>.

¹⁵² — —, 'Russia says it plans full control of Donbas and southern Ukraine' (Reuters, 23 April 2022) <<https://www.reuters.com/world/europe/russia-says-it-plans-full-control-donbas-southern-ukraine-ifax-2022-04-22/>>

¹⁵³ Walker Shaun, "'Referendums' on joining Russia under way in occupied Ukraine' (The Guardian, 23 September 2022) <<https://www.theguardian.com/world/2022/sep/23/occupied-parts-of-ukraine-prepare-to-vote-on-joining-russia>>.

¹⁵⁴ — —, 'Ukraine must demine 12,000 sq km of liberated areas in Kharkiv region' (Reuters, 21 September 2022) <<https://www.reuters.com/world/europe/ukraine-must-demine-12000-km2-liberated-areas-kharkiv-region-official-2022-09-21/>>; — —, 'Ukraine says it recaptured 1,200 sq km of Kherson region' (Reuters, 10 October 2022) <<https://www.reuters.com/world/europe/ukraine-says-it-recaptured-1200-sq-km-kherson-region-2022-10-09/>>.

2023,¹⁵⁵ Ukraine launched counteroffensives with limited success.

Russia, in its 2014 actions against Ukraine, arguably breached its duty not to use force or commit aggression.¹⁵⁶ For many, none of Russia's claims—intervention by invitation, humanitarian intervention, or support for self-determination—justify its conduct.¹⁵⁷ Tancredi and Wong argue that Yanukovych, who had been deposed, could not have validly invited Russia's intervention,¹⁵⁸ as the territorial state's consent must come from its legitimate and effective authorities.¹⁵⁹ Regarding humanitarian intervention, it remains to be seen, as discussed above, if the norm against force admits this exception.¹⁶⁰ Accordingly, it is doubtful, as O'Connell submits, if Russia could have lawfully intervened in Ukraine let alone annex parts of its territory.¹⁶¹ The same is true for support for self-determination. True, there is authority to support the legality of secession outside the context of colonisation and alien subjugation.¹⁶² However, as Vidmar points out, any change of sovereignty must be effected through lawful means.¹⁶³ The change in territory having been made through illegal intervention, Crimea's subsequent annexation cannot be 'cured' by the alleged 'expressed will of the people'.¹⁶⁴

Russia's 2022 invasion, despite its claims,¹⁶⁵ is a clear case of aggression. As Kirsch

¹⁵⁵ Vinograd Cassandra, 'Battling Russia, Ukrainian Leaders Also Fight High Expectations' (New York Times, 21 June 2023) <<https://www.nytimes.com/2023/06/21/world/europe/ukraine-russia-messaging-expectations.html>>.

¹⁵⁶ See e.g. Res 68/282 UN GA (27 March 2004) UN Doc A/RES/68/282; UNSC, 'Draft Resolution on the Crisis in Ukraine' (15 March 2014) S/2014/189. See also Corten, 'Russian intervention in the Ukraine' (n 143), 19 citing Tancredi, 'Russian Annexation of the Crimea' (n 135); Milano Enrico, 'Non-Recognition of Russia's Annexation of Crimea' (2014) 1 *Questions of International Law* 35; Christakis Theodore, 'Les conflits de secession en Crimée et dans l'est de l'Ukraine et le droit international' (2014) 141 *Journal de droit international* 750; Lagerwall Anne, 'L'agression et l'annexion de la Crimée par la Fédération de Russie' (2014) 1 *Questions of International Law* 63; Bismuth Régis, 'La crise ukrainienne et le droit international' (2014) 141 *Journal de droit international* 722.

¹⁵⁷ UNSC, 'Verbatim Record, 7125th Meeting' (2014) (n 157), 3–4; UNSC, 'Verbatim Record, 7134th Meeting' (13 March 2014) UN Doc S/PV.7134, 1.

¹⁵⁸ Tancredi, 'Russian Annexation of the Crimea' (n 135), 17–8; Wong Isabella, 'Authority to Consent to the Use of Force: Crimean & Yemeni Conflicts' (2019) 6 *Journal on the Use of Force & International Law* 52, 70–2.

¹⁵⁹ Doswald-Beck Louise, 'Legal Validity of Intervention by Invitation of the Government' (1985) 56 *British Yearbook of International Law* 189, 191.

¹⁶⁰ Longobardo Marco, 'Genocide, Obligations Erga Omnes, & Responsibility to Protect' (2015) 19(8) *International Journal of Human Rights* 1199, 1205–6.

¹⁶¹ O'Connell, 'Crisis in Ukraine' (n 134), 868.

¹⁶² *In re: Secession of Quebec* (1998) 2 SCR 217 (CAN), 282.

¹⁶³ Vidmar Jure, 'Annexation of Crimea & the Boundaries of the Will of the People' (2015) 16(3) *German Law Journal* 365, 374–6 citing *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ 404, 437–8. O'Connell, 'Crisis in Ukraine' (n 134), 871; Grant Thomas, 'Current Developments: Annexation of Crimea' (2015) 109 *American Journal of International Law* 68, 84.

¹⁶⁴ Vidmar, 'Annexation of Crimea' (n 163), 366.

¹⁶⁵ UNSC, 'Letter from the Permanent Representative of the Russia' (24 February 2022) UN Doc S/2022/154 cited in *Allegations of Genocide* (Ukraine v Russia) (Provisional Measures) [2022] (ICJ, General List 182, 22 March 2022), 9.

submits, there ‘is simply no plausible legal justification for the invasion’.¹⁶⁶ Russia cannot claim self-defence as ‘an “armed attack” [by Ukraine] is not “imminent” [...] in any conceivable way’.¹⁶⁷ Russia also cannot claim to assist Donetsk and Luhansk ‘in accordance with Article 51’ as these are not states under international law.¹⁶⁸ Finally, it is doubtful if Russia could appeal to humanitarian intervention as it remains to be seen if this is a ‘valid exception’ to the norm against force’,¹⁶⁹ and if genocide has indeed occurred in Ukraine.¹⁷⁰

States mostly condemned Russia’s actions. Responding to the events of 2014, some states sought an SC resolution affirming Ukraine’s sovereignty.¹⁷¹ However, this failed due to Russia’s veto.¹⁷² For its part, the GA called on ‘states to [...] refrain from actions aimed at [...] [disrupting] Ukraine’s [...] territorial integrity’.¹⁷³ Elsewhere, the Group of 8 (‘G8’) deemed Russia’s actions a ‘clear violation of [Ukraine’s] sovereignty and territorial integrity’.¹⁷⁴ The EU adopted a similar statement.¹⁷⁵ The same is true for the 2022 invasion. While attempts at an SC resolution failed due to Russia’s veto,¹⁷⁶ the GA, convened an emergency session,¹⁷⁷ in which it ‘deplore[d] [Russia’s] aggression’;¹⁷⁸ demanded the ‘cessation of the hostilities by Russia’;¹⁷⁹ suspended Russia’s HRC membership;¹⁸⁰ condemned the annexation of Donetsk,

¹⁶⁶ Krisch Nico, ‘After Hegemony: Law on the Use of Force & the Ukraine Crisis’ (EJIL: Talk!, 2 March 2022) <<https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis/>>; Arcari Maurizio & Bonafé Beatrice, ‘War in Ukraine: An Ongoing Debate’ (2023) 99 *Questions of International Law* 1, 1.

¹⁶⁷ Milanovic Marko, ‘What is Russia’s Legal Justification for Using Force against Ukraine?’ (EJIL: Talk!, 24 February 2022) <<https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/>>; Dworkin Anthony, ‘International law & the invasion of Ukraine’ (European Council on Foreign Relations, 25 February 2022).

¹⁶⁸ Janik Ralpa, ‘Putin’s War against Ukraine: Mocking International Law’ (28 February 2022) <<https://www.ejiltalk.org/putins-war-against-ukraine-mocking-international-law/>>. See Council of the EU, ‘Report on the Conflict in Georgia vol II’ (n 76), 282.

¹⁶⁹ Milanovic, ‘What is Russia’s Legal Justification for Using Force against Ukraine?’ (n 167).

¹⁷⁰ Janik, ‘Putin’s War against Ukraine’ (n 168). See *Allegations of Genocide* [2022] (n 165), 8.

¹⁷¹ UNSC, ‘Draft Resolution on the Crisis in Ukraine’ (2014) (n 156).

¹⁷² UNSC, ‘Verbatim Record, 7138th Meeting’ (15 March 2014) UN Doc S/PV.7138, 3.

¹⁷³ *Territorial integrity of Ukraine* Res 68/262 UNGA (1 April 2014) UN Doc A/RES/68/282.

¹⁷⁴ — —, ‘G7 Leaders Statement’ (White House Office of the Press Secretary, 2 March 2014) <<https://obamawhitehouse.archives.gov/the-press-office/2014/03/02/g-7-leaders-statement>>.

¹⁷⁵ Council of the EU, ‘Conclusions on Ukraine’ (3 March 2014) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141291.pdf>.

¹⁷⁶ Res 2623 UNSC (27 February 2022) UN Doc S/RES/2623. See UNSC, ‘Verbatim Record, 8981st meeting’ (27 February 2022) UN Doc S/PV.8981.

¹⁷⁷ See *Uniting for Peace* Res 377(V) UNGA (3 November 1950) UN Doc A/RES/377(V).

¹⁷⁸ *Aggression against Ukraine* Res ES-11/1 UNGA (2 March 2022) UN Doc A/RES/ES-11/1; *Comprehensive, just, & lasting peace in Ukraine* Res ES-11/6 UNGA (23 February 2023) UN Doc A/RES/ES-11/6.

¹⁷⁹ *Humanitarian consequences of the aggression against Ukraine* Res ES-11/2 UNGA (24 March 2022) UN Doc A/RES/ES-11/2.

¹⁸⁰ *Suspension of the rights of membership of the Russia in the HRC* Res ES-11/3 UNGA (7 April 2022) UN Doc A/RES/ES-11/3.

Kherson, Luhansk, and Zaporizhzhia,¹⁸¹ and stressed that Russia ‘must be held to account’ for its actions.¹⁸² Other institutional arrangements such as the AU, Economic Community of West African States (‘ECOWAS’), and Group of 20 (‘G20’) made similar demands.¹⁸³ Some took more concrete actions. The Council of Europe (‘CoE’) and the G8 suspended Russia’s membership,¹⁸⁴ and the Organisation for Economic Co-operation and Development (‘OECD’) terminated its accession negotiations with Russia.¹⁸⁵

This marks the only instance after 2001 where ‘states other than an injured state’ enforced the duty not to use force.¹⁸⁶ Some measures may be considered retorsions as the imposing states did not *a priori* breach any of their duties.¹⁸⁷ For instance, in 2014, the EU and US imposed arms embargoes against Russia.¹⁸⁸ Likewise, in 2022, states like the US, Japan, South Korea, Switzerland, EU member states, and Singapore imposed further arms restrictions against Russia.¹⁸⁹ A few states also banned Russian air traffic.¹⁹⁰ Others also closed their ports to

¹⁸¹ *Territorial integrity of Ukraine* Res ES-11/4 UNGA (12 October 2022) UN Doc A/RES/ES-11/4.

¹⁸² *Remedy & reparation for Ukraine* Res ES-11/5 UNGA (14 November 2022) UN Doc A/RES/ES-11/5.

¹⁸³ See African Union, ‘Statement from Chair of the African Union on the situation in Ukraine’ (24 February 2022), ECOWAS, ‘Communique’ (27 February 2022); Gan Nectar & Mogul Rhea, ‘G20 leaders condemn Russia’s war’ (CNN, 16 November 2022) <<https://edition.cnn.com/2022/11/16/asia/g20-summit-day-2-russia-intl-hnk/index.html>>.

¹⁸⁴ Committee of Ministers, ‘Legal & Financial Consequences of the Suspension of Russia from its Rights of Representation in the Council of Europe’ (2 March 2022) Resolution CM/Res(2022)1; OECD, ‘Statement from Secretary-General on initial measures taken in response to Russia’s aggression against Ukraine’ (OECD, 25 February 2022).

¹⁸⁵ Smale Alison & Shear Michael, ‘Russia Is Ousted From Group of 8 by US and Allies’ (New York Times, 24 March 2014) <<https://www.nytimes.com/2014/03/25/world/europe/obama-russia-crimea.html>>.

¹⁸⁶ Note Ukraine, the ‘injured state’, instituted several proceedings against Russia: ‘Application’, *Application of the Terrorist Financing Convention & ICERD* (Ukraine v Russia) (ICJ, General List No 166, 16 January 2017); *Ukraine v Russia* (Admissibility) (ECtHR, App Nos 20958/14 & 38334/18, 14 January 2021); ‘Notification & Statement of Claim of Ukraine’, *Dispute Concerning Coastal State Rights* (Ukraine v Russia) (PCA, 2017-06, 16 September 2016); ‘Application’, *Allegations of Genocide* (Ukraine v Russia) (ICJ, General List No 182, 27 February 2022).

¹⁸⁷ Hofer Alexandra, ‘The “Curiouser & Curiouser” Legal Nature of Non-UN Sanctions: US Sanctions against Russia’ (2018) 23 *Journal of Conflict & Security Law* 76, 87 citing Happold Matthew, ‘Targeted Sanctions & Human Rights’ in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 96.

¹⁸⁸ Council of the EU, ‘Council Decision 2014/512/CFSP’ (31 July 2014) L 229/13; *Determination Pursuant to Section 1(a) (i) of Executive Order 13662* (2014) (US).

¹⁸⁹ 87(42) Federal Register 19344, *Sanctions against Russia Under the Export Administration Regulation* (US); Ministry of Foreign Affairs of Japan, ‘Sanction Measures following Russia’s military actions in Ukraine’ (25 February 2022) <https://www.mofa.go.jp/press/release/press6e_000371.html>; South Korea Ministry of Foreign Affairs, ‘Decision on Situation in Ukraine’ (28 February 2022) <https://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=322003&page=1>; Swiss Federal Council, ‘Trade & financial sanctions imposed against Russia’ (4 March 2022) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87474.html>>; Council of the EU, ‘Council Decision 2022/428/CFSP’ (15 March 2022) LI 87/13; Council of the EU, ‘Council Decision 2022/2474/CFSP’ (16 December 2022) L 259/122; Singapore Ministry of Foreign Affairs, ‘Sanctions & Restrictions against Russia’ (5 March 2022) <<https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2022/03/20220305-sanctions>>.

¹⁹⁰ Government of Iceland, ‘Further solidarity measures for Ukraine’ (27 February 2022)

Russian vessels.¹⁹¹

The other unilateral measures, as explained below, may be considered countermeasures. Indeed, Russia has since objected to these,¹⁹² and levied its counter-sanctions.¹⁹³ In 2014, the US restricted exports to the Russian oil sector.¹⁹⁴ For its part, the EU imposed an export embargo on Russia's energy sector and restrictions on Russian financial institutions.¹⁹⁵ Australia, Canada, and Norway did the same.¹⁹⁶ In 2022, the US, EU, Switzerland, the UK, and Canada levied further restrictions on Russia's oil sector.¹⁹⁷ The EU, Japan, Norway, Switzerland, Australia, South Korea, and the US also expanded the restrictions on investments

<<https://www.government.is/news/article/2022/02/27/Further-solidarity-measures-for-Ukraine/>>; Government of Norway, 'Norway to increase support to Ukraine' (27 February 2022); Council of the EU, 'Council Decision 2022/335/CFSP' (28 February 2022) LI 59/1; Swiss Federal Council, 'Switzerland adopts EU sanctions against Russia' (28 February 2022) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87386.html>>; US Federal Aviation Administration, 'U.S. Will Block Russian Aircraft from Using All Domestic Airspace' (2 March 2022); UK Foreign Office, 'UK strengthens ban on Russia aircraft and introduces new trade sanctions' (9 March 2022) <<https://www.gov.uk/government/news/uk-strengthens-ban-on-russia-aircraft-and-introduces-new-trade-sanctions>>.

¹⁹¹ Shepardson David, 'Biden bans Russian ships from US ports' (Reuters, 22 April 2022) <<https://www.reuters.com/world/us/biden-ban-russian-affiliated-ships-us-ports-sources-2022-04-21/>>; Government of Norway, 'New sanctions against Russia incorporated into Norwegian law' (29 April 2022) <<https://www.regjeringen.no/en/aktuelt/new-sanctions-against-russia-incorporated-into-norwegian-law/id2910809/>>.

¹⁹² Russian Ministry of Foreign Affairs, 'Comment on the Continuing Anti-Russian Sanctions of the US' (30 Jul 2014) <https://www.mid.ru/en_GB/posledniye_dobavleniye/-/asset_publisher/MCZ7HQmDqBY/content/id/2581641>; Russian Ministry of Foreign Affairs, 'Comment regarding further Anti-Russian Sanctions agreed by the EU' (30 Jul 2014) <<https://www.rusemb.org.uk/foreignpolicy/2383>>.

¹⁹³ Hofer, 'US Sanctions against Russia' (n 187), 79. Bogdanova Iryna, *Unilateral Sanctions in International Law & the Enforcement of Human Rights: Impact of the Principle of Common Concern of Humankind* (BRILL 2022), 37. See —, 'Moscow retaliates against Western sanctions with export bans' (Reuters, 11 March 2022) <<https://www.reuters.com/business/russia-suspends-exports-tech-telecoms-medical-auto-agricultural-equipment-until-2022-03-10/>>; —, 'Russia switches off Europe's main gas pipeline until sanctions are lifted' (Financial Times, 5 September 2022) <<https://www.ft.com/content/2624cc0f-57b9-4142-8bc1-4141833a73dd>>.

¹⁹⁴ Executive Order 13662, *Blocking Property of Persons Contributing to the Situation in Ukraine* (2014) (US).

¹⁹⁵ Council of the EU, 'Council Decision 2014/512/CFSP' (n 188); Council of the EU, 'Council Decision 2014/659/CFSP' (8 Sep 2014) L 271/54; Council of the EU, 'Council Decision 2014/933/CFSP' (18 Dec 2014) L 365/152.

¹⁹⁶ F2017C00697, *Autonomous Sanctions (Russia, Crimea and Sevastopol) Specification* (2017) (AUS); SOR/2015-179, *Regulations Amending the Special Economic Measures (Ukraine) Regulations* (2015); Nilsen Thomas, 'Norway continues sanctions on Russia' (Barents Observer, 22 December 2015) <<https://thebarentsobserver.com/ru/node/240>>.

¹⁹⁷ US Department of Commerce, 'Commerce Takes Further Actions to Target Russian Strategic Industries and Punish Enablers of Aggression' (4 March 2022) <<https://www.commerce.gov/news/press-releases/2022/03/commerce-takes-further-actions-target-russian-strategic-industries-and>>; Council of the EU, 'Council Decision 2022/428/CFSP' (n 189); Swiss Federal Council, 'Trade & financial sanctions imposed against Russia' (n 189); UK Foreign Office, 'UK imposes sweeping new sanctions' (6 April 2022) <<https://www.gov.uk/government/news/uk-imposes-sweeping-new-sanctions-to-starve-putins-war-machine>>; UK Treasury, 'UK government bans services enabling the transport of Russian oil' (3 November 2022) <<https://www.gov.uk/government/news/uk-government-bans-services-enabling-the-transport-of-russian-oil>>; SOR/2022-173, *Regulations Amending the Special Economic Measures (Russia) Regulations* (2022) (CAN).

in Russia, transactions involving Russian sovereign debt, and transactions with Russian banks.¹⁹⁸ Some states also imposed export restrictions on luxury goods,¹⁹⁹ aviation supplies,²⁰⁰ and technological goods and services.²⁰¹ Others levied import restrictions on agricultural products,²⁰² petroleum products,²⁰³ aluminium,²⁰⁴ iron and steel,²⁰⁵ and precious metals.²⁰⁶

¹⁹⁸ Council of the EU, 'Council Decision 2022/264/CFSP' (23 Feb 2022) LI 42/95; Council of the EU, 'Council Decision 2022/428/CFSP' (n 189); Ministry of Foreign Affairs of Japan, 'Sanction Measures following Russia's Recognition of the "Independence" of the "Donetsk People's Republic" and the "Luhansk People's Republic"' (24 Feb 2022) <https://www.mofa.go.jp/press/release/press4e_003085.html>; Government of Norway, 'Norway to increase support to Ukraine' (n 190); Swiss Federal Council, 'Switzerland adopts EU sanctions against Russia' (n 190); F2022L00235, *Autonomous Sanctions (Designated Persons, Entities, & Declared Persons—Russia & Ukraine)* (2022) (AUS); South Korean Ministry of Foreign Affairs, 'Government's Decision on Additional Financial Sanctions against Russia' (7 March 2022) <https://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=322012&page=1>; Executive Order 14071, *Prohibiting New Investment in & Certain Services to the Russia in Response to Russian Aggression* (2022) (US).

¹⁹⁹ Executive Order 14068, *Prohibiting Certain Imports, Exports, & New Investment With Respect to Continued Russian Aggression* (2022) (US); F2022L00522, *Autonomous Sanctions (Export Sanctioned Goods—Russia) Designation* (2022) (AUS); Council of the EU, 'Council Decision 2022/428/CFSP' (n 189); Swiss Federal Council, 'Adoption of further EU sanctions against Russia' (18 March 2022) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87677.html>>.

²⁰⁰ UK Foreign Office, 'UK's new trade sanctions' (n 190); Council of the EU, 'Council Decision 2022/578/CFSP' (8 April 2022) L 111/70.

²⁰¹ SOR/2022-67, *Regulations Amending the Special Economic Measures (Russia) Regulations* (2022) (CAN); Council of the EU, 'Council Decision 2022/578/CFSP' (n 200); UK Foreign Office, 'Sanctions in response to Putin's illegal annexation of Ukrainian regions' (30 September 2022) <<https://www.gov.uk/government/news/sanctions-in-response-to-putins-illegal-annexation-of-ukrainian-regions>>.

²⁰² Council of the EU, 'Council Decision 2022/578/CFSP' (n 200).

²⁰³ Executive Order 14066, *Prohibiting Certain Imports & New Investments With Respect to Continued Russian Efforts To Undermine the Sovereignty & Territorial Integrity of Ukraine* (2022) (US); UK Treasury, 'UK announces new economic sanctions against Russia' (15 March 2022) <<https://www.gov.uk/government/news/uk-announces-new-economic-sanctions-against-russia>>; Ministry of State for Business & Energy, 'Statement on the phasing out of Russian oil imports' (9 March 2022) <<https://www.gov.uk/government/speeches/statement-on-the-phasing-out-of-russian-oil-imports>>; F2022L00310, *Autonomous Sanctions (Import Sanctioned Goods—Russia) Designation* (2022) (AUS); SOR/2022-52, *Regulations Amending the Special Economic Measures (Russia) Regulations* (2022) (CAN); Council of the EU, 'Council Decision 2022/884/CFSP' (3 June 2023) L 153/128; Swiss Federal Council, 'Implementation of further EU sanctions against Russia' (29 June 2022) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-89549.html>>; Council of the EU, 'Council Decision 2022/1909/CFSP' (6 October 2022) L 259/122.

²⁰⁴ F2022L00343, *Autonomous Sanctions (Import Sanctioned Goods—Russia) Designation* (2022) (AUS).

²⁰⁵ Council of the EU, 'Council Decision 2022/428/CFSP' (n 189); UK Foreign Office, 'UK imposes sweeping new sanctions' (n 197); US Trade Representative, 'Imposition of Higher Tariffs on Additional Imports from Russia' (24 February 2023) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/february/statement-ambassador-katherine-tai-imposition-higher-tariffs-additional-imports-russia>>; SOR/2022-52 (CAN).

²⁰⁶ UK Department for International Trade, 'UK announces further import sanctions against Russia' (21 April 2022) <<https://www.gov.uk/government/news/uk-announces-further-import-sanctions-against-russia>>; US Department of Treasury, 'U.S. Treasury Sanctions Nearly 100 Targets in Putin's War Machine, Prohibits Russian Gold Imports' (28 June 2022) <<https://home.treasury.gov/news/press-releases/jy0838>>; Government of New Zealand, 'Imports of Russian gold banned' (4 July 2022) <<https://www.beehive.govt.nz/release/imports-russian-gold-banned>>; Council of the EU, 'Council Decision 2022/1272/CFSP' (21 July 2022) L 193/219; Swiss Federal Council, 'Switzerland adopts new sanctions' (3 August 2022) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-89874.html>>; F2022L01282, *Autonomous Sanctions (Import Sanctioned Goods—Russia) Designation* (2022) (AUS).

Canada, the US, the UK, and Japan, Australia, New Zealand, also suspended Russia's 'most-favoured-nation' ('MFN') status.²⁰⁷

The trade measures, as Hofer suggests, may be deemed quantitative trade restrictions prohibited by GATT Article XI.²⁰⁸ Likewise, the tariff restrictions may be apparent breaches of the MFN clause under Article I. Although these measures may fall under Article XXI's security exception,²⁰⁹ it would seem that no state invoked this justification.²¹⁰ As for the financial and service restrictions these, according to Dawidowicz, may also *a priori* breach the MFN clause under Article II of the General Agreement of Trade in Services ('GATS').²¹¹ In this regard, no 'exemption to the application of GATS Article II seems applicable'.²¹² The financial restrictions, as Ruys suggests, may breach Article VIII(2)(a) of the IMF Agreement which prohibits 'restrictions on payments and transfers for current international transactions'.²¹³ Finally, the trade restrictions may also *a priori* breach the imposing states' duties under their bilateral trade agreements with Russia.²¹⁴

Some states also levied targeted measures. In 2014, the EU, US, Australia, Albania, Iceland, Montenegro, and Japan levied travel restrictions on individuals that threaten Ukraine's sovereignty.²¹⁵ The US, EU, Canada, Australia, Japan, and Switzerland also imposed asset

²⁰⁷ SOR/2022-35, *Withdrawal of the Most-Favoured-Nation status from Russia and Belarus* (2022) (CAN); PL 117-110, *Suspending Normal Trade Relations with Russia and Belarus Act* (2022) (US); UK Treasury, 'UK announces new economic sanctions against Russia' (n 203); Yamaguchi Mari, 'Japan formally revokes Russia's "most favored nation" status' (AP News, 21 April 2022) <<https://apnews.com/article/russia-ukraine-business-tokyo-europe-moscow-e264ff718a4c998fe66c67e687864b12>>; *Autonomous Sanctions (Import Sanctioned Goods—Russia) Designation 2022* (AUS); Government of New Zealand, 'New Zealand to apply trade sanctions in response to Russian atrocities' (6 April 2022) <<https://www.beehive.govt.nz/release/new-zealand-apply-trade-sanctions-response-russian-atrocities>>.

²⁰⁸ Hofer, 'US Sanctions against Russia' (n 187), 92–3, 95 citing Neuwirth Rostam & Svetlicini Alexandr, 'Economic Sanctions over the Ukraine Conflict & the WTO' (2015) 49 *Journal of World Trade* 891, 894.

²⁰⁹ See Watson James, 'World Trade Organisation & Unilateral Sanctions: Prohibited or Possible?' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 204–5; Smeets Maarten, 'Economic Sanctions & the WTO' in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 292 citing Panel Report, 'Russia—Measures concerning Traffic in Transit' (29 April 2019) WTO Doc WT/DS512/7, ¶¶7.132–5, 7.138–9; 7.140–5.

²¹⁰ Hofer, 'US Sanctions against Russia' (n 187), 93.

²¹¹ Dawidowicz, *Third Party Countermeasures* (n 3), 235.

²¹² Ibid.

²¹³ Ruys Tom, 'Sanctions, Retorsions, & Countermeasures: Concepts & Legal Framework' in Van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 31.

²¹⁴ See *Agreement on Partnership and Cooperation between the European Communities & Russia* (adopted 24 June 1994, entered into force 01 December 1997) I-34462; *Agreement between Canada & USSR for the Promotion & Reciprocal Protection of Investments* (adopted 20 November 1989, entered into force 27 June 1991) CTS 1991/31; *Agreement between Japan & Russia for the Promotion & Reciprocal Protection of Investments* (adopted 13 November 1998, entered into force 27 May 2000) IC-BT 191.

²¹⁵ Executive Order 13660, *Blocking Property of Certain Persons Contributing to the Situation in Ukraine* (2014) (US); Council of the EU, 'Council Decision 2014/145/CFSP' (17 March 2014) L 78/16; High

freezes and financial restrictions against individuals and entities responsible for or have contributed to Russia's conduct.²¹⁶ In 2022, the US, the EU, the UK, Canada, Australia, Switzerland, Japan, Singapore, and New Zealand levied additional asset freezes and travel restrictions.²¹⁷

The legality of these measures, a relatively new phenomenon,²¹⁸ is less clear and will be discussed in *Chapter 9*. These measures are levied directly against individuals and entities and not towards the wrongful state. Thus, as scholars such as Hofer and Subedi suggest, they may not 'fit within the scope of the [implementation of] responsibility'.²¹⁹ Indeed, authors like Beaucillon and Schmidt submit that it is more correct to consider them an exercise of the imposing states' prescriptive jurisdiction beyond its territory,²²⁰ designed 'to influence

Representative of the European Union, 'Declaration on the alignment of certain third countries with the Council Decision 2014/145/CFSP' (11 April 2014) 8937/1/14 REV1; UK Foreign Office, 'UK Sanctions relating to Russia' (15 April 2019) <<https://www.gov.uk/government/collections/uk-sanctions-on-russia>>; F2015C00408, *Autonomous Sanctions (Designated Persons, Entities, & Declared Persons—Ukraine)* (2014) (AUS); Ministry of Foreign Affairs of Japan, 'Statement by the Minister for Foreign Affairs of Japan on the Sanctions against Russia over the situation in Ukraine' (29 April 2014) <https://www.mofa.go.jp/press/release/press4e_000281.html>.

²¹⁶ Executive Order 13660 (US); Executive Order 13661, *Blocking Property of Persons Contributing to the Situation in Ukraine* (2014) (US); Executive Order 13662 (US); Executive Order 13685, *Blocking Property of Certain Persons & Prohibiting Certain Transactions with Respect to Crimea* (2014) (US); Executive Order 13849, *Implementation of Certain Sanctions Set Forth in the Countering America's Adversaries Through Sanctions Act* (2018) (US); Council of the EU, 'Council Decision 2014/145/CFSP' (n 215); SOR/2014-60, *Special Economic Measures (Russia) Regulations* (2014); *Autonomous Sanctions (Designated Persons, Entities, & Declared Persons—Ukraine)* (AUS); —, 'Japan formally OKs additional Russian Sanctions' (Associated Press, 5 August 2014) <<https://apnews.com/article/b28ca28cc4ba40138ce21adc4f07e958>>; Swiss Federal Council, 'Situation in Ukraine: Federal Council decides on further measures to prevent the circumvention of international sanctions' (27 August 2014) <<https://www.news.admin.ch/message/index.html?lang=en&msg-id=54221>>.

²¹⁷ Executive Order 14065, *Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts in Ukraine* (2022) (US); Council of the EU, 'Council Decision 2022/329/CFSP' (25 February 2022) LI 42/95; UK Foreign Office, 'Foreign Secretary imposes UK's most punishing sanctions on Russia' (24 February 2022) <<https://www.gov.uk/government/news/foreign-secretary-imposes-uks-most-punishing-sanctions-to-inflict-maximum-and-lasting-pain-on-russia>>; SOR/2022-28, *Regulations Amending the Special Economic Measures (Ukraine) Regulations* (2022) (CAN); SOR/2022-30, *Regulations Amending the Special Economic Measures (Ukraine) Regulations* (2022) (CAN); F2022L00187, *Autonomous Sanctions (Designated Persons, Entities, & Declared Persons—Ukraine)* (2022) (AUS); F2022L00193, *Autonomous Sanctions (Designated Persons, Entities, & Declared Persons—Ukraine)* (2022) (AUS); Swiss Federal Council, 'Switzerland adopts EU sanctions against Russia' (n 190); Ministry of Foreign Affairs of Japan, 'Measures following Russia's Recognition of Donetsk & Luhansk' (n 198); Ministry of Foreign Affairs of Japan, 'Sanction Measures following Russia's actions in Ukraine' (n 189); Singapore Ministry of Foreign Affairs, 'Sanctions & Restrictions against Russia' (n 189); Government of New Zealand, 'First sanctions against Russia' (18 March 2022) <<https://www.beehive.govt.nz/release/first-tranche-sanctions-under-russia-sanctions-act-enacted>>.

²¹⁸ Ashley Louisa, 'Status of Unilateral Countermeasures in International Law' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 234.

²¹⁹ Hofer, 'US Sanctions against Russia' (n 187), 78; Subedi Surya, 'Status of Unilateral Sanctions in International Law' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 49.

²²⁰ Beaucillon Charlotte, 'Unilateral & Extraterritorial Sanctions: Definitions, State of Practice, & Contemporary Challenges' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 5; Schmidt Julia, 'Legality of Unilateral Extra-Territorial Sanctions under International Law' (2022) 27 *Journal of Conflict & Security Law* 53, 60.

behaviour or conduct abroad',²²¹ pursuant to the imposing state's laws and policies.²²² These measures may also breach duties directly owed by the imposing state to the individuals and entities,²²³ such as those under investment,²²⁴ and human rights laws.²²⁵ If they do, the imposing state commits a wrongful act.²²⁶ Furthermore, as they do not involve the suspension of duties owed to the wrongful state, they cannot be deemed countermeasures.²²⁷ Thus, the wrongfulness of the measures cannot be precluded.

It must be noted that some states also criticised the measures levied on Russia. In 2014, Hungary, Slovakia, and Italy, signalled concerns regarding the EU measures.²²⁸ In 2022, Mexico, Brazil, Argentina, Indonesia, Turkey, South Africa, and Serbia, announced that they would not levy measures against Russia.²²⁹ Still a few, like China,²³⁰ stressed the illegality of

²²¹ Kerbat Yann, 'Unilateral/Extraterritorial Sanctions as a Challenge to the Theory of Jurisdiction' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 166.

²²² Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 213), 23.

²²³ Hofer, 'US Sanctions against Russia' (n 187), 78, 89, 103.

²²⁴ van Aaken A, 'International Investment Law & Decentralized Targeted Sanctions: An Uneasy Relationship' (Columbia FDI Perspectives, No 164, 5 January 2016).

²²⁵ Jazairy Idriss, 'Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (10 August 2015) UN Doc A/HRC/30/45, 6, 54; Lugato M, 'Sanctions & Individual Rights' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 173.

²²⁶ Hofer, 'US Sanctions against Russia' (n 187), 89; Subedi, 'Status of Unilateral Sanctions' (n 219), 49. See Focarelli Carlo, *International Law as Social Construct: Struggle for Global Justice* (Oxford University Press 2012), 484.

²²⁷ ILC, 'Summary Records of the 52nd Session' (2000) I YbILC 1, 266, 271; Hofer, 'US Sanctions against Russia' (n 187), 90; Subedi, 'Status of Unilateral Sanctions' (n 219), 49.

²²⁸ Szakacs Gergely, 'Europe "shot itself in foot" with Russia sanctions: Hungary PM' (Reuters, 15 August 2016) <<https://www.reuters.com/article/us-ukraine-crisis-sanctions-hungary-idUSKBN0GF0ES20140815>>; —, 'Slovak PM slams sanctions on Russia' (Reuters, 31 August 2014) <<https://www.reuters.com/article/uk-eu-summit-sanctions-slovakia/slovak-pm-slams-sanctions-on-russia-threatens-to-veto-new-ones>>; Baczynska Gabriela, 'Italy, Hungary say no automatic renewal of Russia sanctions' (Reuters, 14 March 2016) <<https://www.reuters.com/article/us-ukraine-crisis-eu/italy-hungary-say-no-automatic-renewal-of-russia-sanctions>>.

²²⁹ —, 'Mexico declines to impose economic sanctions on Russia' (Reuters, 2 March 2022) <<https://www.reuters.com/world/mexicos-president-says-will-not-take-any-sanctions-against-russia-2022-03-01/>>; —, 'Brazil votes for UN resolution, but criticizes "indiscriminate sanctions" against Russia' (Reuters, 3 March 2022) <<https://www.reuters.com/world/brazil-votes-un-resolution-criticizes-indiscriminate-sanctions-2022-03-02/>>; —, 'Argentina rejects sanctioning Russia' (Anadolu Agency, 4 March 2022) <<https://www.aa.com.tr/en/americas/argentina-rejects-sanctioning-russia-foreign-minister/2523216>>; Tani Shotaro & Jibiki Kota, 'Jokowi calls for cease-fire in Russia-Ukraine war' (Nikkei Asia, 9 March 2022) <<https://asia.nikkei.com/Editor-s-Picks/Interview/Indonesia-s-Jokowi-calls-for-cess-fire-in-Russia-Ukraine-war>>; —, 'Turkey considers sanctions against Russia will not resolve Ukraine-Russia crisis' (Asian News International, 13 March 2022) <<https://www.aninews.in/news/world/middle-east/turkey-considers-sanctions-against-russia-will-not-resolve-ukraine-russia-crisis20220313190637/>>; South Africa, 'President: Oral reply to questions in the National Assembly' (17 March 2022) <<https://www.gov.za/speeches/replies-president-cyril-ramaphosa-questions-oral-reply-national-assembly>>; —, 'Serbia's president Aleksandar Vucic rejects sanctions on Russia' (Financial Times, 21 April 2022) <<https://www.ft.com/content/0041d1a9-7fbd-4ea3-8176-e8b7d99e4a92>>

²³⁰ Zhu Grace, 'China Won't Take Part in Western Financial Sanctions on Russia' (Wall Street Journal, 2

these measures. All in all, while several states adopted measures against Russia, some still opposed or did not adopt this practice.

G. Azerbaijani-Armenian conflict (2020–)

Azerbaijan and Armenia had long been involved in a dispute concerning Nagorno-Karabakh. The region, for much of its history, had a sizeable ethnic Armenian population.²³¹ Yet, the Soviet Union, despite protests from the Armenian Soviet Socialist Republic ('SSR'), incorporated it into the Azerbaijan SSR.²³² After the Soviet Union collapsed, Armenians in Nagorno-Karabakh, which sought to join Armenia, held a referendum on this question.²³³ As ethnic Azerbaijanis boycotted the referendum, the result favoured Nagorno-Karabakh's secession from Azerbaijan and the unrecognised Republic of Artsakh's formation.²³⁴ A full-scale conflict followed with Azerbaijan fighting Artsakh and Armenian forces.²³⁵ By the time the parties agreed to a Russian-brokered ceasefire in 1994, Azerbaijan had lost control of Nagorno-Karabakh to Artsakh.²³⁶ Yet, it is important to note that while Artsakh 'carries out [Nagorno-Karabakh's] day-to-day administration', Armenia maintains effective control over the territory.²³⁷ For this reason, most states consider Nagorno-Karabakh to be under Armenian occupation.²³⁸

Clashes erupted between Azerbaijan and Artsakh-Armenian forces in Nagorno-Karabakh notably in 2008, 2010, 2012, and 2014. In 2020, Azerbaijan, which had strengthened its military

March 2022) <<https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-02/card/china-won-t-take-part-in-western-financial-sanctions-on-russia-bank-regulator-chief-uWcY1AvqXs5ssr2057HA>>. Note that China cut its tariffs on coal imports to zero in a move that benefits Russia (—, 'China to cut coal import tariffs to zero from May 1' (Reuters, 28 April 2022) <<https://www.reuters.com/business/energy/china-cut-coal-import-tariffs-zero-may-1-2022-04-28/>>)

²³¹ Krüger Heiko, 'Nagorno-Karabakh' in Walter Christian, *et al.* (eds), *Self-Determination & Secession in International Law* (Oxford University Press 2014), 214–5.

²³² *Ibid.*, 215.

²³³ Mowbray Carolyn, 'Armenia & Azerbaijan's Struggle with Occupation in Nagorno-Karabakh' (2018) 44 *Brooklyn Journal of International Law* 449, 456.

²³⁴ *Chiragov & others v Armenia* (Judgment) (ECtHR, App no 13216/05, 16 June 2015), ¶17.

²³⁵ *Ibid.*, ¶18

²³⁶ Mowbray, 'Occupation in Nagorno-Karabakh' (n 233), 456.

²³⁷ Ruys Tom & Rodriguez Silvestre, 'Military Action to Recover Occupied Land: Lawful Self-defence or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisted' (2021) 97 *International Legal Studies* 665, 670.

²³⁸ See e.g. Res 884 UNSC (12 November 1993) UN Doc S/RES/884; Res 874 UNSC (14 October 1993) UN Doc S/RES/874; Res 853 UNSC (29 July 1993) UN Doc S/RES/853; Res 822 UNSC (30 April 1993) UN Doc S/RES/822; Res 62/243 UNGA (14 March 2008) UN Doc A/RES/62/243.

compared to Armenia,²³⁹ launched a campaign to retake the territory.²⁴⁰ Within two months, it recovered most of the territory it lost in 1994.²⁴¹ Hostilities ended after Azerbaijan and Armenia agreed on a Russian-mediated ceasefire. This allowed Azerbaijan to retain the areas it recaptured and required Armenia to return most of the territory it occupied around Nagorno-Karabakh.²⁴²

States had long viewed Armenia's occupation of Nagorno-Karabakh as unlawful.²⁴³ Yet, the question in this instance pertains to the legality of Azerbaijan's actions—a question that some posit is governed by *jus ad bellum*.²⁴⁴ As Ruys and Rodriguez submit, a state's prolonged 'belligerent occupation' of a territory 'does not eclipse the need for a proper legal basis [for the use of force] when one of the states launches a [new] attack against the other'.²⁴⁵ Furthermore, the 'mere fact that a state uses armed force within its [...] territory' does not *per se* 'prevent the application of the *jus ad bellum*'.²⁴⁶ Such 'force' may still be 'directed against another state'.²⁴⁷

²³⁹ Walker-Forestier Robin, 'New weapons for an old conflict spell danger' (Al Jazeera, 13 October 2020) <<https://www.aljazeera.com/features/2020/10/13/nagorno-karabakh-new-weapons-for-an-old-conflict-spell-danger>>.

²⁴⁰ —, 'Armenia and Azerbaijan fight over disputed Nagorno-Karabakh' (BBC News, 28 September 2020) <<https://www.bbc.com/news/world-europe-54314341>>

²⁴¹ Kramer Andrew, 'Armenia Accepts a Deal in Nagorno-Karabakh War' (New York Times, 9 November 2020) <<https://www.nytimes.com/2020/11/09/world/middleeast/armenia-settlement-nagorno-karabakh-azerbaijan.html>>.

²⁴² —, 'Statement of Azerbaijan, Armenia, & Russia' (10 November 2020) <<http://en.kremlin.ru/events/president/news/64384>>; Kelemen Bence, 'Right to Self-defense to Recover Occupied Territory? A Glance at the Nagorno-Karabakh Conflict' (2020) *Pécs Journal of International and European Law* 5, 6.

²⁴³ See Res 62/243 (n 238); CoE Parliamentary Assembly, 'Resolution 1416: The Conflict Over the Nagorno-Karabakh Region' (29 November 2004) Doc 10364; European Parliament, 'Need for an EU Strategy for the South Caucasus' (20 May 2010) C161 2/20.

²⁴⁴ Ruys & Rodriguez, 'Military Action to Recover Occupied Land' (n 237), 673, 676 ('Thus, when Syria [and] Egypt [attacked] Israel [during] the [1973] Yom Kippur War [discussed above], this was undeniably regarded as a matter governed by the *jus ad bellum*, notwithstanding the ongoing Israeli occupation of Arab land in the wake of the [1967] Six-Day War'). See Milanovic Mark & Hadzi-Vidanovic Vidan, 'A Taxonomy of Armed Conflict' in White Nigel & Henderson Christian (eds), *Research Handbook on International Conflict & Security Law* (2013), 301.

²⁴⁵ Ruys & Rodriguez, 'Military Action to Recover Occupied Land' (n 237), 675 ('In the specific context of belligerent occupation, the dual application of the *jus ad bellum* and IHL is particularly present throughout its entire duration') citing Greenwood Christopher, 'Advisory Opinion on Nuclear Weapons & the Contribution of the International Court to International Humanitarian Law' (1997) 37 *International Review of the Red Cross* 65, 74; Koutroulis Vaïos, 'Of Occupation, Jus ad Bellum, & Jus in Bello: A Reply to Solon Solomon' (2011) 10 *Chinese Journal of International Law* 912, 913; Giladi Rotem, 'Jus ad Bellum/Jus in Bello Distinction & the Law of Occupation' (2012) 41 *Israel Law Review* 246, 249.

²⁴⁶ Ruys & Rodriguez, 'Military Action to Recover Occupied Land' (n 237), 681. *Contra* Wilmschurst Elizabeth, 'Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *International & Comparative Law Quarterly* 963, 966 ('[Must be] directed from outside territory under the control of the defending state').

²⁴⁷ Ruys & Rodriguez, 'Military Action to Recover Occupied Land' (n 237), 681 ('When state A invites [state

Thus, conflicts like this—essentially between Azerbaijan and Armenia—retain their inter-state scope and are not purely internal matters.²⁴⁸ Azerbaijan justified its military action as a measure of self-defence.²⁴⁹ However, as previously discussed, the prevailing view is that self-defence does not necessarily justify the use of force to recover a territory possessed by another state.²⁵⁰ While the disputed territory could have been occupied through force, this does not mean that the force itself is continuing.²⁵¹ Of course, occupation *per se* constitutes aggression.²⁵² Yet, as Ruys, Rodriguez, Kelemen, and Corten submit, not every act of aggression amounts to an armed attack.²⁵³ Based on reports, Armenia appears not to have launched an ‘armed attack’ against Azerbaijan in 2020. Thus, Azerbaijan cannot justify its conduct as self-defence. In addition, Azerbaijan’s use of force arguably breached the duty not to use force to solve territorial disputes and to respect armistice lines.²⁵⁴ The rule, as earlier discussed, is a corollary to the norm against force and applies irrespective of the validity of the title over the disputed territory.²⁵⁵

States’ reactions to the conflict varied. Some condemned Armenia’s occupation of Nagorno-Karabakh and reiterated calls for its withdrawal.²⁵⁶ Others criticised Azerbaijan’s breach of the ceasefire.²⁵⁷ Most called for the conflict’s peaceful resolution.²⁵⁸ For its part, SC

B’s troops] [...] and they overstay their welcome after the invitation has been retracted, [state A’s attempt] to forcibly expel these troops is not a question of law enforcement but a matter [of] *jus ad bellum*’).

²⁴⁸ Ibid, 682 citing Milanovic Mark, ‘Lessons for Human Rights & Humanitarian Law in the War on Terror’ (2007) 89 *International Review of the Red Cross* 373, 384. Corten, *Law Against War* (n 10), 150.

²⁴⁹ UNGA, ‘Letter from the Permanent Representative of Azerbaijan’ (28 Sept 2020) UN Doc A/75/357-S/2020/948.

²⁵⁰ Ruys & Rodriguez, ‘Military Action to Recover Occupied Land’ (n 237), 693.

²⁵¹ Ibid.

²⁵² *Definition of Aggression* Res 3314 (XXIX) UNGA (14 December 1974) UN Doc A/RES/3314, art 3(a).

²⁵³ Ruys & Rodriguez, ‘Military Action to Recover Occupied Land’ (n 237), 689 ff citing Special Committee on the Question of Defining Aggression, ‘Summary Records of the 67th to 78th Meetings’ (19 October 1970) UN Doc A/AC.134/SR.67-78; Special Committee on the Question of Defining Aggression, ‘Summary Records of the 79th to 91st Meetings’ (8 February 1971) UN Doc A/AC.134/SR.79-91. Kelemen, ‘Self-defense to Recover Occupied Territory’ (n 242), 8; Corten, *Law Against War* (n 10), 150.

²⁵⁴ Res 2625 (XXV) (n 120); *Jus Ad Bellum—Ethiopia’s Claims* (n 62), ¶10

²⁵⁵ Ruys & Rodriguez, ‘Military Action to Recover Occupied Land’ (n 237), 694.

²⁵⁶ See e.g. Turkic Council, ‘Statement of the Secretary General of the Turkic Council’ (28 September 2020) <https://www.turkkon.org/en/haberler/statement-of-the-secretary-general-of-the-turkic-council_2075>; Organisation of Islamic Cooperation, ‘OIC Condemns repeated Provocations and Aggression by Armenian Military Forces against Azerbaijan’ (28 September 2020); — —, ‘Armenia-Azerbaijan clashes: How the world reacted’ (Al Jazeera, 27 September 2020) <<https://www.aljazeera.com/news/2020/9/27/armenia-azerbaijan-clashes-world-reactions>>;

²⁵⁷ See e.g. Cyprus Ministry of Foreign Affairs, ‘Statement by the Ministry of Foreign Affairs on the situation in Nagorno Karabakh’ (27 September 2020) <<https://www.pio.gov.cy/en/press-releases-article.html?id=15921#flat>>.

²⁵⁸ See e.g. Government of Canada, ‘Joint statement by Canada and the United Kingdom on the Armenia-Azerbaijan conflict’ (28 September 2020) <<https://www.canada.ca/en/global-affairs/new/2020/09/joint-statement->

urged the cessation of hostilities.²⁵⁹ The EU and NATO made similar demands.²⁶⁰ With this neutral stance, it is not surprising that no ‘state other than an injured state’ levied any measure against Azerbaijan. Yet, it must be noted that the UK maintained its arms embargo against Armenia and Azerbaijan—a retorsion aimed towards de-escalation. The UK levied this measure in 2014 at the request of the Organisation for Security and Cooperation in Europe (‘OSCE’) to ban the sale of arms to forces ‘engaged in combat in the Nagorno-Karabakh’.²⁶¹

II. ANALYSIS OF STATE PRACTICE & *OPINIO JURIS*

Like the previous chapter that dealt with the period between 1970 and 2001, the survey of cases between 2021 and 2023 was not meant to be comprehensive. In the interest of space, this chapter did not examine other breaches of duty not to threaten or use force like the 2003 Colombian incursion in Ecuador,²⁶² the 2003 and 2007 Israeli attacks in Syria,²⁶³ 2006 Ethiopian intervention in Somalia,²⁶⁴ 2007, 2013, and 2015 Turkish incursions in Iraq,²⁶⁵ 2010 North Korean attacks against South Korea,²⁶⁶ US extra-territorial attacks against individuals

by-canada-and-the-united-kingdom-on-the-armenia-azerbaijan-conflict.html>; —, 'China says hopes Armenia, Azerbaijan resolve differences via talks' (Reuters, 28 September 2020) <<https://www.reuters.com/article/armenia-azerbaijan-china-idUSB9N2G5048>>; Foy Henry, 'Nagorno-Karabakh: Russia, France and US condemn escalation but Turkey stands defiant' (Financial Times, 2 October 2020) <<https://www.proquest.com/docview/2456318107>>.

²⁵⁹ —, 'UN SC calls for immediate end to fighting in Nagorno-Karabakh' (France 24, 30 September 2020) <<https://www.france24.com/en/20200930-un-security-council-calls-for-immediate-end-to-fighting-in-nagorno-karabakh>>

²⁶⁰ —, 'NATO chief tells Turkey to help calm Karabakh conflict' (Bangkok Post, 5 October 2020) <<https://www.bangkokpost.com/world/1996983/nato-chief-tells-turkey-to-help-calm-karabakh-conflict>>; Hovhannisyanyan Nvard & Bagirova Nailia, 'Armenia-Azerbaijan clashes kill at least 16' (Reuters, 27 September 2020) <<https://www.reuters.com/article/armenia-azerbaijan-clashes-kill-at-least-16-undermine-regional-stability>>.

²⁶¹ UK Foreign Office, 'UK Sanctions relating to Armenia and Azerbaijan' (31 December 2020) <<https://www.gov.uk/government/collections/uk-sanctions-on-armenia-and-azerbaijan>>. See OSCE Committee of Senior Officials, 'Decisions based on the Interim Report on Nagorno-Karabakh' (28 January 1992).

²⁶² See Pinto Mónica & Kotlik Marcos, "'Operation Phoenix"—2008' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 708 citing Nagle Luz, 'Colombia's Incursion into Ecuadorian Territory' (2008) 17 *Journal of Transnational Law & Policy* 359, 375; Rial Juan Alberto, 'Análisis Jurídico de la Controversia entre Ecuador y Colombia' (2008) 17 *Revista Relaciones Internacionales* 161, 168–9; Buelvas Eduardo & Méndez Liza, 'La Operación Fénix' (2011) 34 *Diálogos de Saberes* 197, 211, 215–6.

²⁶³ See Moir, 'Israeli Airstrikes in Syria' (n 10), 670; Garwood-Gowers Andrew, 'Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?' (2011) 16(2) *Journal of Conflict & Security Law* 263, 279; Dinstein, *War, Aggression, & Self-Defence* (n 9), 199.

²⁶⁴ See Khayre Ahmed, 'Legality of the 2006 Ethiopian Invasion of Somalia' (2014) 22 *African Journal of International & Comparative Law* 208, 213; Warbrick Colin & Yihdego Zeray, 'Ethiopia's Military Action Against the Union of Islamic Courts & Others in Somalia' (2007) 56 *International & Comparative Law Quarterly* 666.

²⁶⁵ See Ruys Tom, 'Quo Vadit Jus as Bellum: Turkey's Military Operations against the PKK in Northern Iraq' (2008) 9 *Melbourne Journal of International Law* 334, 338; Trapp Kimberly, 'Turkish Intervention against the PKK in Northern Iraq—2007–08' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 696.

²⁶⁶ See Nam Seughyun, 'War on the Korean Peninsula? Application of Jus in Bello in the Cheonan and

conducted since 2011 in the territory of other states,²⁶⁷ and the 2011 and 2012 South Sudanese-Sudanese crisis.²⁶⁸ Yet, it must be pointed out that in none of these cases did ‘states other than an injured state’ implement the duty not to threaten or use force.²⁶⁹ These appear to suggest, as will be shown below, that even after the 2001 Draft Articles’ adoption, states, as this norm, have not accepted as the law the competence of ‘states other than an injured state’ to invoke another’s responsibility via judicial dispute resolution or enforce it through unilateral measures. Thus, as to the norm on force, it may be said that 2001 Draft Article 48 remains a progressive measure while the status of 2001 Draft Article 54 remains unsettled.

A. *Invocation of Responsibility through Judicial Dispute Resolution*

The lack of instances in which ‘states other than an injured state’ invoked another’s responsibility via judicial dispute resolution is again apparent. Since 2001, no ‘state other than an injured state’ instituted proceedings to implement the duty not to threaten or use force. This is the case even after the ICJ ruled on the competence of ‘states other than an injured state’, albeit in cases not involving force, to invoke the duties owed *erga omnes partes* through judicial dispute resolution. In 2012, the ICJ in *Obligation to Prosecute and Extradite*, ruled that states’ ‘common interest in compliance’ with the Torture Convention’s duties ‘implies [each state’s] entitlement’ to ‘make a claim concerning [...] [another’s] alleged breach’.²⁷⁰ In 2022, the Court ruled in *Application of the Genocide Convention* that the ‘common interest in compliance’ with the relevant duties under the Genocide Convention entails that any state is ‘entitled to invoke

Yeonpyeong Island Attacks’ (2013) 8 *University of Pennsylvania East Asia Law Review* 43, 67 ff; Office of the Prosecutor, ‘Situation in the Republic of Korea’ (International Criminal Court, 2014), 24.

²⁶⁷ See Kretzmer David, ‘US Extra-Territorial Actions against Individuals: Bin Laden, Al Awlaki, & Abu Khattalah—2011 and 2014’ in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 768 ff; Ferro Luca, ‘Killing Qasem Soleimani: International Lawyers Divided and Conquered’ (2021) 53 *Case Western Reserve Journal of International Law* 163, 170 ff.

²⁶⁸ See Johnson Douglas, ‘Heglig oil dispute between Sudan & South Sudan’ (2012) 6(3) *Journal of Eastern African Studies* 561, 561; Rossi Christopher, ‘International Community, South Sudan, & the Responsibility to Protect’ (2016) 49 *New York University Journal of International Law & Politics* 129, 169.

²⁶⁹ See on Colombia’s incursion in Ecuador: Pinto & Kotlik, ‘Operation Phoenix’ (n 262), 703–6. On Israel’s airstrikes in Syria: Moir, ‘Israeli Airstrikes in Syria’ (n 10), 664–7. On Ethiopia’s intervention in Somalia: Martin Jean-Christophe, ‘Ethiopian Military Intervention in Somalia—2011’ in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 806–8. On Turkey’s incursions in Iraq: Trapp, ‘Turkish Intervention in Northern Iraq’ (n 265), 692–5. On North Korean attacks against South Korea: Hofer Alexandra, ‘Negotiating International Public Policy through Adoption & Contestation of Sanctions’ (2017) 50 *Revue Belge de Droit International* 440, 456; On the US’ extra-territorial attacks on individuals: Kretzmer, ‘US Extra-Territorial Actions against Individuals’ (n 267), 763–8. On the South Sudanese-Sudanese crisis: Res 2046 UNSC (2 May 2012) UN Doc S/RES/2046; —, ‘EU Considering Sanctions vs Sudan, South Sudan’ (Dow Jones Institutional News, 23 April 2012) <<https://www.proquest.com/wire-feeds/eu-considering-sanctions-vs-sudan-south-says/docview/2126461786>>.

²⁷⁰ *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422, 450. *But see* (Xue, dissenting), 574–6; (Sur, dissenting), 614–5, 618.

[another's] responsibility'.²⁷¹ More recently, the Court, in its decisions on provisional measures in *Application of the Torture Convention* (2023) and *Application of the Genocide Convention in Gaza* (2024), indicated that 'any party [to the relevant Convention] [...] is entitled to invoke [another's] responsibility for a breach of [a duty owed] *erga omnes partes* [contractes]'.²⁷²

It must be highlighted that the ICJ's decisions were limited to duties owed *erga omnes partes contractes*. This poses no issue to the duty not to threaten or use force under the Charter as this may be considered owed *erga omnes partes*. Yet, whether the Court's rulings may be extended to cover duties owed *erga omnes* under the customary norm on force remains to be seen. Recalling the discussion in *Chapter 2*, this may be answered in the affirmative. After all, duties owed *erga omnes* and owed *erga omnes partes* arguably only differ as to their applicability—norms that impose duties owed *erga omnes* bind every state while duties owed *erga omnes partes* apply only to a group of states to whom the norm applies.²⁷³ However, the Court left this matter for future determination.²⁷⁴

Other factors also affect states' implementation of the duty not to threaten or use force through judicial dispute resolution. For one, even if such competence is accepted, this does not imply jurisdiction. A state must still find a jurisdictional basis for the proceedings.²⁷⁵ Yet, as noted in the previous chapter, the norm on the threat or use of force is rarely the subject of compromissory clauses.²⁷⁶ Furthermore, many of the states that have breached the duty not to threaten or use force have not made optional clause declarations as to disputes involving the norm,²⁷⁷ or have withdrawn these declarations.²⁷⁸ This makes invocation through judicial

²⁷¹ *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022), 35, 37.

²⁷² *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192, 12; *Application of the Torture Convention* (Canada & The Netherlands v Syria) (Provisional Measures) [2023] General List No 188, 14.

²⁷³ Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1, 14; Crawford James, *International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002), 277–8; Voefray Francois, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 225.

²⁷⁴ Urs, 'Question of Standing before the ICJ' (n 273), 10.

²⁷⁵ *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90, 102; *Armed Activities on the Territory of the Congo* (DRC v Rwanda) (Jurisdiction & Admissibility) [2006] ICJ 6, 32; *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Judgment) [2007] ICJ 43, 104.

²⁷⁶ Tams, *Enforcing Obligations Erga Omnes* (n 3), 195; Olleson Simon, 'Virtue of Pragmatism: Reflections on the Future of the Articles of State Responsibility' (2022) 93 *Questions of International Law* 23, 43.

²⁷⁷ Note that states like Eritrea, Russia, and Azerbaijan have not lodged optional clause declarations recognising the jurisdiction of the ICJ (See —, 'Declarations recognising the ICJ's Jurisdiction as Compulsory' (UNTS, 2024) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1>).

²⁷⁸ See e.g. US, 'Termination of its Optional Clause Declaration' (7 October 1985) 1354 UNTS 452; Israel,

proceedings difficult. Even ‘injured states’ have encountered difficulties in seizing tribunals’ jurisdiction in cases involving breaches of the duty not to threaten or use force. Georgia had to rely on the Convention against Racial Discrimination and the European Convention on Human Rights (‘ECHR’) for its cases against Russia.²⁷⁹ Likewise, Ukraine had to invoke Russia’s duties under the ECHR, Terrorist Financing Convention, and Genocide Convention.²⁸⁰ Nonetheless, it must also be stressed that in the instances in which the ICJ would have had jurisdiction over claims against the wrongful state,²⁸¹ no ‘state other than an injured state’ invoked the wrongful state’s responsibility.

B. Enforcement through Unilateral Measures

As to countermeasures by ‘states other than an injured state’, the survey above suggests that contrary to the claim of some scholars,²⁸² this competence, as to the norm on force, is yet to crystallise into a customary rule. Its status remains as it was when the ILC adopted the 2001 Draft Articles: limited and inconsistent practice and lacks evidence of *opinio juris*.

First, the practice remained neither widespread nor representative. Since 2001, only in response to the Russo-Ukrainian conflict did states impose unilateral measures that are countermeasures to enforce the duty not to threaten or use force. In this instance, most of the imposing states were still Western ones—the US, UK, EU member states, Australia, Canada, Norway, and Switzerland. The only non-Western states that levied countermeasures against Russia were Japan and South Korea. The same is true for threats of unilateral measures as in the case of the 2008 Russo-Georgian conflict where the EU expressed its intention to levy measures against Russia. Thus, the practice is limited to a group of states that does not include states of ‘different political, economic, and legal systems’.²⁸³

The point made in *Chapter 5A* regarding the conduct of ‘major’ or ‘leading’ states is worth repeating. It is counterproductive to limit the analysis to economically powerful states, mostly

‘Termination of Optional Clause Declaration’ (19 November 1985) 1349 UNTS 346.

²⁷⁹ See ‘Application’, *Application of the ICERD* (n 93); *Georgia v Russia* (n 93).

²⁸⁰ See ‘Application of Ukraine’, *Application of the Terrorist Financing Convention & ICERD* (n 186); *Ukraine v Russia* (n 186); ‘Notification & Statement of Claim of Ukraine’, *Dispute Concerning Coastal State Rights* (n 186); ‘Application of Ukraine’, *Allegations of Genocide* (n 186).

²⁸¹ Note that ‘states other than an injured state’ could have invoked the UK’s responsibility for its threats and use of force against Syria (See UK, ‘Optional Clause Declaration’ (5 July 2004) 654 UNTS 335).

²⁸² See Dawidowicz, *Third Party Countermeasures* (n 3), 252, 266; Tams, *Enforcing Obligations Erga Omnes* (n 3), 250, 390–1; Proukaki, *Problem of Enforcement* (n 3), 207.

²⁸³ *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (Judgment) [1969] ICJ 3 (Lachs, dissenting), 229; International Law Association, ‘Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law’ (International Law Association, 2000), 25.

Western ones, deemed to have the capacity to levy unilateral measures. Doing so risks a ‘hegemonical approach to international relations’ with ‘certain states proclaiming themselves to be the sole representatives of the ‘international community’’.²⁸⁴ Crucially, it neglects that in some instances, other states have supported the imposition of collective measures against wrongful states.²⁸⁵ Case in point, the 2008 Eritrean-Djibouti conflict where IGAD members, instead of imposing unilateral measures against Eritrea, sought the imposition of collective measures by the SC.

Second, state practice between 2001 and 2023 has been neither consistent nor uniform. There remains too much inconsistency suggesting that the competence of ‘states other than an injured state’ to enforce the wrongful state’s responsibility through countermeasures has not become customary.²⁸⁶ Comparable situations did not result in similar conduct even from Western States. One may expect that cases involving clear and serious breaches of the duty not to threaten or use force would result in analogous responses. Yet, this had not been the case. For instance, while states levied countermeasures in response to Russia’s use of force against Ukraine in 2014 and 2022, none did so for the 2008 Russo-Georgian and 2020 Azerbaijani–Armenian conflicts.

As observed in the previous chapter, the only discernible pattern of behaviour pertains to how states react to unlawful uses of force against ‘friendly’ states and by ‘less friendly’ states.²⁸⁷ This explains why Western states and their allies levied measures against Russia for its invasion of Ukraine. This also explains why none levied measures against the states that participated in the US-led invasion of Afghanistan, invasion of Iraq, and attacks in Syria; and against Israel for its attacks in Lebanon.

²⁸⁴ Corten, ‘Customary Prohibition on the Use of Force’ (n 25), 811, 819–20 citing Byers Michael & Chesterman Simon, ‘Changing the Rules about Rules? Unilateral Intervention & the Future of International Law’ in Holzgrefe J & Keohane R (eds), *Humanitarian Intervention: Ethical, Legal, & Political Dilemmas* (Cambridge University Press 2003), 194. See Corten, *Law Against War* (n 10), 24; Dubuisson François, ‘La problématique de la légalité de l’opération “Force alliée” contre la Yougoslavie’ in Corten Olivier & Delcourt B (eds), *Droit, légitimation et politique extérieure: l’Europe et la guerre du Kosovo* (Bruylant 2001), 179; Lagerwall Anne, ‘Kosovo, Afghanistan, Irak: le retour des guerres d’agression’ in Corten Olivier & Delcourt B (eds), *Les guerres anti terroristes* (Contradictions 2004), 95–7; Subedi, ‘Status of Unilateral Sanctions’ (n 219), 39–40 citing Chimni BS, ‘Customary International Law: A Third World Perspective’ (2018) 112 *American Journal of International Law* 1, 12.

²⁸⁵ See Hofer Alexandra, ‘Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’ (2017) 16 *Chinese Journal of International Law* 1, 17, 39.

²⁸⁶ See *Asylum* (Colombia v Peru) (Judgment) [1950] ICJ 266, 277; *SS Lotus* (France v Turkey) (Judgment) [1927] PCIJ Ser A No 10, 21; *North Sea Continental Shelf* [1969] (n 283), 45.

²⁸⁷ Brownlie Ian, ‘UN Charter & the Use of Force, 1945–1985’ in Cassese Antonio (ed), *Current Legal Regulation of the Use of Force* (Nijhoff 1986), 500; Tomaševski Katarina, *Responding to Human Rights Violations: 1946–1999* (Kluwer 2000), 369. See Hofer, ‘Adoption & Contestation of Sanctions’ (n 269), 447.

Finally, there is still a lack of a broad acknowledgement of the practice as law from states. Some Western states—the US, EU member states, the UK, Australia, Canada, and New Zealand, along with their allies such as Japan, have asserted the prerogative of ‘states other than an injured state’ to enforce responsibility through unilateral measures. A few did so contemporaneously with the measures they imposed.²⁸⁸ Others made individual statements to this effect. For instance, the US claimed that unilateral measures are ‘important foreign policy tools designed to respond to threats to [...] national security’.²⁸⁹ The EU asserted that ‘unilateral [...] measures [are] admissible in certain circumstances’.²⁹⁰ The UK stressed the need to be able ‘to impose [...] sanctions in coordination with [its] allies’,²⁹¹ while Australia highlighted the need ‘to participate in concerted international action [with] like-minded countries’.²⁹² Canada also stated these measures allow it to ‘defend its values and [...] play a leadership role in response to international crises’.²⁹³ Some states also defended this prerogative in explaining their opposition to GA resolutions that broadly condemned unilateral measures,²⁹⁴ and in

²⁸⁸ See *Executive Order 13662* (US); Council of the EU, ‘Council Decision 2014/512/CFSP’ (n 188).

²⁸⁹ US Department of Treasury, ‘Remarks on the Evolution of Sanctions’ (30 March 2016) <<https://www.treasury.gov/press-center/press-releases/Pages/jl0398.aspx>>; US, ‘Preface to the National Security Strategy of 2015’ (2015) <https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf>.

²⁹⁰ UNGA, Second Committee, ‘Summary Record of the 62nd Session, 28th Meeting’ (16 November 2007) UN Doc A/C.2/62/SR.28, 5 (Portugal on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 64th Session, 41st Meeting’ (9 December 2009) UN Doc A/C.2/64/SR.41, 4 (Sweden on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (1 December 2011) UN Doc A/C.2/66/SR.37, 4 (Poland on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 68th Session, 28th Meeting’ (16 November 2013) UN Doc A/C.2/68/SR.28, 3 (Lithuania on behalf of the EU); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (28 September 2015) UN Doc A/C.2/70/SR.31, 4 (Luxembourg on behalf of the EU).

²⁹¹ Cm 9403, *Consultation on the UK’s Legal Framework for Imposing & Implementing Sanctions* (2017) (UK).

²⁹² No 28, 2011, *Autonomous Sanctions Act* (2011) (AUS), Explanatory Memorandum.

²⁹³ Canada Ministry of Foreign Affairs, ‘Government Response to the Seventh Report of the Standing Committee on Foreign Affairs and International Developmental’ (17 July 2017), 2.

²⁹⁴ See UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (16 October 2002) UN Doc A/57/PV.31, 11 (Holy See); 12 (US); 13 (Australia); UNGA, ‘Verbatim Record, 60th Session, 68th Meeting’ (22 December 2005) UN Doc A/60/PV.68, 8 (US); UNGA, Second Committee, ‘Summary Record of the 60th Session, 33rd Meeting’ (2 December 2005) UN Doc A/C.2/60/SR.33, 4 (UK on behalf of the EU: ‘Economic measures should be compatible with the principles of international law’); UNGA, ‘Verbatim Record, 62nd Session, 78th Meeting’ (19 December 2007) UN Doc A/62/PV.78, 11 (US); UNGA, Second Committee, ‘Summary Record of the 62nd Session, 28th Meeting’ (2007) (n 290), 5 (Portugal on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 64th Session, 41st Meeting’ (2009) (n 290), 4 (Sweden on behalf of the EU); UNGA, Third Committee, ‘Summary Record of the 64th Session, 42nd Meeting’ (12 November 2009) UN Doc A/C.3/64/SR.42, 8 (US); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (2011) (n 290), 3 (US), 4 (Poland on behalf of the EU); UNGA, Third Committee, ‘Summary Record of the 66th Session, 44th Meeting’ (15 November 2011) UN Doc A/C.3/66/SR.44, 9 (US); UNGA, Third Committee, ‘Summary Record of the 67th Session, 44th Meeting’ (26 November 2012) UN Doc A/C.3/67/SR.44, 2 (US); UNGA, Second Committee, ‘Summary Record of the 68th Session, 28th Meeting’ (2013) (n 290), 3 (Lithuania on behalf of the

responding to the Secretary-General's requests for comments on unilateral measures.²⁹⁵ Lastly, some also enacted new or additional laws for the imposition of these measures: Australia has its 2011 Autonomous Sanctions Act that allows it to levy measures in response to 'internal or international armed conflict[s]';²⁹⁶ the EU, under TEU Article 29 and Article 215 of the Treaty of the Functioning of the European Union ('TFEU') may also do so through its Common Foreign and Security Policy;²⁹⁷ and the UK has its 2018 Sanctions & Money Laundering Act that permits it to impose measures 'in the interests of [...] peace and security'.²⁹⁸

Yet, other states do not share this view. Indeed, states' reactions to the measures against Russia for its invasion of Ukraine show that some reject this prerogative. Crucially, while many states did not protest every imposition of unilateral measures including countermeasures,²⁹⁹ many voted for GA resolutions that condemned these. States continued to adopt resolutions that broadly condemned the coercive nature of unilateral measures,³⁰⁰ called upon the states to

EU); UNGA, Third Committee, 'Summary Record of the 68th Session, 49th Meeting' (21 November 2013) UN Doc A/C.3/68/SR.49, 9 (US); UNGA, Third Committee, 'Summary Record of the 69th Session, 52nd Meeting' (24 November 2014) UN Doc A/C.3/69/SR.52, 6 (US); UNGA, Second Committee, 'Verbatim Record, 70th Session, 31st Meeting' (2015) (n 290), 4 (Luxembourg on behalf of the EU); UNGA, Second Committee, 'Verbatim Record, 70th Session, 52nd Meeting' (20 November 2015) UN Doc A/C.2/70/SR.52, 5 (US).

²⁹⁵ HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 August 2010) UN Doc A/HRC/15/43, 5 (Slovakia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (14 July 2011) UN Doc A/66/138, 10 (Malta); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (9 August 2017) UN Doc A/72/307, 9 (European Union); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (31 July 2019) UN Doc A/74/264, 20 (European Union).

²⁹⁶ *Autonomous Sanctions Act* (AUS), Explanatory Memorandum.

²⁹⁷ *Treaty of the European Union (as amended)* (adopted 13 December 2007, entered into force 1 December 2009) C326/15, art 29; *Treaty on the Functioning of the European Union (as amended)* (adopted 1 December 2009, entered into force 1 October 2010) C326/141, art 215; Council of the EC, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' (7 June 2004) Doc 10198/1/04; Council of the EU, 'Guidelines on Implementation & Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU CFSP' (15 June 2012) Doc 15114/05.

²⁹⁸ 2018 c 13, *Sanctions and Anti-Money Laundering Act* (2018) (UK), §1(2).

²⁹⁹ Note Henry Etienne, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law' (2017) 18 *Melbourne Journal of International Law* 1, 17, 19.

³⁰⁰ See *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 56/179 UNGA (21 December 2001) UN Doc A/RES/56/179; Res 58/198 UNGA (23 December 2003) UN Doc A/RES/58/198; Res 60/185 UNGA (22 December 2005) UN Doc A/RES/60/185; Res 62/183 UNGA (19 December 2007) UN Doc A/RES/62/183; Res 64/189 UNGA (21 December 2009) UN Doc A/RES/64/189; Res 66/186 UNGA (22 December 2011) UN Doc A/RES/66/186; Res 68/200 UNGA (20 December 2013) UN Doc A/RES/68/200; Res 70/185 UNGA (22 December 2015) UN Doc A/RES/70/185; Res 72/201 UNGA (20 December 2017) UN Doc A/RES/72/201; Res 74/200 UNGA (19 December 2019) UN Doc A/RES/74/200; Res 76/191 UNGA (17 December 2021) UN Doc A/RES/76/191. See also *Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political & Economic Compulsion* Res 57/5 UNGA (16 September 2002) UN Doc A/RES/57/5. See also UNGA, 'Verbatim Record, 57th Session, 31st Meeting' (2002) (n 294), 3 (Iran), 5 (Malaysia); UNGA, Second Committee, 'Summary Record of the 60th Session, 17th Meeting' (31 October 2005) UN Doc A/C.2/60/SR.17, 11 (Myanmar); UNGA, Second Committee, 'Summary Record of the 66th Session, 37th Meeting' (2011) (n 290), 4 (Syria); UNGA, Third

‘adopt [...] measures to eliminate their use against developing countries’, and criticised these measures for not being ‘authorised by [...] the UN’.³⁰¹ They also adopted resolutions that rejected unilateral measures, including those with ‘extra-territorial effects’,³⁰² due to their ‘negative effects on [...] human rights’.³⁰³

States have also condemned these measures outside the UN. The NAM has repeatedly ‘reaffirmed [its] opposition to all unilateral measures’, denounced their use to put ‘political or economic pressure’ on states, rejected their extra-territorial application, and stressed their negative effects on human rights.³⁰⁴ It also condemned ‘unilateralism’,³⁰⁵ and stressed the need

Committee, ‘Summary Record of the 71st Session, 23rd Meeting’ (31 October 2013) UN Doc A/C.3/71/SR.23, 6 (Iran); UNGA, ‘Verbatim Record, 70th Session, 81st Meeting’ (22 Dec 2015) UN Doc A/70/PV.81, 6 (Belarus); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (2015) (n 290), 5 (Russia).

³⁰¹ See also UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 294), 6 (Egypt); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (2011) (n 290), 3 (Mexico: ‘Multilateralism and dialogue remained the best way of resolving conflicts’); UNSC, ‘Verbatim Record, 7323rd Meeting’ (25 November 2014) UN Doc S/PV.7323, 14 (China: ‘[Some] act at will [and] impose or threaten to impose unilateral sanctions [...] which [violates the] principle of sovereign equality among [...] states [and] undermine the authority of SC sanctions’).

³⁰² See *Human Rights & Unilateral Coercive Measures* Res 56/148 UNGA (19 December 2001) UN Doc A/RES/56/148; Res 57/222 UNGA (18 December 2002) UN Doc A/RES/57/222; Res 58/171 UNGA (22 December 2003) UN Doc A/RES/58/171; Res 59/188 UNGA (20 December 2004) UN Doc A/RES/59/188; Res 60/155 UNGA (16 December 2005) UN Doc A/RES/60/155; Res 61/170 UNGA (19 December 2006) UN Doc A/RES/61/170; Res 62/162 UNGA (18 December 2007) UN Doc A/RES/62/162; Res 63/179 UNGA (18 December 2008) UN Doc A/RES/63/179; Res 65/217 UNGA (21 December 2010) UN Doc A/RES/65/217; Res 66/165 UNGA (19 December 2011) UN Doc A/RES/66/156; Res 67/170 UNGA (20 December 2012) UN Doc A/RES/67/170; Res 68/162 UNGA (18 December 2013) UN Doc A/RES/68/162; Res 69/180 UNGA (18 December 2014) UN Doc A/RES/69/180; Res 70/151 UNGA (17 December 2015) UN Doc A/RES/70/151; Res 71/193 UNGA (18 December 2016) UN Doc A/RES/71/193; Res 72/168 UNGA (19 December 2017) UN Doc A/RES/72/168; Res 73/167 UNGA (18 December 2018) UN Doc A/RES/73/167; Res 74/154 UNGA (18 December 2019) UN Doc A/RES/74/154; Res 75/181 UNGA (16 December 2020) UN Doc A/RES/75/181; Res 76/161 UNGA (15 December 2021) UN Doc A/RES/76/161; Res 77/214 UNGA (15 December 2022) UN Doc A/RES/77/214. See also UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 294), 2 (Libya), 3 (Iran), 13 (Australia: ‘continues to oppose the application of extraterritorial unilateral economic coercive measures that affect third countries’), 13 (Canada: ‘for many years, taken a position [...] condemning the inappropriate extraterritorial reach of national laws’).

³⁰³ See also UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 294), 2 (Libya), 3 (Iran), 9 (Syria), 10 (Iraq); UNGA, Second Committee, ‘Summary Record of the 60th Session, 17th Meeting’ (2005) (n 303), 5 (Jamaica); UNGA, Second Committee, ‘Summary Record of the 68th Session, 20th Meeting’ (24 October 2013) UN Doc A/C.2/68/SR.20, 9 (Syria), 12 (Brazil); UNGA, Third Committee, ‘Summary Record of the 68th Session, 35th Meeting’ (31 October 2013) UN Doc A/C.3/68/SR.35, 11 (Iran); UNGA, Third Committee, ‘Summary Record of the 71st Session, 23rd Meeting’ (2013) (n 300), 6 (Iran); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (2015) (n 290), 5 (Russia), 5 (Syria).

³⁰⁴ Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (16 July 2009) NAM2009/FD/Doc.1, 9, 91; Conference of Heads of the NAM, ‘Final document of the 14th Summit’ (2006) (n 47), 234.7; Conference of Heads of the NAM, ‘Final Document of the 16th Summit’ (31 August 2012) NAM2012/Doc.1/Rev.2, 133; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (18 September 2016) NAM/2016/CoB/DOC.1/Corr.1, 17, 145

³⁰⁵ Conference of Heads of the NAM, ‘Final document of the 14th Summit’ (2006) (n 47), 19.5

for ‘multilateral decision-making processes’.³⁰⁶ It further declared that ‘if a member suffers harm as a result of unilateral [measures]’, the NAM ‘should express its solidarity with the [...] [state] through the provision of moral, material, and other forms of assistance’.³⁰⁷ For its part, the G77 also ‘rejected the imposition’ of ‘all forms of [unilateral] coercive economic measures’, highlighted the ‘urgent need’ for their elimination, and stressed that these measures ‘undermine the principles [...] of international law’.³⁰⁸ The Group of Arab States,³⁰⁹ AU,³¹⁰ and BRICS,³¹¹ have also made similar statements.

States’ individual statements are also significant. In 2013, Russia asserted that ‘measures [...] outside the [SC’s framework]’ present a risk to ‘peace and stability’.³¹² In 2015, it again claimed that these measures ‘circumvent the [Charter’s] principles’.³¹³ For its part, China urged states to commit to ‘multilateralism and reject unilateralism’.³¹⁴ In 2016, Russia and China criticised the ‘imposition by states of their will on others’ and deemed ‘unilateral measures’

³⁰⁶ Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (n 304), 11; Conference of Heads of the NAM, ‘Final Document of the 16th Summit’ (n 304), 5; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (n 304), 17, 145.

³⁰⁷ Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (n 304), 5; Conference of Heads of the NAM, ‘Final Document of the 16th Summit’ (n 304), 7; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (n 304), 14.

³⁰⁸ G77 Foreign Ministers, ‘Declaration Adopted at the 26th Meeting’ (19 September 2002), ¶42; G77 & China Foreign Ministers, ‘Declaration adopted at the 27th Annual Meeting’ (25 September 2003), ¶36; G77 & China Foreign Ministers, ‘Declaration adopted at the 28th Annual Meeting’ (30 September 2004), ¶55; G77 & China Foreign Ministers, ‘Declaration adopted at the 30th Annual Meeting’ (22 September 2006), ¶33; G77 & China Foreign Ministers, ‘Declaration adopted at the 31st Annual Meeting’ (27 September 2007), ¶19; G77 & China Foreign Ministers, ‘Declaration adopted at the 32nd Annual Meeting’ (26 September 2008), ¶21; G77 & China Foreign Ministers, ‘Declaration adopted at the 33rd Annual Meeting’ (25 September 2009), ¶39; G77 & China Foreign Ministers, ‘Declaration adopted at the 34th Annual Meeting’ (28 September 2010), ¶69; G77 & China Foreign Ministers, ‘Declaration adopted at the 35th Annual Meeting’ (23 September 2011), ¶39; G77 & China Foreign Ministers, ‘Declaration adopted at the 36th Annual Meeting’ (28 September 2012), ¶36; G77 & China Foreign Ministers, ‘Declaration adopted at the 37th Annual Meeting’ (26 September 2013), ¶52; G77 & China Foreign Ministers, ‘Declaration adopted at the 38th Annual Meeting’ (26 September 2014), ¶47; G77 & China Foreign Ministers, ‘Declaration adopted at the 39th Annual Meeting’ (24 September 2015), ¶106; G77 & China Foreign Ministers, ‘Declaration adopted at the 40th Annual Meeting’ (23 September 2016), ¶¶47, 151; G77 & China Foreign Ministers, ‘Declaration adopted at the 41st Annual Meeting’ (22 September 2017), ¶¶178, 202; G77 & China Foreign Ministers, ‘Declaration adopted at the 42nd Annual Meeting’ (27 September 2018), ¶¶203–4; G77 & China Foreign Ministers, ‘Declaration adopted at the 43rd Annual Meeting’ (27 September 2019), ¶¶228–9.

³⁰⁹ *Human Rights & Unilateral Coercive Measures* Res 24/14 HRC (24 Sept 2013) UN Doc A/HRC/24/L.5/Rev.1.

³¹⁰ AU Assembly, ‘Sanctions & Unilateral Coercive Measures’ (Feb 2020) Assembly/AU/Res.1 (XXXIII) (‘Urge all states to refrain from imposing unilateral coercive measures and urge states to remove such measures’).

³¹¹ See BRICS, ‘5th Summit: eThekweni Declaration’ (27 March 2013); BRICS, ‘6th Summit: Fortaleza Declaration’ (15 July 2014); BRICS, ‘7th Summit: Ufa Declaration’ (9 July 2015); BRICS, ‘8th Summit: Goa Declaration’ (16 October 2016); BRICS, ‘9th Summit: Xiamen Declaration’ (12 September 2017).

³¹² Ministry of Foreign Affairs of Russia, ‘Concept of the Foreign Policy of the Russian Federation’ (18 February 2013) <https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6BZ29>.

³¹³ UNGA, ‘Verbatim Record, 70th Session, 13th Meeting’ (28 September 2015) UN Doc A/70/PV.13, 26.

³¹⁴ *Ibid.*, 19

unlawful.³¹⁵ Russia, India, and China also asserted that these ‘undermine the [SC’s] prerogatives and [...] its sanctions regimes, and ‘[negatively] affect [targeted] states’.³¹⁶ For similar reasons—coercion and intervention,³¹⁷ exercise of extra-territorial jurisdiction,³¹⁸

³¹⁵ Ministry of Foreign Affairs of Russia, ‘Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law’ (25 June 2016) <https://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYIKr/content/id/2331698>.

³¹⁶ Ministry of External Affairs of India, ‘Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People’s Republic of China’ (18 April 2016) <https://mea.gov.in/bilateral-documents.htm?dtl/26628/Joint_Communicu_of_the_14th_Meeting_of_the_Foreign_Ministers_of_the_Russian_Federation_the_Republic_of_India_and_the_Peoples_Republic_of_China>.

³¹⁷ See e.g. UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report’ (2 July 2002) UN Doc A/57/179, 2 (Ecuador); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (15 October 2001) UN Doc A/56/473, 2 (Belarus), 6 (Malaysia), 8 (Yemen); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (11 September 2003) UN Doc A/58/301, 5 (Cuba), 6 (Iran), 13 (Thailand), 13 (Syria); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (12 August 2005) UN Doc A/60/226, 4 (Bulgaria), 7 (Guatemala), 7 (Honduras), 7 (Cuba), 8 (Jamaica), 12 (Syria); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (6 August 2007) UN Doc A/62/210, 5 (Belarus), 5 (Benin), 6 (Cuba), 8 (Ukraine); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2011) (n 295), 6 (Brunei), 6 (Colombia), 7 (Cuba), 7 (Egypt), 11 (Myanmar), 12 (Oman), 14 (Ukraine); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (29 July 2013) UN Doc A/68/218, 9 (Lao), 10 (Philippines), 10 (Nicaragua), 13 (Syria); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (16 July 2015) UN Doc A/70/152, 6 (Brunei), 6 (Cambodia), 7 (Central African Republic); 7 (Congo), 7 (Cuba), 10 (Ecuador), 11 (Madagascar), 12 (Sri Lanka), 15 (Tunisia); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2017) (n 295), 2 (Iran), 6 (Cuba), 10 (Guatemala), 11 (Russia); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 295), 5 (Burundi), 5 (Cambodia), 6 (Cuba), 10 (Ghana), 11 (Nigeria), 12 (Russia), 13 (Sudan); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (30 August 2021) UN Doc A/76/310, 7 (Iran), 13 (Russia), 15 (Syria). See also UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (20 July 2001) UN Doc A/56/207, 3 (Cuba); UN CHR, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (24 January 2002) UN Doc E/CN.4/2002/51/Add.1, 3 (Cuba); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (11 October 2005) UN Doc A/60/305, 4 (Iraq), 4 (Georgia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (17 August 2006) UN Doc A/61/287, 3 (Libya); HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (13 August 2007) UN Doc A/HRC/6/2, 2 (Georgia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (3 August 2009) UN Doc A/64/219, 2 (Algeria), 3 (Angola), 4 (Jamaica); HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2010) (n 295), 4 (Jamaica); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (29 July 2012) UN Doc A/67/181, 6 (Cuba), 10 (Jamaica); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (27 June 2014) UN Doc A/69/97, 2 (Colombia).

³¹⁸ See e.g. UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2001) (n 317), 3 (Cuba), 7 (Myanmar), 7 (Malaysia); UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report’ (2002) (n 317), 1 (Iran), 2 (Argentina), 2 (Ecuador); 2 (Japan: ‘Unilateral economic measures that are taken as the result of extraterritorial application of domestic laws are contrary to international law’); 3 (Mali), 3 (Namibia), 3 (Qatar), 6 (Libya); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2003) (n 317), 12 (Libya), 14 (Venezuela); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2005) (n 317), 8 (Jamaica); 8 (Kazakhstan); 12 (Uruguay); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2007) (n 317), 5 (Benin), 6 (Cuba), 7 (Myanmar), 7 (Qatar), 8 (Zimbabwe); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2011) (n 295), 10 (Malaysia); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2013) (n 317), 16 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2015) (n 317), 15 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political

negative effects on human rights,³¹⁹ and unilateralism,³²⁰ states have also condemned these

& Economic Coercion: SG Report' (2017) (n 295), 5 (Belarus); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 295), 20 (EU: 'condemns the application of unilateral measures that have extraterritorial effects contrary to international law'). *See also* HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 295), 2 (Algeria), 3 (Argentina); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (5 August 2011) UN Doc A/66/272, 3 (Argentina), 8 (Cuba), 11 (Dominican Republic); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 317), 11 (Mexico).

³¹⁹ *See e.g.* UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (2001) (n 317), 4 (Guatemala); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2001) (n 317), 2 (Cuba), 3 (Jamaica), 3 (North Korea), 5 (Libya); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 317), 2 (Iraq), 2 (Jamaica), 2 (Qatar); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 October 2004) UN Doc A/59/436, 2 (Cuba), 3 (Mexico); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2005) (n 317), 3 (Mexico), 3 (Cuba), 4 (Lebanon); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2006) (n 317), 2 (Cuba), 4 (Trinidad & Tobago); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2007) (n 317), 2 (Colombia), 4 (Syria); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2009) (n 317), 2 (Algeria), 3 (Angola), 4 (Jamaica), 5 (Paraguay); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 295), 2 (Algeria), 3 (Belarus), 4 (Jamaica), 5 (Qatar), 6 (Russia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2011) (n 318), 3 (Argentina), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 11 (Ecuador), 13 (Guyana), 14 (Iraq), 14 (Kuwait); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 317), 3 (Andorra), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 8 (Iran), 10 (Kuwait), 12 (Syria), 13 (Trinidad & Tobago); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2014) (n 317), 3 (Iran), 4 (Lebanon), 5 (Mauritius). *See also* UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 317), 4 (Iraq), 6 (Libya), 7 (Malaysia), 8 (Saudi Arabia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 317), 4 (Argentina), 4 (Cuba); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 317), 7 (Iraq), 8 (Kazakhstan), 9 (Sudan); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 317), 5 (Colombia), 9 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 295), 7 (Cuba), 7 (Egypt), 9 (Guatemala), 9 (Lebanon), 11 (Mexico), 12 (Oman), 13 (Sudan), 15 (Vietnam); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 317), 5 (Brazil: 'disputes the interpretation that unilateral sanctions act as "countermeasures" to induce a state to end the infringement of certain norms [...] Even if this were the case, there should be acceptance of clear parameters of legality such as proportionality to guarantee that human rights will not be put at risk'), 6 (Burundi), 8 (Cuba), 9 (Iran), 11 (Senegal), 12 (Sudan), 14 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 317), 13 (Syria), 15 (Turkey), 16 (Venezuela), 18 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 295), 5 (Armenia), 8 (Cuba), 20 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 295), 5 (Burundi), 10 (Jordan), 12 (Russia), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2021) (n 317), 4 (Cuba), 10 (Iran), 14 (Syria).

³²⁰ *See e.g.* UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 317), 3 (Gambia); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 317), 3 (Mali); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 317), 4 (Costa Rica: 'only support[s] [measures] [...] within the framework of the [UN]'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 317), 9 (Senegal), 9 (Panama: 'measures [that] may be applied against developing countries [are] only when those measures [...] duly authorized by the [UN]'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 317), 7 (Egypt); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 295), 7 (Egypt: '[These measures] are in contradiction of the principles of multilateralism'), 8 (Gabon: 'encourages multilateralism'), 10 (Mauritius: 'The multilateral process must not be undermined by unilateral measures'); 11 (Mexico: 'Sanctions can only emanate from the decisions or recommendations of the [SC], or the [GA]'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 317), 5 (Brazil: 'Sanctions [must be] conditioned upon a decision of the SC'), 9 (Montenegro), 11 (Qatar), 16 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 317), 12 (Paraguay);

measures in responding to the Secretary-General's requests for comments.

However, as discussed in *Chapter 5A*, it may be problematic to consider these statements as an 'unqualified proposition' that all unilateral measures are unlawful.³²¹ They must be nuanced 'precisely to understand' the measures condemned.³²² The claim regarding the illegality of measures that involve the exercise of extra-territorial jurisdiction without a proper basis may be correct.³²³ Yet, the same may not be true for the assertion that measures that enforce another state's responsibility *per se* breach the norms on coercion, intervention,³²⁴ and human rights.³²⁵ Arguably, the measures that are 'not in accordance with international law' are those that are not retorsions and are not countermeasures taken by the 'injured state'. These include measures that involve *a priori* breaches but whose wrongfulness cannot be precluded such as those not imposed as a response to wrongful acts;³²⁶ not levied against the wrongful state but on third states,³²⁷ or against individuals or entities;³²⁸ or measures that go beyond the

UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 295), 11 (Lesotho); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 295), 11 (Russia: '[Unilateral measures] undermine trust between countries and the role of the UN as the sole legitimate arbitrator in such matters'); 13 (South Africa), 19 (Turkey: '[Issues] need collective action and responses with the participation of the international community as a whole'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2021) (n 317), 7 (Iran), 14 (South Africa: 'Measures should be undertaken in the multilateral framework'). See also HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 295), 4 (Burkina Faso), 4 (Costa Rica); 6 (Russia: 'it would continue advocating for a multilateral approach in international affairs'); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2011) (n 318), 7 (Burkina Faso: 'Multilateral frameworks are appropriate for the resolution of challenges in inter-state relations'); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 317), 11 (Mexico); 12 (Trinidad & Tobago).

³²¹ Barber Rebecca, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70 *International & Comparative Law Quarterly* 343, 359.

³²² Ibid.

³²³ See Schmidt, 'Unilateral Extraterritorial Sanctions' (n 220), 65; Ruys, 'Sanctions, Retorsions, & Countermeasures' (n 213), 29.

³²⁴ Crawford James, 'Third Report on State Responsibility' (2000) II(2) YbILC 12, 93. See Milanovic Mark, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law' (2023) 117 *American Journal of International Law* 601, 622.

³²⁵ Dawidowicz, *Third Party Countermeasures* (n 3), 338 citing Crawford, 'Third Report on State Responsibility' (2000) (n 324), 84. Tzanakopoulos Antonios, 'Mechanisms to Assess & Mitigate Adverse Human Rights Impact of Unilateral Sanctions' (Workshop on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Geneva) (23 May 2014), 2.

³²⁶ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 130 citing *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 55; *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa (Naulilaa)* (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1027; *Responsibility of Germany arising out of acts committed after 31 July 1914* (Portugal v Germany) (Award) (1930) 2 RIAA 1056, 1056–7.

³²⁷ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 130; Ruys Tom & Ryngaert Cedric, 'Secondary Sanctions: A Weapon out of Control? Legality of, & European Responses to, US Secondary Sanctions' (2020) *British Yearbook of International Law* 1, 4

³²⁸ ILC, 'Summary Records of the 52nd Session' (2000) (n 227), 266, 271; Crawford, 'Third Report on State Responsibility' (2000) (n 324), 84; Ruys Tom, 'Immunity, Inviolability, & Countermeasures' in Angelet Nicolas & Ferro Luca (eds), *Cambridge Handbook of Immunities & International Law* (Cambridge University Press 2019),

limits of countermeasures such as those that are not proportional,³²⁹ or breach human rights duties.³³⁰

Crucially, unlike some states, that deem unilateral measures permissible as ‘they seek to obtain “noble objectives” on behalf of the international community’,³³¹ most states continue, as scholars like Hofer observe, to require collective decisions for the imposition of enforcement measures,³³² and thus prefer collective measures.³³³ Accordingly, most continue to condemn unilateralism and the measures taken by the ‘minority of the powerful states’ purporting to act on the international community’s behalf.³³⁴ Thus, it would appear that most states still have not accepted the competence of ‘states other than an injured state’ to impose countermeasures and, in the absence of a positive rule that provides such competence, many deem that the imposing

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³²⁹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 134; *Naulilaa* (n 326), 1028; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 448.

³³⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 131–3; Dawidowicz, *Third Party Countermeasures* (n 3), 337.

³³¹ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 285), 26. *See e.g.* UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 294), 12 (US); 13 (Australia); UNGA, ‘Verbatim Record, 60th Session, 68th Meeting’ (2002) (n 294), 8 (US); UNGA, Second Committee, ‘Summary Record of the 60th Session, 33rd Meeting’ (2005) (n 294), 4 (UK on behalf of the EU); UNGA, ‘Verbatim Record, 62nd Session, 78th Meeting’ (2007) (n 294), 11 (US); UNGA, Second Committee, ‘Summary Record of the 62nd Session, 28th Meeting’ (2007) (n 290), 5 (Portugal on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 64th Session, 41st Meeting’ (2009) (n 290), 4 (Sweden on behalf of the EU); UNGA, Third Committee, ‘Summary Record of the 64th Session, 42nd Meeting’ (2009) (n 294), 8 (US); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (2011) (n 290), 3 (US), 4 (Poland on behalf of the EU); UNGA, Third Committee, ‘Summary Record of the 66th Session, 44th Meeting’ (2011) (n 294), 9 (US); UNGA, Third Committee, ‘Summary Record of the 67th Session, 44th Meeting’ (2012) (n 294), 2 (US); UNGA, Second Committee, ‘Summary Record of the 68th Session, 28th Meeting’ (2013) (n 290), 3 (Lithuania on behalf of the EU); UNGA, Third Committee, ‘Summary Record of the 68th Session, 49th Meeting’ (2013) (n 294), 9 (US); UNGA, Third Committee, ‘Summary Record of the 69th Session, 52nd Meeting’ (2014) (n 294), 6 (US); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (2015) (n 290), 4 (Luxembourg on behalf of the EU); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 52nd Meeting’ (2015) (n 294), 5 (US).

³³² Hofer, ‘Divide on Unilateral Coercive Measures’ (n 285), 17. *See e.g.* UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2003) (n 317), 4 (Costa Rica); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2005) (n 317), 9 (Panama); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2011) (n 295), 7 (Egypt), 8 (Gabon), 10 (Mauritius), 11 (Mexico); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2013) (n 317), 5 (Brazil); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 295), 11 (Russia); 13 (South Africa), 19 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2021) (n 317), 7 (Iran), 14 (South Africa). *See also* HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2010) (n 295), 6 (Russia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2011) (n 318), 7 (Burkina Faso).

³³³ Hofer, ‘Adoption & Contestation of Sanctions’ (n 269), 447. *See* Henry, ‘Revisionist Claims of Custom’ (n 299), 17.

³³⁴ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 285), 39; Hofer, ‘Adoption & Contestation of Sanctions’ (n 269), 446. *See* Ruys, ‘Immunity, Inviolability, & Countermeasures’ (n 328), 709; Cai Congyan, ‘China’s Position & Practice concerning Unilateral Sanctions’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 72

state's breach of duty will not be precluded.

CHAPTER CONCLUSION

This chapter analysed the state practice and *opinio juris* on the implementation of breaches of the duty not to threaten or use force after the 2001 Draft Articles' adoption. A survey of the instances of breach of the duty not to threaten or use force between 2001 and 2023 and the actions that states took to implement this duty suggests that states have not accepted as law the competence of 'states other than an injured state' to implement the duty owed *erga omnes*. During this period, no 'state other than an injured state' invoked the responsibility of another through judicial proceedings. Similarly, while there were threats of countermeasures in a few instances, only in one case did 'states other than an injured state' enforce the duty through countermeasures. Again, the states that claimed this prerogative were predominantly Western ones while other states argued against such competence. Thus, the chapter submits that as to the norm on force, 2001 Draft Article 48 remains a progressive measure and the question left by 2001 Draft Article 54 is still unanswered.■

CHAPTER 6A: SOME NORMS SAFEGUARDING HUMAN RIGHTS (1970–2001)

Certain human rights norms also constitute some of international law's fundamental rules.¹ This class of norms, albeit limited,² includes those on genocide, torture, racial discrimination, and slavery.³ Such is their importance that aside from being customary, they have also been the subject of agreements that have enjoyed widespread state acceptance.⁴ Yet, the rules safeguarding human rights differ from the norm against force as to their opposability. None of the conventions that contain these norms have attained the Charter's near-universal status.⁵ Their conventional forms only apply to states parties.⁶

Not all these norms impose similar duties in their conventional and customary forms. The customary and conventional norms on racial discrimination (*duty not to engage in racial discrimination*) impose similar duties.⁷ The same is true for the norms on slavery (*duty to prohibit and abolish slavery*).⁸ However, this is not the case for genocide and torture.⁹ While the conventional norm on genocide imposes a *duty to prevent and punish genocide*,¹⁰ it is the

¹ *Barcelona Traction, Light, & Power Company* (Belgium v Spain) (Judgment) [1970] ICJ 1, 32.

² Bradley Marthe, 'Jus Cogens' Preferred Sister: Obligations Erga Omnes & the International Court of Justice' in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 215; Frowein Jochen, 'Reactions by Not Directly Affected States to Breaches of Public International Law' (1994) 248 *Recueil des Cours de l'Académie de Droit International* 345, 406.

³ *Barcelona Traction* [1970] (n 1), 32; ILC, 'Report on the Work of the 53rd Session' (2001) II(2) YbILC 20, 127.

⁴ *Barcelona Traction* [1970] (n 1), 32. See Meron Theodor, *Human Rights & Humanitarian Norms as Customary Law* (Clarendon 1989), 11; Cassese Antonio, *Human Rights in a Changing World* (Polity Press 1990), 78.

⁵ Note that the Genocide Convention (*Convention on the Prevention & Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277) has 152 parties. The Torture Convention (*Convention against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85) has 172 parties. The ICERD (*International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 182) has 182 states parties. The Slavery Convention (*Slavery Convention* (adopted 7 December 1953, entered into force 7 July 1955) 212 UNTS 17) has 99 parties. The ICCPR (*International Covenant on Civil & Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171) has 174 parties. Finally, the ICESCR (*International Covenant on Economic, Social & Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3) has 171 states parties.

⁶ See Higgins Rosalyn, *Problems & Process: International Law & How We Use It* (Clarendon 1995), 34.

⁷ Vinodh Jaichand, 'Human Rights, South Africa, & Racial Discrimination' (1988) 15 *Journal of Legislation* 29, 38; Lingaas Carola, 'Crime against Humanity of Apartheid in a Post-Apartheid World' (2015) *Oslo Law Review* 86, 103.

⁸ Lenzerini Federico, 'Slavery under Customary International Law' (2000) 10 *Italian Yearbook of International Law* 145, 155; Allain Jean, 'Slavery & Obligations Erga Omnes' (2019) 36 *Australian Yearbook of International Law* 85, 87.

⁹ Johnston Katie, 'Identifying the Jus Cogens Norm in the Jus Ad Bellum' (2020) 70 *International & Comparative Law Quarterly* 29, 33.

¹⁰ *Genocide Convention* (n 5), arts 3–4.

customary norm that imposes a *duty not to commit genocide*.¹¹ Similarly, while the customary norm on torture imposes a *duty not to commit torture*,¹² not all its conventional rules do the same. The Torture Convention, for instance, only imposes ancillary duties *to prevent and punish torture* and *to provide adequate remedies to its victims*.¹³

Like the prohibition against force, many submit that certain human rights norms impose duties owed *erga omnes* or *erga omnes partes*.¹⁴ Thus, permitting every state, including ‘states other than an injured state’, to demand the duties’ observance.¹⁵ *Chapters 6A* and *6B* examine this claim. They seek to determine if states have recognised the competence of ‘states other than an injured state’ to implement the duties imposed by certain human rights norms.

This chapter examines if states have accepted the competence of ‘states other than an injured state’ to implement the duties imposed by certain human rights norms by the time of the 2001 Draft Articles’ adoption. First, it clarifies the scope of the duties that these norms impose. It examines the content of these rules and maps out the duties claimed to be owed *erga omnes* and *erga omnes partes*. Next, it examines the state practice and *opinio juris* before the 2001 Draft Articles’ adoption related to the implementation of these duties. Finally, it observes that during this period, state practice and *opinio juris* on the competence of ‘states other than an injured state’ to implement duties imposed by certain human rights norms diverged. Thus, it submits that as to these norms, the ILC correctly classified the rules on implementation by

¹¹ Gaeta Paola, ‘On What Conditions Can a State Be Held Responsible for Genocide?’ (2007) 18 *European Journal of International Law* 631, 632. *Contra Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Judgment) [2007] ICJ 43, 113.

¹² Johnston, ‘Jus Cogens Norm in Jus Ad Bellum’ (n 9), 33.

¹³ *Torture Convention* (n 5), arts 2–5. *Compare Convention for the Amelioration of the Condition of the Wounded & Sick in Armed Forces in the Field* (adopted 12 August 1949, entered into force 21 October 1950) 74 UNTS 31, art 50; *Convention for the Amelioration of the Condition of Wounded, Sick & Shipwrecked Members of Armed Forces at Sea* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art 51; *Convention Relative to the Treatment of Prisoners of War* (adopted 12 August 1949, entered into force 21 October 1950) 74 UNTS 135, art 130; *Convention Relative to the Protection of Civilian Persons in the Time of War* (adopted 12 August 1949) 75 UNTS 287, art 147; ICCPR (n 5), arts 7, 10.

¹⁴ See *Barcelona Traction* [1970] (n 1), 32 (‘Such [duties include] [...] the [norm] outlawing [...] genocide [...] rules [on] slavery and racial discrimination’); *Prosecutor v Furundžija* (Judgment) (ICTY, Trial Chamber, 95-17/1, 10 December 1998), ¶151 (‘The prohibition of torture imposes upon states [duties owed] *erga omnes*’). See also HRCComm, ‘General Comment 31: Nature of the General Legal Obligation Imposed on States Parties’ (2004) UN Doc C/21/Rev1/Add13, ¶2 (‘The contractual dimension of the treaty involves any [party] being [bound] to every other [party] to comply with its undertakings’); Borelli Silvia & Olleson Simon, ‘Obligations Relating to Human Rights & Humanitarian Law’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 1185 (‘Any human rights [duty], insofar as it is established as a matter of custom [...] is owed *erga omnes*’). But see Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 273 (‘There is certainly no indication in practice that all conventional human rights [duties] possess such status’).

¹⁵ See e.g. *Barcelona Traction* [1970] (n 1), 32; ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 127.

‘states other than an injured state’ under the 2001 Draft Articles as ‘progressive measures’.¹⁶

I. SCOPE OF THE DUTIES OWED *ERGA OMNES* OR *ERGA OMNES PARTES*

Before proceeding, the scope of the duties claimed to be owed *erga omnes* and *erga omnes partes* must be clarified. First, different sources of law bind states differently.¹⁷ Customary law applies to all states while conventional law applies only to parties.¹⁸ This affects not only which states bear the duty that a norm imposes but also which states, under 2001 Draft Article 48, may implement the wrongful states’ responsibility. Second, for genocide and torture, the customary and conventional norms impose different duties. This section briefly outlines these differences.

A. Genocide

States’ recognition of genocide’s collective dimension is unsurprising given the Second World War’s atrocities.¹⁹ In its aftermath, states condemned genocide as a crime that denies ‘entire human groups’ [...] right of existence’.²⁰ The importance afforded by states to the norm led to its rapid development and the Genocide Convention.²¹ States, under this agreement, undertook steps to prevent and punish genocide’s commission.²² Yet, the modesty and vagueness of the Convention’s provisions led to doubts regarding its capacity to curb genocide. It did not, as authors like Shany submit, ‘satisfactorily address states’ responsibility for genocide’ and ‘excessively relied on the territorial state’ to prosecute its perpetrators.²³ This, according to Crawford, Seibert-Fohr, and Shaw, created a ‘space for [custom] to develop in parallel to the Convention’ and fill out its normative gaps,²⁴ including the prohibition on states

¹⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 23, 127.

¹⁷ Compare 2001 Draft Article 12 (ibid, 55). Note that this presumes that the duty already binds the state.

¹⁸ *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (Judgment) [1969] ICJ 3, 38–9. But note the concept of ‘persistent objector’ (See ILC, ‘Report on the Work of the 69th Session’ (2017) UN Doc A/72/10, 152).

¹⁹ See Longobardo Marco, ‘Genocide, Obligations Erga Omnes, & Responsibility to Protect’ (2015) 19(8) *International Journal of Human Rights* 1199, 1199; Ben-Naftali Orna, ‘Obligations to Prevent & Punish Genocide’ in Gaeta Paola (ed), *UN Genocide Convention: Commentary* (Oxford University Press 2009), 28.

²⁰ Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997), 93 citing *Crime of Genocide* Res 96(I) UNGA (11 December 1946) A/RES/96(I). See Res 95(I) UNGA (11 December 1946) A/RES/95(1).

²¹ See *Genocide Convention* (n 5).

²² Ragazzi, *Obligations Erga Omnes* (n 20), 93–4; Schabas William, ‘Law & Genocide’ in Bloxham Donald & Moses A (eds), *Oxford Handbook of Genocide Studies* (Oxford University Press 2010), 128.

²³ Shany Yuval, ‘Road to Genocide’ in Gaeta Paola (ed), *UN Genocide Convention: Commentary* (Oxford University Press 2009), 4.

²⁴ Ibid. But see ‘Memorial of Belgium’, *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Merits) (ICJ, General List No 144, 1 July 2010), ¶4.81 (‘The [Genocide Convention] [...] is an expression of customary law’).

from committing genocide.²⁵

The conventional and customary norms impose distinct duties. The former, according to Gaeta, is a due diligence duty.²⁶ It creates a ‘framework of cooperation’ among states,²⁷ by imposing a *duty to prevent genocide*, and should it occur, a *duty to punish* its perpetrators.²⁸ As Ben-Naftali and Longobardo observe, responsibility arises if a state fails to act once it has or should have learned of the risk of genocide.²⁹ Yet, it does not *per se* engage the state’s responsibility should it, through persons whose acts are attributable to it, commit genocide.³⁰ As Gaeta argues, the *duty not to commit genocide* cannot be inferred from the *duty to prevent and punish* its commission.³¹ While a norm’s imposition of duties of prevention and punishment suggests the conduct’s illegality, it is ‘not the source of the prohibition of the conduct itself’.³² The *duty not to commit genocide* is imposed by the customary norm that addresses the convention’s shortcomings.³³

Regardless of this distinction, many consider the duties the norms impose to be owed *erga*

²⁵ Tams Christian, ‘Article 1’ in Tams Christian, *et al.* (eds), *Convention on the Prevention & Punishment of the Crime of Genocide: Commentary* (Hart 2014), 56–7 noting Crawford James & Olleson Simon, ‘State Responsibility’ in Shelton Dinah (ed), *Encyclopedia of Genocide & Crimes Against Humanity* (Thompson Gale 2005), 910; Seibert-Fohr Anja, ‘State Responsibility for Genocide under the Genocide Convention’ in Gaeta Paola (ed), *UN Genocide Convention: Commentary* (Oxford University Press 2009), 354 citing Gaeta, ‘State Responsibility for Genocide’ (n 11), 642; Shaw Malcom, ‘Genocide & International Law’ in Dinstein Yoram (ed), *International Law at a Time of Perplexity Essays in Honour of Shabtai Rosenne* (Nijhoff 1989), 814.

²⁶ Gaeta, ‘State Responsibility for Genocide’ (n 11), 637 citing *Application of the Genocide Convention* [2007] (n 11), 221 (‘Responsibility is however incurred if the state manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide’)

²⁷ Shany, ‘Road to Genocide’ (n 23), 4.

²⁸ Ben-Naftali, ‘Obligations to Prevent & Punish Genocide’ (n 19), 38, 42, 45; Longobardo, ‘Genocide, Obligations Erga Omnes, & Responsibility to Protect’ (n 19), 1200.

²⁹ *Application of the Genocide Convention* [2007] (n 11), 221.

³⁰ Quigley John, *Genocide Convention: International Law Analysis* (Ashgate 2006), 222 (‘[The] Convention’s curious omission’).

³¹ Gaeta, ‘State Responsibility for Genocide’ (n 11), 638. See ‘Counter-Memorial Yugoslavia’, *Application of the Genocide Convention* (Bosnia & Herzegovina v Yugoslavia) (Merits) (ICJ, General List No 91, 22 July 1997), 312–3; ‘Verbatim Record 2006/17’, *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Merits) (ICJ, General List No 91, 12 March 2006), 42; *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Preliminary Objections) [1996] ICJ 595 (Shi & Vereshchetin, dissenting), 631; (Kreča, dissenting), 767–71. *Contra Application of the Genocide Convention* [2007] (n 11), 113, 115–9 (‘Parties [have the duty] under the Convention not to commit, through [entities] whose conduct is attributable to them, genocide’); Tams, ‘Article 1’ (n 25), 56 ff (‘[The] Convention [must be] read to include an implicit prohibition against state conduct’); Milanović Marko, ‘State Responsibility for Genocide’ (2006) 17 *European Journal of International Law* 553, 566.

³² Gaeta, ‘State Responsibility for Genocide’ (n 11), 649.

³³ *Ibid*, 642. Note that while ‘it is still controversial whether [the duty not to commit genocide] is implicit in the Convention’ (Seibert-Fohr, ‘State Responsibility under the Genocide Convention’ (n 25), 354–5), it may be argued that the *duty to prevent and punish genocide* has become the customary (See Longobardo, ‘Genocide, Obligations Erga Omnes, & Responsibility to Protect’ (n 19), 1202; Schabas, ‘Law & Genocide’ (n 22), 132; Tan Yudan, ‘Identification of Customary Rules in International Criminal Law’ (2018) 34 *Utrecht Journal of International & European Law* 92, 101).

omnes or erga omnes partes.³⁴ The ICJ, in *Barcelona Traction*, claimed that the customary norm imposes a duty owed *erga omnes*.³⁵ Similarly, it has repeatedly affirmed that the conventional norm imposes a duty owed *erga omnes partes contractes*.³⁶ Several states have also adopted this view.³⁷

B. Torture

States also recognised that torture ‘constitutes a direct and deliberate attack on [the] human personality and dignity’.³⁸ Given its prevalence especially during times of conflict, states sought to create norms against its commission such as those under the Geneva Conventions.³⁹ Various human rights treaties also contain protections against cruel, inhuman, or degrading treatment or punishment.⁴⁰ Moreover, there are specialised instruments such as the Torture

³⁴ See for a discussion of peremptory status Ago Roberto, 'Droit des traités à la lumière de la Convention de Vienne' (1971) 134 *Recueil des Cours de l'Académie de Droit International* 297, 324, Bianchi Andrea, 'Human Rights & the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491, 491–2.

³⁵ *Barcelona Traction* [1970] (n 1), 32. See ILC, 'Report on the Work of the 53rd Session' (2001) (n 3), 127.

³⁶ See *Application of the Genocide Convention* [1996] (n 31), 616; (Oda, Declaration), 635; (Weeramantry, Separate Opinion), 646; *Armed Activities on the Territory of the Congo* (DRC v Rwanda) (Jurisdiction & Admissibility) [2006] ICJ 6, 31–2; *Application of the Genocide Convention* [2007] (n 11) (Ranjeva, Separate Opinion), 238; *Application of the Genocide Convention* (Croatia v Serbia) (Judgement) [2015] ICJ 3, 44, 47; (Trindade, Dissenting), 308; *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022), 35, 37; *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192, 12. But see *Application of the Genocide Convention* (Gambia v Myanmar) (Provisional Measures) [2019] (ICJ, 11 November 2019) (Xue, Separate Opinion), 33 ('It is one thing for each party to the Convention [...] to have an interest in compliance with the [duties] *erga omnes partes* [...] and it is quite another to allow any party to institute proceedings against another party without any qualification on jurisdiction and admissibility'); *Application of the Genocide Convention* [2022] (n 36) (Xue, dissenting), 7 ('This reasoning, based on a particular reading of the [Genocide] Advisory Opinion, does not seem consistent with the established practice of the states'). Note (Kress, declaration), 4 ff.

³⁷ See 'Memorial of Bosnia & Herzegovina', *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Counter-claims) (ICJ, General List No 93, 15 April 1994), 182 ('[A]ny state has a 'legal interest' in suing a state committing genocide'); *Application of the Genocide Convention* [2015] (n 36), 44 ('Croatia [...] maintains that the Genocide Convention [...] creates [duties owed] *erga omnes*'); *Application of the Genocide Convention* [2019] (n 36), 17 ('Myanmar accepts that, because of the *erga omnes partes* character of some [duties] under the Convention, the Gambia has an interest in its compliance with such [duties] [...] The Gambia contends that, the [duties] [...] are [...] owed *erga omnes partes*'); 'Joint Declaration of Intervention of Canada, Denmark, France, Germany, and the UK', *Application of the Genocide Convention* (The Gambia v Myanmar) (Intervention) (ICJ, General List No 178, 15 November 2023), 2; 'Declaration of Intervention of Maldives', *Application of the Genocide Convention* (The Gambia v Myanmar) (Intervention) (ICJ, General List No 178, 15 November 2023), 4; 'Application', *Application of the Genocide Convention in Gaza* (South Africa v Israel) (ICJ, General List No 192, 28 December 2023), 3, 6, 9, 78 ('South Africa also seeks to protect [duties owed] *erga omnes partes* rights [...] under the Genocide Convention'); 'Application Instituting Proceedings', *Proceedings between Nicaragua & Germany* (Nicaragua v Germany) (Institution of Proceedings) (ICJ, 1 March 2024), 6, 23 ('Nicaragua [...] seeks protection of its rights [that correlate] to [Germany's duties owed] *erga omnes partes* under both the Genocide Convention and [*erga omnes*] under customary international law').

³⁸ Nowak Manfred, Birk Mortiz, & Monina Giuliana (eds), *UN Convention against Torture & its Optional Protocol: Commentary* (2nd edn, Oxford University Press 2019), 1.

³⁹ See *First Geneva Convention* (n 13), art 50; *Second Geneva Convention* (n 13), art 51; *Third Geneva Convention* (n 13), art 130; *Fourth Geneva Convention* (n 13), art 147.

⁴⁰ See ICCPR (n 5), art 5; *Convention for the Protection of Human Rights & Fundamental Freedoms* (adopted

Convention that impose the *duty to prevent and punish acts of torture*.⁴¹ Finally, as some, including the ICJ observe, the *duty not to commit torture* has also become customary.⁴²

Like the norm on genocide, the duties imposed by the customary and conventional norms on torture also differ. The customary norm imposes a *duty not to commit torture*.⁴³ Yet, the Torture Convention, as Johnston and Zach observe, only obliges states to take measures to prevent acts of torture in their jurisdictions.⁴⁴ It requires states *to prevent torture, punish its perpetrators, and provide remedies* to their victims.⁴⁵ In contrast, some humanitarian and human rights instruments impose upon states both the *duty not to commit torture* through persons whose acts are attributed to it and the *duty to take measures to prevent and punish torture*.⁴⁶ Furthermore, they require states *to take measures to suppress acts of torture*,⁴⁷ and *to respect and ensure the right of persons to be free from torture*.⁴⁸

The ICJ in *Barcelona Traction* did not deem the norm on torture to impose duties owed

4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 3; *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 27; *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 5.

⁴¹ *Torture Convention* (n 5), arts 2, 4, 6, 7, 9; Nowak, Birk, & Monina (eds), *UN Convention against Torture & its Optional Protocol* (n 38), 63.

⁴² *Ahnadou Sadio Diallo* (Guinea v DRC) (Judgment) [2010] ICJ 639, 671 ('There is no doubt that the prohibition [on torture] is among the rules [that] are binding on states in all circumstances, even apart from any treaty commitments'); *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422, 457 ('The prohibition of torture is part of customary international law [...] that [...] is grounded in a widespread international practice and on the *opinio juris* of states') citing *Universal Declaration of Human Rights* Res 217 A (III) UNGA (10 Dec 1948) UN Doc A/RES/217; *Declaration on the Protection of All Persons from Being Subjected to Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment* Res 3452 (XXX) UNGA (9 Dec 1975) UN Doc A/RES/3452.

⁴³ Johnston, 'Jus Cogens Norm in Jus Ad Bellum' (n 9), 33. See Andenas Mads & Weatherall Thomas, 'Questions relating to the Obligation to Extradite or Prosecute' (2013) 62 *International & Comparative Law Quarterly* 753, 760–1; Lepard Brian, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2012), 242.

⁴⁴ Johnston, 'Jus Cogens Norm in Jus Ad Bellum' (n 9), 33 citing *Torture Convention* (n 5), art 2(1); Zach Gerrit, 'Article 1: Definition of Torture' in Nowak Manfred, *et al.* (eds), *UN Convention Against Torture & its Optional Protocol: Commentary* (Oxford University Press 2019), 63. *Contra* Tams, 'Article 1' (n 25), 59 ('Notwithstanding [the Torture Convention's] silence, there is general agreement that states are required [...] not to engage in torture') citing CAT, 'General Comment No 2: Article 2' (24 January 2008) UN Doc CAT/C/GC/2, ¶15.

⁴⁵ Nowak, Birk, & Monina (eds), *UN Convention against Torture & its Optional Protocol* (n 38), 7 ff.

⁴⁶ See on humanitarian law: *First Geneva Convention* (n 13), art 3; *Third Geneva Convention* (n 13), arts 87, 130; *Fourth Geneva Convention* (n 13), arts 3, 32, 147; Sassòli Marco, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *International Review of the Red Cross* 401, 404–12. On human rights: *ICCPR* (n 5), arts 7, 10; HRC, 'General Comment 31' (2004) (n 14), ¶6 ('The [duties are] both negative and positive in nature'); HRC, *Comm No 588/1994*, 56th sess, UN Doc CCPR/C/56/D/588/1994 (22 March 1996) ('*Johnson v Jamaica*'), ¶8.2.

⁴⁷ See *First Geneva Convention* (n 13), art 49; *Third Geneva Convention* (n 13), art 129.

⁴⁸ See *ICCPR* (n 5), arts 2(1), 5; HRC, 'General Comment 31' (2004) (n 14), ¶4; HRC, 'General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.9, ¶13. *Note Rodriguez v Honduras* (Judgment) (IACtHR, Ser C No 4, 29 July 1988), ¶172.

erga omnes. Yet, since then, many have claimed that torture belongs to this class of norms.⁴⁹ The ICTY stated that the norm ‘imposes [duties owed] *erga omnes* [and are owed] to all [states] each of which has a correlative right’.⁵⁰ Several scholars have also claimed that the conventional norms on torture such as those under the Geneva Conventions,⁵¹ and those under multilateral human rights treaties,⁵² are owed *erga omnes partes contractes*. For its part, the ICJ asserted that the duties under the Torture Convention are owed *erga omnes partes contractes*.⁵³ Some states have also claimed the same.⁵⁴

C. Racial Discrimination

The development of the norms on racial discrimination traces its roots, in part, from states’ experiences under colonialism, previous conflicts, and continued manifestations of racial prejudice. Colonialism reinforced the idea of hierarchy between the colonist and the colonised.⁵⁵ The Second World War showed the effects of the Nazi doctrine of racial

⁴⁹ See for a discussion of the peremptory status *Obligation to Prosecute or Extradite* [2012] (n 42), 457; *Prosecutor v Delalić* (Judgment) (ICTY, Trial Chamber, 96-21-T, 16 November 1998), ¶454; *Furundžija* (n 14), ¶¶153–6; *Cantoral Benavides v Peru* (Judgement) (IACtHR, Ser C No 88, 18 August 2000), ¶99; *Tibi v Ecuador* (Judgement) (IACtHR, Ser C No 144, 7 September 2004), 143; de Wet Erika, ‘Prohibition of Torture as Jus Cogens & its Implications for National & Customary Law’ (2004) 15 *European Journal of International Law* 97, 121.

⁵⁰ *Furundžija* (n 14), ¶151. See Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 107, fn 819 (‘The [duties] of the responsible state [...] may be owed to another state, to several states, to all other states parties or to the international community as a whole’).

⁵¹ See Longobardo Marco, ‘Contribution of Humanitarian Law to the Development of the Law on Responsibility regarding Obligations Erga Omnes & Erga Omnes Partes’ (2018) 23 *Journal of Conflict & Security Law* 383, 391.

⁵² See Plagman Hanshe, ‘Status of the Right to Life & the Prohibition of Torture under International Law: Its Implications for the US’ (2003) *Journal of the Institute of Justice & International Studies* 172, 173; Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 257. See generally de Wet Erika, ‘Jus Cogens & Obligations Erga Omnes’ in Shelton Dinah (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2013), 554; Arnardóttir Oddný Mjöll, ‘Res Interpretata, Erga Omnes Effect, & the Role of the Margin of Appreciation in Giving Domestic Effect to ECtHR Judgments’ (2017) 28 *European Human Rights Law Review* 819, 822–3. See also *Ireland v UK* (Judgment) (ECtHR, App No 5310/71, 18 January 1978), ¶239; *Effect of Reservations on the Entry Into Force of the IACHR (Arts 74 & 75)* (Advisory Opinion) (IACtHR, OC-2/82, 24 September 1982), ¶29.

⁵³ *Obligation to Prosecute or Extradite* [2012] (n 42), 450 (‘Any party [...] may invoke the responsibility of another [...] to [ascertain] the failure to comply with its [duties owed] *erga omnes partes*’); (Trindade, Separate Opinion), 527 ff; *Application of the Torture Convention* (Canada & The Netherlands v Syria) (Provisional Measures) [2023] General List No 188, 14 (‘It follows that any party to the Convention [...] may invoke the responsibility of another’). But see *Obligation to Prosecute or Extradite* [2012] (n 42) (Xue, Dissenting), 574–7; (Owada, Declaration), 470; (Skotnikov, Separate Opinion), 482–4; (Sur, Dissenting), 608; *Application of the Torture Convention* [2023] (n 53) (Xue, dissenting), 1.

⁵⁴ See ‘Memorial of Belgium’, *Obligation to Prosecute or Extradite* (n 24), 79; ‘Joint Application Instituting Proceedings’, *Application of the Torture Convention* (Canada & The Netherlands v Syria) (ICJ, General List No 188, 8 June 2023), 3.

⁵⁵ Thornberry Patrick, *International Convention on the Elimination of All Forms of Racial Discrimination: Commentary* (Oxford University Press 2016), 9 citing Anghie Antony, *Imperialism, Sovereignty & the Making of International Law* (Cambridge University Press 2004), 36; Obrégon L, ‘The Civilised & the Uncivilised’ in Fassbender Bardo & Peters Anne (eds), *Oxford Handbook of the History of International Law* (Oxford University Press 2012), 37.

superiority.⁵⁶ In addition, the decolonisation period saw segregationist policies such as South Africa's Apartheid.⁵⁷

It is within this context that states began to address racial discrimination. In 1948, the GA, through the UDHR, declared that every person is entitled to all rights [...] without distinction to 'race, colour, [...] language, religion, [...] national or social origin'.⁵⁸ In 1960, it adopted Resolution 1510 (XV) which called on states to take all 'measures to prevent all manifestations of racial, religious, and national hatred'.⁵⁹ It then asked the then Commission on Human Rights ('CHR') and the Economic and Social Council ('EcoSoC') to prepare a draft declaration on racial discrimination.⁶⁰ This led to the Convention on the Elimination of All Forms of Racial Discrimination ('CERD') and the Convention on the Suppression and Punishment of the Crime of Apartheid.⁶¹

Unlike the two norms discussed above, the conventional and customary rules on racial discrimination are broadly similar. The conventional norms impose a *duty not to engage in racial discrimination* and to *eliminate racial discrimination in all its forms*.⁶² They do the same for the most egregious cases of racial discrimination and require states to *prevent, prohibit, and eradicate* Apartheid and segregation.⁶³ As tribunals submit, the conventional norms, which at the time of adoption were *de lege ferenda*,⁶⁴ have since become customary.⁶⁵ As such, the

⁵⁶ Thornberry, *ICERD* (n 55), 19.

⁵⁷ *Ibid*, 88.

⁵⁸ Res 217 A (III) (n 42), art 2.

⁵⁹ *Manifestations of Racial & National Hatred* Res 1510 (XV) UNGA (15 December 1960) UN Doc A/RES/1510.

⁶⁰ Thornberry, *ICERD* (n 55), 28 citing *Preparation of a Draft Declaration & Convention on the Elimination of All Forms of Racial Discrimination* Res 1780 (XVII) UNGA (7 December 1962) UN Doc A/RES/1780.

⁶¹ Thornberry, *ICERD* (n 55), 29 citing *Declaration on the Elimination of All Forms of Racial Discrimination* Res 1904 (XVIII) UNGA (20 Nov 1963) UN Doc A/RES/1904(XVIII); See *ICERD* (n 5); *Convention on the Suppression & Punishment of the Crime of Apartheid* (adopted 30 Nov 1973, entered into force 18 Jul 1976) 1015 UNTS 243.

⁶² *ICERD* (n 5), art 2; Thornberry, *ICERD* (n 55), 162, 181–8. See *ECHR* (n 40), art 14; *ACHR* (n 40), art 24; *ACHPR* (n 40), arts 2, 3, 18, 28; *ICCPR* (n 5), art 2; *ICESCR* (n 5), art 2(2).

⁶³ *ICERD* (n 5), art 3; Thornberry, *ICERD* (n 55), 256; Du Plessis Max, 'International Criminal Law: Crime of Apartheid Revisited' (2011) 24 *South African Journal of Criminal Justice* 47, 419; Vinodh, 'Human Rights, South Africa, & Racial Discrimination' (n 7), 38. See *ICSPCA* (n 61), arts 3, 4.

⁶⁴ Vinodh, 'Human Rights, South Africa, & Racial Discrimination' (n 7), 40 citing Watson JS, 'Legal Theory, Efficacy, & Validity in the Development of Human Rights Norms' (1979) *University of Illinois Law Forum* 609, 631.

⁶⁵ *Southwest Africa* (Ethiopia & Liberia v South Africa) (Judgment) [1966] ICJ 6 (Tanaka, dissenting), 293 ('The norm of non-discrimination on the basis of race has become [...] customary'); *Juridical Condition & Rights of Undocumented Migrants* (Advisory Opinion) (IACtHR, OC-18/03, 17 September 2003), 95, 98–101; *Yatama v Nicaragua* (Preliminary Objections & Merits) (IACtHR, Ser C No 127, 20 October 2016), 81–2. See also ILC, 'Memorandum by the Secretariat: Formation & Evidence of Customary International Law' (14 March 2013) UN

customary norm arguably contains similar duties as its conventional counterpart.

The ICJ in *Barcelona Traction* asserted that the norm on racial discrimination imposes a duty owed *erga omnes*.⁶⁶ Yet, it did not clarify whether the *erga omnes* status related to the norm on racial discrimination broadly or only to its most serious forms. If one views the *Barcelona Traction* decision as a response to the *Southwest Africa* cases, it could be argued that the Court may have referred only to Apartheid and segregation.⁶⁷ However, whether this claim holds remains to be seen. Indeed, some states and tribunals assert that the customary and conventional norms on racial discrimination, not just Apartheid, impose duties owed *erga omnes* or *erga omnes partes contractes*.⁶⁸

D. Slavery

The importance afforded by states on the norm against slavery as early as the 1800s,⁶⁹ stems from the realisation that it ‘deprives [persons] of their dignity’.⁷⁰ Yet, early norms only prohibited slavery’s traditional forms. Otherwise known as ‘chattel slavery’, these pertained to the exercise of any or all the powers of the right of ownership over a person.⁷¹ Indeed, as late as 1926, the Convention to Suppress Slave Trade and Slavery still defined slavery in this manner.⁷²

Doc A/CN.4/659, 29–30; Butcher Goler Teal, 'Legal Consequences for States of the Illegality of Apartheid' (1986) 8 *Human Rights Quarterly* 404, 410; Lingaas, 'Apartheid in a Post-Apartheid World' (n 7), 105; Meron Theodor, 'Meaning & Reach of the Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *American Journal of International Law* 283, 283.

⁶⁶ *Barcelona Traction* [1970] (n 1), 32. See for a discussion of the peremptory status Schabas William, *The Customary International Law of Human Rights* (Oxford University Press 2021), 64–6, 167–8; de Wet Erika, 'Emergence of International & Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611, 616; Cassese Antonio, 'Enhanced Role of Jus Cogens' in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 162; Tladi Dire, 'Fourth Report on Peremptory Norms' (31 January 2019) UN Doc A/CN.4/727, 45–6; *Juridical Condition & Rights of Undocumented Migrants* (n 65), ¶¶97–101, 110–1.

⁶⁷ See Dugard John & Reynolds John, 'Apartheid, International Law, & the Occupied Palestinian Territory' (2013) 24 *European Journal of International Law* 867, 883; Lingaas, 'Apartheid in a Post-Apartheid World' (n 7), 107; Meron, *Human Rights & Humanitarian Norms as Custom* (n 4), 11.

⁶⁸ See Tams, *Enforcing Obligations Erga Omnes* (n 52), 212 citing G77 Foreign Ministers, 'Declaration Adopted at the 7th Meeting' (1983). CERD, *Comm No 100/5*, 100th sess, UN Doc CERD/C/100/5 (12 December 2019) ('*Palestine v Israel*'), ¶¶3.43, 3.50; *Juridical Condition & Rights of Undocumented Migrants* (n 65), 113 ('The fundamental principle of equality and non-discrimination [...] entails [duties owed] *erga omnes*'); *Yatama v Nicaragua* (n 65) (Trindade, separate opinion), 3; Ragazzi, *Obligations Erga Omnes* (n 20), 118.

⁶⁹ Lenzerini, 'Slavery under Custom' (n 8), 149 citing *Additional Articles to the Paris Peace Treaty* (adopted 30 May 1814) 62 CTS 193; *Declaration Relative to the Universal Abolition of the Slave Trade* (adopted 8 February 1815) 63 CTS 473; *Additional Article to the Second Paris Peace Treaty* (adopted 20 November 1815) 65 CTS 257; *Treaty of London for the Suppression of the African Slave Trade* (adopted 20 December 1841) 92 CTS 437.

⁷⁰ Nowak, Birk, & Monina (eds), *UN Convention against Torture & its Optional Protocol* (n 38), 1.

⁷¹ Lenzerini, 'Slavery under Custom' (n 8), 159–60.

⁷² Ragazzi, *Obligations Erga Omnes* (n 20), 106 citing *International Convention to Suppress Slave Trade & Slavery* (adopted 25 September 1926, entered into force 7 March 1927) 60 LNTS 253, art 1. Note that some submit

By the 1930s, states recognised the need to prohibit other forms of exploitation like debt bondage, forced labour, and human trafficking.⁷³ This led to the 1956 Supplementary Convention that required states to ‘take all practicable and necessary [...] measures’ to ‘abolish or abandon’ other forms of exploitation ‘whether or not they are covered by [slavery’s] definition [...] [under] [...] the Slavery Convention’ thereby remedying the 1926 Convention’s shortcomings.⁷⁴ Other human rights treaties also have similar provisions. For instance, the ICCPR prohibits slavery ‘in all their forms’ including servitude and forced labour.⁷⁵ Other specialised instruments also addressed other forms of ‘modern slavery’.⁷⁶

The conventional rule, like the customary law that developed along with it,⁷⁷ imposes the *duty to prohibit and abolish slavery*.⁷⁸ The 1926 Convention and the 1956 Supplementary Convention both require parties to *repeal laws allowing slavery and criminalise its commission*.⁷⁹ The International Labour Organisation’s (‘ILO’) Convention No 29 also requires

that the older slavery instruments cover slavery in its contemporary forms. The UN Working Group on Contemporary Forms of Slavery argued that treaties on slavery cover the exercise of ‘actual power of disposal or enjoyment over another [person]’ (Lenzerini, ‘Slavery under Custom’ (n 8), 160–1). The ICTY claimed that the 1926 Convention encompasses forms of slavery that are akin to the exercise of any or all of the powers [attached] to the right of ownership’ (*Prosecutor v Kunarac* (Judgement) (ICTY, Appeals Chamber, Case Nos IT-96-23 & IT-96-23/1-A, 12 June 2002), ¶116 cited in Allain, ‘Slavery & Obligations Erga Omnes’ (n 8), 91. *But see Siliadin v France* (Judgement) (ECtHR, App no 73316/01, 25 July 2005), ¶122). Perhaps more clearly, the Inter-American Court of Human Rights (‘IACtHR’) stated that the essence of slavery pertained to ‘control’ amounting to the ‘loss of one’s own will or a considerable reduction of personal autonomy’ (*Workers of Fazenda Brasil v Brazil* (Preliminary Objections) (IACtHR, Ser C No 318, 20 October 2016), ¶¶269, 271 cited in Allain, ‘Slavery & Obligations Erga Omnes’ (n 8), 94. *See — —*, ‘Bellagio-Harvard Guidelines of the Legal Parameters of Slavery’ (Queen’s University, 2012); Honoré A, ‘Ownership’ in Guest A (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961), 107, 113).

⁷³ Allain, ‘Slavery & Obligations Erga Omnes’ (n 8), 89; Allain Jean, ‘Legal Definition of Slavery into the Twenty-First Century’ in Allain Jean (ed), *Legal Understanding of Slavery* (Oxford University Press 2012), 199.

⁷⁴ *Supplementary Convention on the Abolition of Slavery* (adopted 30 April 1956, entered into force 7 September 1956) 266 UNTS 3, art 1.

⁷⁵ *See ICCPR* (n 5), art 8; *ECHR* (n 40), art 4; *ACHR* (n 40), art 6; *ACHPR* (n 40), art 5.

⁷⁶ *See e.g. Convention on Forced or Compulsory Labour (No 29)* (adopted 10 June 1930, entered into force 1 May 1932) 39 UNTS 55; *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; *Convention on the Protection of the Rights of All Migrant Workers & Members of their Families* (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3; *Protocol to Prevent, Suppress, & Punish Trafficking in Persons* (adopted 12 Dec 2000, entered into force 15 Nov 2000) 2237 UNTS 319.

⁷⁷ *Note* that some submit that the norm has become customary law given states’ domestic legislations against slavery, their condemnation of slavery, and accession to conventions on slavery (*See Kunarac* (n 72), ¶116; Hannum Hurst, ‘Status of the UDHR in National & International Law’ (1996) 25 *Georgia Journal of International & Comparative Law* 288, 342, 44; Jennings Robert & Watts Arthur (eds), *Oppenheim’s International Law: Volume I Peace* (9th edn, Oxford University Press 2008), 981; Redman Renee, ‘League of Nations & the Right to Be Free from Enslavement’ (1994) 70 *Chicago-Kent Law Review* 759, 759; Rassam Yasmine, ‘International Law & Contemporary Forms of Slavery: Economic and Social Rights-Based Approach’ (2005) 23 *Penn State International Law Review* 809, 810).

⁷⁸ *See* Allain, ‘Slavery & Obligations Erga Omnes’ (n 8), 88 (‘The norm prohibiting slavery requires states go beyond abolition and take positive action to prevent enslavement’); Lenzerini, ‘Slavery under Custom’ (n 8), 157.

⁷⁹ *Slavery Convention* (n 5), arts 2, 6; *Supplementary Convention on Slavery* (n 74), art 1.

states to ‘*suppress forced or compulsory labour in all its forms*’ subject to some exceptions like compulsory military service, work or service in genuine cases of emergency, and prison labour.⁸⁰ Some human rights instruments also oblige parties to ‘*respect and ensure [a person’s] right to be free from slavery*’ and to *adopt measures to give effect to the conventions’ provisions*.⁸¹ Finally, specialised instruments such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’), the 1989 Convention on the Rights of the Child (‘CRC’), and the 1990 Convention on the Protection of the Rights of All Migrant Workers, also follow this framework. They require states to ‘*take appropriate measures*’ to *eliminate other forms of exploitation* and ‘*to respect and ensure*’ a person’s right to be free from exploitation.⁸²

Authorities claim that the norm on slavery imposes a duty owed *erga omnes* on states. The ICJ, in *Barcelona Traction*, asserted that the customary norm on slavery imposes duties owed *erga omnes*.⁸³ Due to the similarity between the conventional and customary norms, some suggest that the conventional norms also impose duties owed *erga omnes partes contractes*.⁸⁴

II. IMPLEMENTATION BY ‘STATES OTHER THAN AN INJURED STATE’ BEFORE THE 2001 DRAFT ARTICLES’ ADOPTION

From the discussion above, it may be observed that there are at least four norms safeguarding human rights deemed to impose duties owed *erga omnes* and *erga omnes partes*. This leads to the question of whether states have accepted the competence of ‘states other than an injured state’ to implement these duties by the time of the 2001 Draft Articles’ adoption.

Recall that the ILC deemed 2001 Draft Article 48 which provides for the competence of ‘states other than an injured state’ to implement duties owed *erga omnes*, as a progressive measure.⁸⁵ Furthermore, under 2001 Draft Article 54, it left the resolution of the issue concerning these states’ capacity to enforce responsibility via countermeasures to international

⁸⁰ See *ILO Convention No 29* (n 76), arts 2, 25, 26; *Convention on the Abolition of Forced Labour (No 105)* (adopted 26 June 1957, entered into force 17 January 1959) 320 UNTS 291, arts 1, 2.

⁸¹ See *ICCPR* (n 5), arts 2(1), 5; HRCComm, ‘General Comment 31’ (2004) (n 14), ¶4.

⁸² See e.g. *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1, art 6; *Convention on the Rights of the Child* (n 76), arts 19, 34; *Convention on the Protection of the Rights of All Migrant Workers* (n 76), art 11.

⁸³ *Barcelona Traction* [1970] (n 1), 32. See for a discussion of the peremptory status: Schabas, *Customary Human Rights Law* (n 66), 64–6; Tladi, ‘Fourth Report on Peremptory Norms’ (2019) (n 66), 46–8.

⁸⁴ Allain, ‘Slavery & Obligations Erga Omnes’ (n 8), 101–3; Webb Philippa & Garciandia Rosana, ‘State Responsibility for Modern Slavery: Uncovering & Bridging the Gap’ (2019) 68 *International & Comparative Law Quarterly* 539, 563. See generally HRCComm, ‘General Comment 31’ (2004) (n 14), ¶2; *IACHR Reservations* (n 52), ¶29.

⁸⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 117, 126–7.

law's further development.⁸⁶ Yet, as noted in *Chapter 5A*, not everyone agrees with this. Some, like Tams, Olleson, and Nissel, claim that international law already supported the competence of 'states other than an injured state' to implement duties owed *erga omnes*.⁸⁷ Others, like Sicilianos, Dawidowicz, and Proukaki, assert that the ILC incorrectly concluded that the state practice and *opinio juris* on countermeasures by 'states other than an injured state' diverged.⁸⁸

This chapter submits that the ILC correctly evaluated the trend at the time of the 2001 Draft Articles' adoption. State practice and *opinio juris* since *Barcelona Traction* had been sporadic and divergent. As shown below, between 1970 and 2001, only in a few instances did 'states other than an injured state' implement the duties imposed by certain human rights norms. None invoked the wrongful state's responsibility through judicial dispute resolution. Furthermore, only a few states, mostly Western ones, enforced the duty through unilateral measures.

A. *Apartheid in South Africa (1948–91)*

From 1948 to 1991, South Africa implemented discriminatory policies against people of colour called 'Apartheid'.⁸⁹ Among others, it prohibited marriages between 'whites' and 'non-whites',⁹⁰ banned sexual relations across racial lines,⁹¹ registered individuals based on race,⁹² and excluded 'people of colour' from some residential and business areas.⁹³ South Africa also 'enforced and maintained' Apartheid through a 'brutal security apparatus' that 'gave wide powers to security forces', 'removed [some] review powers [from] the courts', and restricted opposition parties' activities.⁹⁴ This continued until 1994 when political violence in South Africa and pressure from states led to its first open elections which the African National

⁸⁶ Ibid, 139.

⁸⁷ See Tams, *Enforcing Obligations Erga Omnes* (n 52), 197; Nissel Alan, 'ILC Articles on State Responsibility: Between Self-Help & Solidarity' (2005) 38 *New York University Journal of International Law & Policy* 355, 361; Olleson Simon, 'Virtue of Pragmatism: Reflections on the Future of the Articles of State Responsibility' (2022) 93 *Questions of International Law* 23, 39

⁸⁸ See Sicilianos Linos-Alexander, 'Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility' (2002) 13(5) *European Journal of International Law* 1127, 1143; Dawidowicz, *Third Party Countermeasures* (n 14), 242; Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 207.

⁸⁹ Erasmus Gerhad, 'Third States & Sanctions in Public International Law—Position of South Africa' (1992) 30 *Archiv des Völkerrechts* 128, 129; Dugard & Reynolds, 'Apartheid & the OPT' (n 67), 873.

⁹⁰ Act No 55, *Prohibition of Mixed Marriages* (1949) (SAF).

⁹¹ Act No 23, *Sexual Offences Act* (1957) (SAF).

⁹² Act No 30, *Population Registration Act* (1950) (SAF).

⁹³ Act No 41, *Groups Areas Act* (1950) (SAF). See also Act No 49, *Reservation of Separate Amenities Act* (1956) (SAF); Act No 27, *Native Building Workers Act* (1951) (SAF); Act No 47, *Bantu Education Act* (1953) (SAF); Act No 45, *Extension of University Education Act* (1959) (SAF).

⁹⁴ Dugard & Reynolds, 'Apartheid & the OPT' (n 67), 875.

Congress won.⁹⁵

South Africa no doubt, as scholars like Dugard and Reynolds submit, breached its customary *duty not to engage in racial discrimination*.⁹⁶ Apartheid classified persons based on ‘appearance, social acceptance, and descent’ which determined their ‘social, economic, and political status’.⁹⁷ It was not a ‘system of differentiation but [...] of discrimination as persons classified as “coloured” or “Bantu” were [given] lesser rights’.⁹⁸ Such discrimination was also systematic and institutionalised ‘involving a state-sanctioned regime of law, policy, and institutions’.⁹⁹

States condemned South Africa’s actions. In 1946, the GA expressed its concern regarding South Africa’s treatment of its Indian population.¹⁰⁰ In 1952, it also created a Commission on Racial Situation in South Africa that asked South Africa to repeal its racist laws.¹⁰¹ By 1960, the GA became more assertive as the Afro-Asian bloc’s size increased.¹⁰² In 1961, it deplored South Africa’s ‘disregard’ of its duties and asked states to take ‘separate and collective actions’ against the state.¹⁰³ In 1962, it requested states to take measures including severing relations with South Africa, closing ports to South African-flagged vessels, boycotting South African goods, imposing an arms embargo, and denying landing rights to South African aircraft.¹⁰⁴ In

⁹⁵ See Cliness Francis, 'After 300 Years, Blacks Vote in South Africa' (New York Times, 27 April 1994) <<https://www.proquest.com/historical-newspapers/after-300-years-blacks-vote-south-africa/docview/109254112>>.

⁹⁶ Note that South Africa ratified the ICCPR and ICERD on 10 December 1998. It is not a party to the Apartheid Convention. Yet, during the relevant period, the *duty not to engage in racial discrimination* has become customary (See *Legal Consequences of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1970] ICJ 16 (Ammoun, separate opinion), 67; (Dillard, separate opinion), 150; (De Castro, separate opinion), 170).

⁹⁷ Dugard & Reynolds, ‘Apartheid & the OPT’ (n 67), 873.

⁹⁸ Ibid.

⁹⁹ Ibid, 881.

¹⁰⁰ Res 44(I) UNGA (8 Dec 1946) UN Doc A/RES/44(I). See Res 395(V) UNGA (2 Dec 1950) UN Doc A/RES/395(V); Res 511(VI) UNGA (26 Jan 1952) UN Doc A/RES/511(VI); Res 615(VII) UNGA (5 Dec 1952) A/RES/615(VII); Res 820(IX) UNGA (14 Dec 1954) UN Doc A/RES/820(IX); Res 919(X) UNGA (14 Dec 1955) UN Doc A/RES/919(X).

¹⁰¹ Res 616(VII) UNGA (5 December 1952) A/RES/616(VII). See Res 721(VIII) UNGA (8 December 1953) A/RES/721(VIII); Res 1016(XI) UNGA (30 January 1957) A/RES/1016(XI); Res 1178(XII) UNGA (26 November 1957) UN Doc A/RES/1178(XII); Res 1248(XIII) UNGA (30 October 1958) UN Doc A/RES/1248(XIII).

¹⁰² Dugard John, 'International Law in the Struggle for Liberation in South Africa' (1991) 18 *Social Justice* 83, 85.

¹⁰³ Res 1598(XV) UNGA (13 April 1961) UN Doc A/RES/1598(XV). See Res 1663(XVI) UNGA (28 November 1961) UN Doc A/RES/1663(XVI).

¹⁰⁴ Res 1761 UNGA (6 Nov 1962) UN Doc A/RES/1761. See also Res 1978(XVIII) UNGA (16 Dec 1962) A/RES/1978(XVIII); Res 2054(XX) UNGA (16 Dec 1965) UN Doc A/RES/2054(XX); Res 2202(XXI) UNGA

1970, it also rejected South Africa's credentials denying it voting rights.¹⁰⁵

For its part, the SC, in 1960, condemned South Africa's forcible response to anti-Apartheid protests.¹⁰⁶ In 1963, it urged states to cease arms shipment to South Africa.¹⁰⁷ In 1977, it imposed a mandatory arms embargo under Article 41 against South Africa through Resolution 418.¹⁰⁸ This was followed in 1985 by Resolution 569 which urged states to adopt measures such as the suspension of new investments, suspension of guaranteed export loans, and prohibition of sales of computer equipment that may be used by the military and police.¹⁰⁹

Several states also imposed unilateral measures against South Africa. Some of these may be deemed retorsions as there was no duty breached.¹¹⁰ These measures include India's trade boycott in 1946,¹¹¹ OAU's termination of diplomatic relations with South Africa in 1963; OAU, Indonesia, and Kuwait's denial of ports to South African shipping in 1963;¹¹² OAU and India's denial of landing rights to South African aircraft in 1964;¹¹³ the UK's prohibition on arms exports in 1964; and the US' blocking of IMF loans to states practising racial discrimination in 1983.¹¹⁴

The other measures were countermeasures. These include the embargos levied in 1960 by Ghana, Malaysia, Indonesia, Kuwait, Nigeria, Pakistan, Sierra Leone, Tanzania, and Uganda.¹¹⁵ Note that while the GA and SC urged states to levy measures against South Africa, these resolutions, except for SC Resolution 418, were not mandatory.¹¹⁶ Thus, for GATT parties and

(16 Dec 1966) UN Doc A/RES/2202(XXI); Res 2307(XXII) UNGA (13 Dec 1967) UN Doc A/RES/2307(XXII); Res 2396(XXIII) UNGA (2 Dec 1968) UN Doc A/RES/2396(XXIII); Res 2506(XXIV) UNGA (21 Nov 1969) UN Doc A/RES/2506(XXIV); Res 2671(XXV) UNGA (8 Dec 1970) UN Doc A/RES/2671(XXV); 2775 (XXVI) UNGA (29 Nov 1971) UN Doc A/RES/2775(XXVI); Res 2923(XXVII) UNGA (15 Nov 1972) UN Doc A/RES/2923(XXVII); Res 3151(XXVIII) UNGA (14 Dec 1972) UN Doc A/RES/3151(XXVIII); Res 3411 (XXX) UNGA (28 Nov 1975) UN Doc A/RES/3411(XXX); Res 38/11 UNGA (16 Nov 1983) UN Doc A/RES/38/11.

¹⁰⁵ Res 2636(XXV) UNGA (20 Nov 1970) UN Doc A/RES/2636(XXV); Res 3206(XXIX) UNGA (30 Sept 1974) UN Doc A/RES/3206(XXIX).

¹⁰⁶ Res 134 UNSC (1 April 1960) UN Doc S/RES/134.

¹⁰⁷ Res 181 UNSC (7 August 1963) UN Doc S/RES/181.

¹⁰⁸ Res 418 UNSC (4 November 1977) UN Doc S/RES/418.

¹⁰⁹ Res 569 UNSC (26 July 1985) UN Doc S/RES/569.

¹¹⁰ Dawidowicz, *Third Party Countermeasures* (n 14), 115.

¹¹¹ Dugard, 'Struggle for Liberation in South Africa' (n 102), 87.

¹¹² Proukaki, *Problem of Enforcement* (n 88), 167.

¹¹³ Ibid; Dugard John, 'OAU & Colonialism' (1967) 16 *International & Comparative Law Quarterly* 157, 160,

¹¹⁴ Crawford Neta & Klotz Audie (eds), *How Sanctions Work: South Africa* (Palgrave Macmillan 1999), 284–5.

¹¹⁵ Dawidowicz, *Third Party Countermeasures* (n 14), 115.

¹¹⁶ Ibid, 114–5.

states that had bilateral trade treaties with South Africa, these measures *a priori* breached their duty not to impose qualitative and discriminatory trade restrictions.¹¹⁷ While these may fall under the exceptions provided by GATT Article XX(b) on measures protecting human life,¹¹⁸ and Article XXI(b) on measures protecting ‘essential security interests’,¹¹⁹ no state invoked these exceptions.¹²⁰

The same may be said for the measures levied later by other states. In 1963, Hungary suspended its trade relations with South Africa and the Philippines restricted its wood imports.¹²¹ In 1965, Japan banned direct investments in South Africa.¹²² France did the same in 1985.¹²³ In 1973, the OAPEC levied an oil embargo on South Africa.¹²⁴ In 1986, after SC Resolution 569’s adoption which urged states to adopt unilateral measures against South Africa, the EEC, and the US, banned investments in South Africa.¹²⁵ Moreover, EEC member states, Commonwealth states, and the US, prohibited iron and steel imports.¹²⁶ Commonwealth states and the US also banned oil exports.¹²⁷ These states,¹²⁸ along with France, Denmark, and New Zealand,¹²⁹ further restricted coal imports. There were also bans on loans by Commonwealth

¹¹⁷ Ibid, 115–6; Proukaki, *Problem of Enforcement* (n 88), 167.

¹¹⁸ See Bartels Lorand, 'Article XX of GATT & Problem of Extraterritorial Jurisdiction: Trade Measures for the Protection of Human Rights' (2002) 36(2) *Journal of World Trade* 355, 402–3; Harris Rachel & Moon Gillian, 'GATT Article XX & Human Rights:' (2015') 16 *Melbourne Journal of International Law* 1, 33 ff.

¹¹⁹ See Watson James, 'World Trade Organisation & Unilateral Sanctions: Prohibited or Possible?' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 206.

¹²⁰ Dawidowicz, *Third Party Countermeasures* (n 14), 116.

¹²¹ Proukaki, *Problem of Enforcement* (n 88), 167.

¹²² Crawford & Klotz (eds), *How Sanctions Work: South Africa* (n 114), 284

¹²³ Prial Frank, 'French Suspend New Investment In South Africa' (New York Times, 25 July 1985) <<https://www.proquest.com/newspapers/french-suspend-new-investment-south-africa/docview/425458348>>.

¹²⁴ Wright Sanford, 'Comprehensive International Sanctions against South Africa' (1986) 33 *Africa Today* 5, 7; Paces Eric, 'Arabs Halt Oil to Portugal, Rhodesia and South Africa' (New York Times, 29 November 1973) <<https://www.proquest.com/historical-newspapers/arabs-halt-oil-portugal-rhodesia-south-africa/docview/119752071>>.

¹²⁵ Norman Peter, 'EC Members Agree to Curbs Against Pretoria' (Wall Street Journal, 17 September 1986) <<https://www.proquest.com/newspapers/ec-members-agree-curbs-against-pretoria-modest/docview/398014025>>; PL 99-440, *Comprehensive Anti-Apartheid Act* (1986) (US).

¹²⁶ Norman, 'EC Members Agree to Curbs Against Pretoria' (n 125); Commonwealth of Nations, 'Commonwealth Accord on Southern Africa' (20 October 1985); Norman Peter, 'Thatcher's Failure to Agree on Sanctions Shows Shift From Commonwealth to EC' (Wall Street Journal, 6 August 1986) <<https://www.proquest.com/newspapers/thatchers-failure-agree-on-sanctions-shows-shift/docview/398064227>>; Crawford & Klotz (eds), *How Sanctions Work: South Africa* (n 114), 285; *Comprehensive Anti-Apartheid Act* (US).

¹²⁷ *Comprehensive Anti-Apartheid Act* (US); — —, 'Limited South Africa Sanctions Renewed' (Chicago Tribune, 16 August 1986) <<https://www.proquest.com/newspapers/limited-s-africa-sanctions-renewed/docview/290955248>>.

¹²⁸ *Comprehensive Anti-Apartheid Act* (US); — —, 'Limited South Africa Sanctions Renewed' (n 127).

¹²⁹ Katzen Leo, 'South Africa's Vulnerability to Sanctions' (1985) 8 *Review of International Studies* 89, 89.

states.¹³⁰ In addition, Australia, New Zealand, Canada, Norway, and the US restricted the importation of agricultural products.¹³¹ Furthermore, Commonwealth states banned ‘aviation links’ with South Africa,¹³² while Australia and the US suspended their respective air services agreements with the state.¹³³

B. Torture & other human rights violations in the Central African Republic (1966–79)

In 1966, Bokassa led a coup in the Central African Republic ousting Dacko,¹³⁴ and marked the beginning of a dictatorial regime characterised by gross and systematic human rights violations.¹³⁵ Bokassa’s rule lasted until 1979 when widespread protests erupted in January due to Bokassa’s abuses and the failing economy.¹³⁶ While the government quelled the unrest through force, it failed to quash a coup launched in September. This coup, supported by France, restored Dacko to power.¹³⁷

Little had been recorded about Bokassa’s abuses. Indeed, the 1979 Franco-African Commission on Inquiry stated that ‘no one [may] ever know [...] the degree of Bokassa’s bestiality’.¹³⁸ Yet, there are specific accounts of torture such as that of Bokassa’s Minister of Public Health accused of plotting against him in 1969,¹³⁹ and those arrested during the 1979 protests some of whom were stoned, bayoneted, or whipped.¹⁴⁰ The consensus appears to be that the regime’s opponents were detained and subjected to brutal conditions and

¹³⁰ Norman, ‘Thatcher’s Failure to Agree on Sanctions Shows Shift From Commonwealth to EC’ (n 126).

¹³¹ Rodman Kenneth, ‘Sanctions against South Africa’ (1994) 109 *Political Science Quarterly* 313, 314.

¹³² Proukaki, *Problem of Enforcement* (n 88), 176.

¹³³ Ibid, 170, 176; Dawidowicz, *Third Party Countermeasures* (n 14), 156–7, 158.

¹³⁴ — —, ‘Central African Regime Ousted’ (New York Times, 2 January 1966) <<https://www.proquest.com/historical-newspapers/central-african-regime-ousted/docview/117111923>>.

¹³⁵ Dawidowicz, *Third Party Countermeasures* (n 14), 123.

¹³⁶ Reoch Richard, ‘Community of Conscience: International Public Opinion & Protection of Human Rights’ (1983) *Canadian Human Rights Yearbook* 183, 188. See — —, ‘Central African Empire Accused of Killing Students’ (New York Times, 15 May 1979) <<https://www.proquest.com/historical-newspapers/central-african-empire-accused-killing-students/docview/120830387>>.

¹³⁷ Weinstein Warran, ‘Human Rights in Africa: A Long-Awaited Voice’ (1980) 78 *Current History* 97, 27. See — —, ‘Bokassa Is Reported Overthrown In Coup in Central African Empire’ (New York Times, 21 September 1979) <<https://www.proquest.com/historical-newspapers/bokassa-is-reported-overthrown-coup-central/docview/120705813>>; — —, ‘Central African Capital Reported to Be Quiet as Troops Deter Looting’ (New York Times, 23 September 1979) <<https://www.proquest.com/historical-newspapers/central-african-capital-reported-be-quiet-as/docview/120702674>>.

¹³⁸ Power Jonathan, *Ending War Crimes, Chasing the War Criminals* (BRILL 2017), 27 citing Franco-African Commission of Inquiry, ‘Report on the Events in Bangui’ (1979).

¹³⁹ O’Toole Thomas, ‘“Made in France”: Second Central African Republic’ (1982) 6 *Proceedings of the Meeting of the French Colonial Historical Society* 136, 141.

¹⁴⁰ Reoch, ‘International Public Opinion & Protection of Human Rights’ (n 136), 188.

mistreatment.¹⁴¹ These undoubtedly amounted to torture there being the infliction of ‘severe pain or suffering’,¹⁴² intentionally committed by state organs.¹⁴³ Thus, the Central African Republic arguably breached its *duty not to commit torture* which, at least by 1966, had become customary.¹⁴⁴

States were slow to react to the abuses in the Central African Republic. It was only in 1980, after Bokassa’s ouster that the CHR included the African state in its violations agenda.¹⁴⁵ Outside the UN, only in 1979, after the government’s forcible response to the protests, did states respond to Bokassa’s abuses.¹⁴⁶ In May, Francophone African states formed the Commission of Inquiry which confirmed Bokassa’s role in abuses in the Central African Republic.¹⁴⁷ In August, the EEC decided to freeze the development aid provided to the state under the Lomé Convention.¹⁴⁸ This was arguably a countermeasure. It was a ‘*de facto* suspension’ of aid contrary to the Convention which did not ‘condition the [provision of] development [aid] on the observance of human rights [duties]’.¹⁴⁹ Unlike in Uganda’s case discussed below, the EEC did not attempt to justify the suspension under *rebus sic stantibus*.¹⁵⁰ France also suspended its 1960 Agreement on Technical Military Assistance. This was also a countermeasure as the treaty ‘did not condition the provision of military assistance on the observance of human rights or include a denunciation clause’.¹⁵¹ In addition, France and the US, in measures of retorsion there

¹⁴¹ US Department of State, 'Central African Republic' (1979) 3 *Annual Human Rights Reports Submitted to Congress* 38, 38; Reoch, 'International Public Opinion & Protection of Human Rights' (n 136), 187. See —, 'Bokassa doomed by Bangui Court' (New York Times, 13 June 1987) <<https://www.proquest.com/historical-newspapers/bokassa-doomed-bangui-court/docview/110651003>>; Goldsmith Michael, 'Trial of former Emperor Bokassa I' (AP News, 22 March 1987) <<https://apnews.com/article/70ecda84e8a2f04374f37816672fc02a>>.

¹⁴² See Zach, 'Article 1: Definition of Torture' (n 44), 42–3; Nowak Manfred, 'Report of the Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 February 2010) UN Doc A/HRC/13/39, ¶60; Joseph Sarah & Castan Melissa, *International Covenant on Civil & Political Rights: Cases, Materials, & Commentary* (3rd edn, Oxford University Press 2013), 217–8 citing *Aydın v Turkey* (Merits) (ECtHR, App no 57/1996/676/866, 25 Sept 1997), ¶¶80–6; HRC, *Comm No 687/1996*, 71th sess, UN Doc CCPR/C/71/D/687/1996 (3 April 2001) ('*García v Colombia*'), ¶2,1.

¹⁴³ See Zach, 'Article 1: Definition of Torture' (n 44), 54; Joseph & Castan, *ICCPR* (n 142), 220.

¹⁴⁴ See *Obligation to Prosecute or Extradite* [2012] (n 42), 457. Note that the CAR only acceded to the Torture Convention on 11 October 2016 and the ICCPR on 8 May 1981.

¹⁴⁵ Tomaševski Katarina, *Responding to Human Rights Violations: 1946–1999* (Kluwer 2000), 371.

¹⁴⁶ Turack Daniel, 'African Charter on Human & Peoples' Rights' (1984) 17 *Akron Law Review* 365, 370.

¹⁴⁷ Weinstein, 'Human Rights in Africa: A Long-Awaited Voice' (n 137), 131. See Franco-African Commission of Inquiry, 'Report on the Events in Bangui' (n 138).

¹⁴⁸ Dawidowicz, *Third Party Countermeasures* (n 14), 124. See *Convention between African, Caribbean, & Pacific States and the EEC* (adopted 28 February 1975, entered into force 1 April 1976) 12 CMLR 4633.

¹⁴⁹ Dawidowicz, *Third Party Countermeasures* (n 14), 124.

¹⁵⁰ Proukaki, *Problem of Enforcement* (n 88), 132.

¹⁵¹ Dawidowicz, *Third Party Countermeasures* (n 14), 125.

being no duty breached, also decided to halt their development aid to the state.¹⁵²

C. Torture & Genocide against religious & ethnic minorities in Uganda (1971–8)

In 1971, Idi Amin launched a coup against Obote,¹⁵³ beginning a dictatorship that only ended in 1979 when Tanzania invaded Uganda.¹⁵⁴ Amin's rule was marked by human rights violations.¹⁵⁵ Between 1971 and 1979, his regime arrested thousands often without investigation and placed them in detention centres.¹⁵⁶ Those detained were tortured and some were killed.¹⁵⁷ Amin also targeted religious and ethnic minorities in Uganda. Ugandan forces killed Christians and persons of Asian descent whom Amin perceived as a threat to his rule.¹⁵⁸ Anchoi and Langi groups, whom Amin deemed Obote's supporters, suffered a similar fate.¹⁵⁹ The exact figure of deaths under the regime is not known. From some estimates, around 300,000 people died due to Amin's brutal rule.¹⁶⁰

Uganda, under Amin, clearly breached its customary *duty not to commit torture*.¹⁶¹ The severity of the pain and suffering intentionally inflicted by state organs clearly amounted to torture.¹⁶² Yet, views differ on whether the killings in Uganda constitute genocide.¹⁶³ Arguably, Christians, the Anchoi, and the Langi are 'groups' under genocide's definition.¹⁶⁴ Christians

¹⁵² US Department of State, 'Central African Republic' (n 141), 38.

¹⁵³ Lewis Anthony, 'The Coup had a certain Air of Familiarity: Uganda' (New York Times, 31 January 1971) <<https://www.proquest.com/historical-newspapers/coup-had-certain-air-familiarity/docview/119136739/>>.

¹⁵⁴ Winfrey Carey, 'Uganda Regime Assumes Office Amid Jubilation' (New York Times, 14 April 1979) <<https://www.proquest.com/historical-newspapers/uganda-regime-assumes-office-amid/docview/120928181/>>.

¹⁵⁵ Darnton John, 'Idi Amin: Savior Who Created of 8 Years of Horror' (New York Times, 30 April 1979) <<https://www.nytimes.com/1979/04/30/archives/idi-amin-a-savior-who-became-the-creator-of-8-years-of-horror.html>>.

¹⁵⁶ —, 'Human Rights in Uganda' (AFR 59/05/78, Amnesty International, 1978), 6.

¹⁵⁷ Sarkin Jeremy, 'Transitional Justice in Uganda' (2015) 7 *Hague Journal on the Rule of Law* 111, 114.

¹⁵⁸ Williams Kenneth, 'Justice or Peace: Proposal for Resolving the Dilemma' (2015) 25 *Pace International Law Review* 132, 155.

¹⁵⁹ —, 'Human Rights in Uganda' (n 156), 6, 11.

¹⁶⁰ Dawidowicz, *Third Party Countermeasures* (n 14), 119; Owusu Emmanuel, "'Guilty of Having Been Obedient": A Fresh Dissection of the Superior Orders Controversy' (2021) *International Humanitarian Legal Studies* 1, 24.

¹⁶¹ Note that Uganda ratified the Convention against Torture on 3 November 1986 and the ICCPR on 21 June 1995.

¹⁶² See —, 'Human Rights in Uganda' (n 156), 6; Sarkin, 'Transitional Justice in Uganda' (n 157), 114. Note Zach, 'Article 1: Definition of Torture' (n 44), 42–43; Joseph & Castan, *ICCPR* (n 142), 217–8 citing *Austria v Italy (Pfunders case)* (Admissibility) (ECmHR, App No 788/60, 11 January 1961), ¶¶70–6; *Garcia v Colombia* (n 142).

¹⁶³ Note that Uganda only acceded to the Genocide Convention on 14 November 1995.

¹⁶⁴ See Abrams Jason, 'Atrocities in Cambodia & Kosovo: Observations on the Codification of Genocide' (2001) 35 *New England Law Review* 303, 306; Van Shaack Beth, 'Crime of Political Genocide: Repairing the

were a religious minority in Uganda while the Anchoi and the Langi were distinct ethnic groups.¹⁶⁵ Yet, the problem lies with the existence of ‘genocidal intent’,¹⁶⁶ that is, if the perpetrators designed the measures towards the groups’ destruction.¹⁶⁷ Mendlovitz and Fousek argue that Amin only sought to eliminate threats to his rule and not ‘groups as such’.¹⁶⁸ However, motive must be distinguished from intent. As Hannum and Byron submit, the rationale behind the group’s destruction is immaterial,¹⁶⁹ whether it was due to Amin’s desire to establish a Muslim nation or punish Obote’s supporters.¹⁷⁰ What is relevant, according to the jurisprudence of tribunals like the ICTY, is if the perpetrators engaged in a ‘pattern of conduct’ from which it could be inferred that they intended to destroy the group.¹⁷¹ In Uganda, the scale of violence towards religious and ethnic groups arguably evinces such a design.¹⁷²

States met the abuses in Uganda with mixed responses. The UN was slow to investigate the human rights violations. Since 1971, NGOs had provided reports of torture and killings in Uganda to the CHR. Yet, only in 1978 did the UN authorise an examination of the situation which did not push through due to Tanzania’s invasion.¹⁷³ Uganda also found support from its neighbours most of which feared that states’ involvement in Uganda ‘bore a risk of similar action against them in the future’.¹⁷⁴ Uganda was even elected the OAU’s chair in 1976 and

Genocide Convention's Blind Spot' (1997) 106 *Yale Journal of International Law* 2259, 2271; Schabas William, 'Cambodia: Was it Really Genocide?' (2001) 23 *Human Rights Quarterly* 470, 473. *But see* Mendlovitz Saul & Fousek John, 'Enforcing the Law on Genocide' (1996) 21 *Alternatives: Global, Local, Political* 237, 262.

¹⁶⁵ Williams, ‘Justice or Peace’ (n 158), 155; — —, ‘Human Rights in Uganda’ (n 156), 6, 11.

¹⁶⁶ Lane Eric, 'Mass Killing by Governments' (1979) 12 *International Law & Politics* 239, 262.

¹⁶⁷ *See Application of the Genocide Convention* [2007] (n 11), 108; Schabas William, 'Were the Atrocities in Cambodia & Kosovo Genocide?' (2001) 35 *New England Law Review* 287, 295.

¹⁶⁸ Mendlovitz & Fousek, ‘Law on Genocide’ (n 164), 246. *See* Lane, ‘Mass Killing by Governments’ (n 166), 262.

¹⁶⁹ Hannum Hurst, 'International Law & Cambodian Genocide: Sounds of Silence' (1989) 11 *Human Rights Quarterly* 82, 108, 110; Byron Christine, 'Comment on the Report of the International Commission of Inquiry on Darfur' (2005) 5 *Human Rights Law Review* 352, 356; Zeiler Jean, 'Applicability of the Genocide Convention to the Famine in Eritrea' (1989) 19 *Georgia Journal of International & Comparative Law* 589, 605–6. *See* Gordon Joy, 'Economic Sanctions on Iraq & Accusation of Genocide' (2002) 5 *Yale Human Rights & Development Law Journal* 57, 63

¹⁷⁰ Williams, ‘Justice or Peace’ (n 158), 155; — —, ‘Human Rights in Uganda’ (n 156), 11.

¹⁷¹ *Prosecutor v Akayesu* (Judgement) (ICTR, Trial Chamber, 96-4-T, 2 September 1998), ¶524; *Prosecutor v Karadžić & Mladić* (Review of Indictments) (ICTY, Trial Chamber, IT-95-5-R61 & IT-95-18-R61, 11 July 1996), ¶94. *See* HRC, ‘Detailed Findings of the Independent International Fact-Finding Mission on Myanmar’ (16 September 2019) A/HRC/42/CRP.5, 73.

¹⁷² *Akayesu* (n 171), ¶¶523–4; *Compare* Kreß Claus, 'Darfur Report & Genocidal Intent' (2005) 3 *Journal of International Criminal Justice* 562, 566 *citing* Greenawalt Kent, 'Rethinking Genocidal Intent: Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259, 2288.

¹⁷³ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 101, 103.

¹⁷⁴ Proukaki, *Problem of Enforcement* (n 88), 126 *citing* Ulman Richard, 'Human Rights & Economic Power: US versus Idi Amin' (1977) 56 *Foreign Affairs* 529, 530.

was elected to the CHR in 1975.¹⁷⁵

Yet, some Western states imposed measures against Uganda. A few responded through retorsions such as the UK, Canada, Norway, the Netherlands, and the US's suspension of aid in 1973.¹⁷⁶ The US also cut aid, voted against the international development banks' grant of loans, and prohibited arms exports to Uganda. For its part, the EEC in June 1977 suspended aid provided under the Lomé Convention to Uganda.¹⁷⁷ This was a countermeasure as it involved the EEC's *a priori* breach of its duty owed to Uganda.¹⁷⁸ To recall, the EEC was bound to provide aid to some African, Caribbean, and Pacific states.¹⁷⁹ The Lomé Convention contained no provision that authorises the suspension of duties due to human rights violations—a fact that the EEC recognised.¹⁸⁰ Finally, the US also imposed an embargo,¹⁸¹ in breach of GATT Articles XI and XIII which prohibit quantitative and discriminatory trade restrictions and is thus a countermeasure.¹⁸²

D. Genocide against Tutsis & Hutus in Burundi (1972, 1993)

Since the pre-colonial era, Tutsis in Burundi, despite being the minority, had dominated the Hutus.¹⁸³ This societal structure caused tensions between the two groups often resulting in violence.¹⁸⁴ Two instances were particularly severe—the 1972 massacre of Hutus ('Ikiza') and

¹⁷⁵ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 101.

¹⁷⁶ Ibid, 103 citing Cunliffe SA, 'British Economic Aid Policy & International Human Rights: Conservative & Labour Policies in the 1970s' (1985) 33 *Political Studies* 101, 112; Keenleyside TA, 'Development Assistance' in Matthews RO & Pratt C (eds) (eds), *Human Rights in Canadian Foreign Policy* (McGill-Queen's University Press 1988), 199. See Fredman S, 'US Trade Sanctions Against Uganda' (1979) 11 *Law & Policy in International Business* 1149, 1159.

¹⁷⁷ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 104 citing Kamminga Menno, 'Human Rights & Lomé Convention' (1979) 56 *Netherlands Quarterly of Human Rights* 20, 28; Palmer John, 'Europe may freeze aid' (The Guardian, 22 Jun 1977) <<https://www.proquest.com/historical-newspapers/europe-may-freeze/docview/185940135>>.

¹⁷⁸ Proukaki, *Problem of Enforcement* (n 88), 131.

¹⁷⁹ Dawidowicz, *Third Party Countermeasures* (n 14), 122.

¹⁸⁰ Commission of the European Communities, *Answer to Written Question 115/78* (21 August 1978) OJ 1978 C119/27 ('The Convention does not provide any measures which we could take [...] against Uganda: we are linked with that country, as with the other ACP countries, by an [...] agreement which has been duly ratified by all the parties').

¹⁸¹ 22 USC 287, *Uganda Embargo Act* (1978) (US).

¹⁸² Proukaki, *Problem of Enforcement* (n 88), 130; Tams, *Enforcing Obligations Erga Omnes* (n 52), 210; Dawidowicz, *Third Party Countermeasures* (n 14), 121 citing Zoller Elizabeth, *Enforcing International Law through US Legislation* (1985), 101; Sicilianos Linos-Alexander, *Les réactions décentralisées à l'illicite: des contre-mesures la légitime défense* (Librairie générale de droit et de jurisprudence 1990), 156.

¹⁸³ Schweigert Romana, 'Late Justice for Burundi' (2006) 55 *International & Comparative Law Quarterly* 653, 654 citing UNSC, 'Report of the SC Mission to Burundi' (24 Feb 1994) UN Doc S/1994/1039, 3. See UNSG, 'Report of the Preparatory Fact-Finding Mission to Burundi' (24 Feb 1995) UN Doc S/1995/157, 10.

¹⁸⁴ Schweigert, 'Justice for Burundi' (n 183), 654; Tomaševski, *Responding to HR Violations: 1946–99* (n

the 1993 killings of Tutsis.¹⁸⁵ The Ikiza occurred after the Hutus rebelled against the Tutsi-dominated government.¹⁸⁶ In response, the government arrested and executed prominent Hutus which it deemed threats to national security.¹⁸⁷ Paramilitary forces also targeted Hutu civilians and moderate Tutsis.¹⁸⁸ The violence, which subsided by August, killed 100,000 Hutus and displaced 200,000.¹⁸⁹

In 1993, Burundi held elections that resulted in a Hutu victory.¹⁹⁰ Threatened by the new government's policy of proportional representation in education and employment,¹⁹¹ members of the Tutsi-dominated military assassinated the elected president and several other officials.¹⁹² Hutu-led groups deemed this as a 'rejection of the democratic change of power'.¹⁹³ Several groups launched violent reprisals and urged 'Hutu citizens to kill any Tutsi they could get their hands on'.¹⁹⁴ This resulted in ethnic violence with Hutus killing Tutsis and Tutsis retaliating against Hutus.¹⁹⁵ Estimates put the number of casualties between 50,000 to 100,000 with 200,000 more displaced.¹⁹⁶

The lack of scholarly attention to the violence in Burundi makes the determination of

145), 241.

¹⁸⁵ UNSG, 'Report of the Assessment Mission on the Establishment of an International Judicial Commission of Inquiry for Burundi' (11 March 20025) UN Doc S/2005/158, 9. *Note* that similar instances of ethnic violence, albeit at a relatively smaller scale, occurred in 1965, 1998, and 1991.

¹⁸⁶ Reyhan Patricia, 'Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?' (1997) 60 *Albany Law Review* 771, 776. *See* — —, 'King killed in attempted Burundi coup' (The Guardian, 1 May 1972) <<https://www.proquest.com/historical-newspapers/king-killed-attempted-burundi/docview/185644461>>; — —, 'Burundi Refugees report Massacre' (New York Times, 8 May 1972) <<https://www.proquest.com/historical-newspapers/burundi-refugees-report-massacre/docview/119345171>>.

¹⁸⁷ Russel Aidan, 'Rebel & Rule in Burundi, 1972' (2015) 48 *International Journal of African Historical Studies* 73, 88. *See* Lemarchand René, 'Genocide in the Great Lakes' (1998) 41 *African Studies Review* 3.

¹⁸⁸ Lemarchand René, 'Hutu-Tutsi Conflict in Burundi' in Porter Jack (ed), *Genocide and Human Rights* (University Press of America 1982), 204; Aidan Russel, 'Obedience & Selective Genocide in Burundi' (2015) 85 *Journal of the International African Institute* 437, 440.

¹⁸⁹ UNSG, 'Report of the Preparatory Fact-Finding Mission to Burundi' (1995) (n 183), 10–1.

¹⁹⁰ — —, 'Burundi president sworn in' (New York Times, 11 July 1993) <<https://www.proquest.com/newspapers/burundi-president-sworn/docview/429162356>>.

¹⁹¹ Magnarella Paul, 'Background & Causes of the Genocide in Rwanda' (2005) 3 *Journal of International Criminal Justice* 801, 813; UNSG, 'Report of the Preparatory Fact-Finding Mission to Burundi' (1995) (n 183), 12.

¹⁹² UNSC, 'Report of the SC Mission to Burundi' (1994) (n 183), 2–3; Huband Mark, 'UN to call in private force for Burundi: Government in hiding drops appeal for intervention' (The Guardian, 29 October 1993) <<https://www.proquest.com/historical-newspapers/un-call-private-force-burundi/docview/187545270>>.

¹⁹³ UNSG, 'Report of the Preparatory Fact-Finding Mission to Burundi' (1995) (n 183), 20.

¹⁹⁴ Magnarella, 'Background & Causes of the Genocide in Rwanda' (n 191), 814.

¹⁹⁵ UNSG, 'Report of the Preparatory Fact-Finding Mission to Burundi' (1995) (n 183), 20.

¹⁹⁶ *Ibid*, 20; UNSC, 'Report of the SC Mission to Burundi' (1994) (n 183), 2. *See* — —, 'Burundi war 'has displaced 1.5m' (Guardian, 22 Dec 1993) <<https://www.proquest.com/historical-newspapers/news-brief/docview/187493567>>.

whether the 'Ikiza' and the 1993 killing of Tutsis amount to genocide difficult.¹⁹⁷ However, it is submitted that both massacres may be deemed genocide. First, the Hutus and Tutsis are 'protected groups'. While, the two groups, to some extent, have similar customary practices,¹⁹⁸ they are distinct 'peoples' and possess distinct 'language[s] or culture[s]'.¹⁹⁹ Second, as Akhavan and Lemerchand submit, the 1972 and 1993 killings undoubtedly involved genocidal acts given their scale—both involved deaths estimated to have reached 100,00 and 50,000 respectively.²⁰⁰ Finally, both were accompanied by genocidal intent. The 1972 killings were arguably accompanied by a genocidal design, formulated by the state, as evinced by the Burundi officials' statements and the Hutus' systematic execution.²⁰¹ The same is true for the 1993 killings of Tutsis. As the UN's Commission of Inquiry for Burundi concluded, the massacre was not merely a 'hostile act by one [...] group against another but an effort to [...] destroy the Tutsi ethnic group' by Hutu-led groups.²⁰² Thus, Burundi arguably failed in its *duty not to commit genocide* in 1972 while it breached its *duty to prevent genocide and punish its perpetrators* in 1993.²⁰³

States' responses to the violence had been 'characterised by hesitation and caution'.²⁰⁴ In 1973, the UN, in response to the Ikiza, placed Burundi on its human rights agenda.²⁰⁵ For its part, the OAU adopted a resolution assuring support to Burundi towards restoring peace.²⁰⁶

¹⁹⁷ Schweigert, 'Justice for Burundi' (n 183), 653 noting Reyhan, 'Genocidal Violence in Burundi' (n 186), 776

¹⁹⁸ Verdirame Guglielmo, 'Genocide Definition in the Jurisprudence of the Ad Hoc Tribunal' (2000) 49 *International & Comparative Law Quarterly* 578, 592.

¹⁹⁹ *ibid* citing Akayesu (n 171), ¶¶511–6. See *Prosecutor v Kayishema & Ruzindana* (Judgement) (ICTR, Trial Chamber, 95-1-T, 21 May 1999), ¶98; *Prosecutor v Jelisić* (Judgement) (ICTY, Trial Chamber, 95-10-T, 14 December 1999), ¶70; *Prosecutor v Rutaganda* (Judgement) (ICTR, Trial Chamber, 96-3-T, 6 Dec 1999), ¶¶56–7; *Prosecutor v Musema* (Judgement) (ICTR, Trial Chamber, ICTR-96-13-T, 27 January 2000), ¶¶161–2.

²⁰⁰ Schweigert, 'Justice for Burundi' (n 183), 655 citing Akhavan Payam, 'Justice & Reconciliation in the Great Lakes Region of Africa: Contribution of the ICTR' (1997) 7 *Duke Journal of Comparative & International Law* 325, 343. See UNSG, 'Report of the Preparatory Fact-Finding Mission to Burundi' (1995) (n 183), 10; UNSC, 'Report of the SC Mission to Burundi' (1994) (n 183), 2.

²⁰¹ Aidan, 'Obedience & Selective Genocide in Burundi' (n 188), 440; Russel, 'Rebel & Rule in Burundi' (n 187), 88–9. See Chrétien Pierre & Dupaquier Jean-François, *Burundi 1972, au bord des génocides* (Éditions Karthala 1996), 147; Lemarchand, 'Hutu-Tutsi Conflict in Burundi' (n 188), 204.

²⁰² UN Commission of Inquiry for Burundi, 'Final Report' (1996), 65–6.

²⁰³ Note that Burundi acceded to the Genocide Convention on 6 January 1997.

²⁰⁴ Reyhan, 'Genocidal Violence in Burundi' (n 186), 774; Kuiper Leo, *Genocide: Its Political Use in the Twentieth Century* (Yale University Press 1981), 164.

²⁰⁵ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 238. See Teltsch Kathleen, 'Killings Go On in Burundi' (New York Times, 29 July 1972) <<https://www.proquest.com/historical-newspapers/killings-go-on-burundi-u-n-statement-suggests/docview/119496539>>. Note Burundi was in the UN CHR's confidential 1503 procedure in 1974–5.

²⁰⁶ Kuiper, *Genocide & Political Use* (n 204), 164.

Individual states exhibited a similar attitude. Only Belgium, as the former colonial power, acted against Burundi by suspending aid—a retorsion.²⁰⁷ The same is true for the events of 1993. The UN only expressed its concern and condemned the violence.²⁰⁸ Yet, it took no further actions aside from appointing a rapporteur in 1994 and creating a commission to investigate the human rights violations in 1995.²⁰⁹ Only a few states, such as Belgium and France, took unilateral measures through retorsions by decreasing aid to Burundi between 1990 and 1995.²¹⁰

E. Torture, forced labour, & other human rights violations in Myanmar (1988–)

Since the 1962 coup,²¹¹ Myanmar has been under a repressive military rule.²¹² By March 1988, its suppression of civil and political rights led to widespread pro-democracy protests to which the military forcibly responded by arresting hundreds of civilians many of whom were tortured or executed.²¹³ The *junta* then banned gatherings, established martial law, and assumed all state powers.²¹⁴ In 1990, Myanmar held elections and the opposition, the National Democratic League ('NLD'), won with overwhelming support.²¹⁵ Yet, the *junta* refused to step down and repeatedly postponed the announcement of polls' results.²¹⁶ The regime's abuses

²⁰⁷ — —, 'Burundi accusation against Belgium' (The Guardian, 5 June 1972) <<https://www.proquest.com/historical-newspapers/burundi-accusation-against-belgium/docview/185582468>>. Note Lemarchand René, 'What Next? Selective Genocide in Burundi' in Young Tom (ed), *Readings in the International Relations of Africa* (Indiana University Press 2015), 106 ('The French promptly offered to make up for whatever aid Belgium might withdraw').

²⁰⁸ See e.g. UNSC, 'Note by the SC President' (25 October 1993) UN Doc S/26631; Res 48/17 UNGA (3 November 1993) UN Doc A/RES/48/17; UNSC, 'Statement of the SC President' (29 March 1995) UN Doc S/PRST/1995/13.

²⁰⁹ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 241 citing Res 1012 UNSC (28 August 1995) UN Doc S/RES/1012.

²¹⁰ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 244. Note that OAU members imposed a trade embargo—a countermeasure—against Burundi in 1996. Yet, this was primarily a response to the Pierre Buyoya's coup in 1996 and not Uganda's breach of its duties related to the norm on genocide (See Proukaki, *Problem of Enforcement* (n 88), 190; Dawidowicz, *Third Party Countermeasures* (n 14), 172–4; Tams, *Enforcing Obligations Erga Omnes* (n 52), 222; Bossuyt Marc, 'UN Human Rights Procedures regarding Burundi, Rwanda, & Zaire (1994–1997)' in Wellens Karel (ed), *International Law: Theory & Practice: Essays in Honour of Eric Suy* (Nijhoff 1998), 496).

²¹¹ — —, 'Army Seizes Burma In a Bloodless Coup' (New York Times, 2 March 1962) <<https://www.proquest.com/historical-newspapers/army-seizes-burma-bloodless-coup/docview/116014984>>.

²¹² See Fuller Thomas, 'In Pause Before Results, Myanmar Exults in Vote' (New York Times, 9 November 2015) <<https://www.proquest.com/newspapers/pause-before-results-myanmar-exults-vote/docview/1731729952>>.

²¹³ Yokota Yozo, 'Human Rights in Myanmar' (17 February 1993) UN Doc E/CN.4/1993/37, 5.

²¹⁴ Lallah Rajsoomer, 'Human Rights in Myanmar' (8 October 1996) UN Doc A/51/466, 7.

²¹⁵ — —, 'Myanmar Votes to Oust Military From Power' (Los Angeles Times, 29 May 1990) <<https://www.proquest.com/newspapers/myanmar-votes-oust-military-power/docview/281071844>>; Kurtenback Elain, 'Democratic Opposition Party Leads in Burmese Voting; Curfew Imposed' (Washington Post, 28 May 1990) <<https://www.proquest.com/newspapers/democratic-opposition-party-leads-burmese-voting/docview/408062666>>.

²¹⁶ Lallah, 'Human Rights in Myanmar' (1996) (n 214), 8.

continued with accounts of extra-judicial executions, arbitrary detentions, torture, and forced labour.²¹⁷

Of the *junta*'s abuses, torture and forced labour are of particular relevance to the present study given their *erga omnes* status. As to torture, there were extensive reports of state organs torturing civilians to extract confessions on opposition activities.²¹⁸ The means employed involved physical acts like beatings, suffocation, stabbing, sexual assault, and psychological torture through threats of death.²¹⁹ Undoubtedly, these acts, committed by the organs of the state, involve the infliction of 'severe pain or suffering'. Thus, Myanmar failed in its customary *duty not to commit torture*.²²⁰

There were also reports of civilians forced to render non-compensated labour including work on development projects, acting as porters for the military, performing sexual services for troops, or engaging in mine-sweeping activities.²²¹ Those who refused were subjected to ill-treatment.²²² These may not be slavery in the traditional sense.²²³ Yet, as Special Rapporteur Lallah submits,²²⁴ they constitute 'forced' or 'compulsory' labour under ILO Convention No 29 or 'work or service [...] exacted from any person under the [threat of] penalty and for which the [...] person has not offered himself voluntarily'.²²⁵ While the Convention allows for compulsory military service, work during genuine cases of emergency, and prison labour, most of the work required by Myanmar from civilians do not fall under these exceptions.²²⁶ Thus, Myanmar—a party to the Convention since 1955—breached its conventional *duty to prohibit and abolish forced labour*.

²¹⁷ Yokota Yozo, 'Human Rights in Myanmar' (13 November 1992) UN Doc A/47/651, 9 ff.

²¹⁸ See Yokota, 'Human Rights in Myanmar' (1993) (n 213), 18; Yokota Yozo, 'Human Rights in Myanmar' (16 February 1994) UN Doc E/CN.4/1994/57, 19 ff; Yokota Yozo, 'Human Rights in Myanmar' (5 February 1996) UN Doc E/CN.4/1995/65, 24; Lallah, 'Human Rights in Myanmar' (1996) (n 214), 14.

²¹⁹ Yokota, 'Human Rights in Myanmar' (1996) (n 214), 24.

²²⁰ Note that Myanmar is not a party to the Torture Convention nor the ICCPR.

²²¹ International Labour Organisation, 'Report of the Commission of Inquiry to Examine the Observance by Myanmar of the Forced Labour Convention' (1998), ¶102; Yokota, 'Human Rights in Myanmar' (1993) (n 213), 17; Yokota, 'Human Rights in Myanmar' (1994) (n 218), 19; Lallah, 'Human Rights in Myanmar' (1996) (n 214), 32.

²²² Yokota, 'Human Rights in Myanmar' (1994) (n 218), 19; Lallah, 'Human Rights in Myanmar' (1996) (n 214), 32.

²²³ Note that Myanmar is not a party to the Slavery Convention and the Supplementary Convention.

²²⁴ Lallah, 'Human Rights in Myanmar' (1996) (n 214), 30–4; Lallah Rajsoomer, 'Human Rights in Myanmar' (16 October 1997) UN Doc A/52/484, 13. See also Damrosch Lori, 'Enforcing International Law through Non-Forcible Measures' (1997) 269 *Recueil des Cours de l'Académie de Droit International* 9, 93.

²²⁵ ILO Convention No 29 (n 76), art 2. See ILO Convention No 105 (n 80), art 1.

²²⁶ See Lallah, 'Human Rights in Myanmar' (1997) (n 224), 13–6.

States responded to the human rights abuses in Myanmar. While the SC did not take any action against Myanmar, the GA since 1991, has condemned the human rights abuses in Myanmar including extrajudicial executions, torture, and forced labour.²²⁷ The CHR has done the same and appointed special rapporteurs to examine the situation.²²⁸

However, states' individual reactions varied. No ASEAN state levied any measures as they preferred 'constructive engagement' with Myanmar.²²⁹ The same is true for China, Thailand, Singapore, and South Korea which remained Myanmar's largest trading partners.²³⁰ In contrast, some Western states imposed unilateral measures. In 1988, the EEC, the US, and Japan suspended development assistance to Myanmar.²³¹ The EEC/EU also imposed an arms embargo on Myanmar in 1991 and travel bans on senior officials in 1996.²³² In 1997, it revoked Myanmar's benefits under the General System of Preferences ('GSP').²³³ In 2000, it also banned the export of 'equipment [...] used for internal repression' and, along with Switzerland, froze some officials' assets.²³⁴ The US also imposed an arms embargo in 1988, suspended Myanmar's eligibility for the GSP programme in 1989, banned investment and imports in 1995, and levied travel bans on senior officials in 1997.²³⁵ The aid suspensions and arms embargos were retorsions as these did not breach the imposing states' duties.²³⁶ However, the trade restrictions may be deemed countermeasures as they amount to quantitative restrictions prohibited

²²⁷ See *Situation of Human Rights in Myanmar* Res 46/132 UNGA (17 Dec 1991) UN Doc A/RES/46/132; Res 47/144 UNGA (1 Mar 1993) UN Doc A/RES/47/144; Res 48/150 UNGA (31 Jan 1994) UN Doc A/RES/48/150; Res 49/197 UNGA (9 Mar 1995) UN Doc A/RES/49/197; Res 50/194 UNGA (11 Mar 1996) UN Doc A/RES/50/194; Res 51/117 UNGA (6 Mar 1997) UN Doc A/RES/51/117; Res 52/137 UNGA (12 Dec 1997) UN Doc A/RES/52/137; Res 53/162 UNGA (25 Feb 1999) UN Doc A/RES/53/162; Res 54/186 UNGA (29 Feb 2000) UN Doc A/RES/54/186.

²²⁸ *Situation of Human Rights in Myanmar* Res 1992/58 UN CHR (3 March 1992) UN Doc E/CN.4/RES/1992/58. See Res 1993/73 UN CHR (10 March 1993) UN Doc E/CN.4/RES/1993/73; Res 1994/85 UN CHR (9 March 1994) UN Doc E/CN.4/RES/1994/85; Res 1995/72 UN CHR (8 March 1995) UN Doc E/CN.4/RES/1995/72; Res 1996/80 UN CHR (23 April 1996) UN Doc E/CN.4/RES/1996/80; Res 1997/64 UN CHR (16 April 1997) UN Doc E/CN.4/RES/1997/64; Res 1999/17 UN CHR (23 April 1999) UN Doc E/CN.4/RES/1999/17.

²²⁹ Gopalan Sandeep & Fuller Roslyn, 'Enforcing International Law: States, IOs, & Courts as Shaming Reference Groups' (2014) 39 *Brooklyn Journal of International Law* 73, 111; Damrosch, 'Non-Forcible Measures' (n 224), 97–8.

²³⁰ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 206.

²³¹ Ibid, 208.

²³² Council of the EC, 'Common Position 96/635/CFSP' (28 October 1996) L 287/1.

²³³ Council of the EC, 'Council Regulation 552/97' (24 March 1997) L 85/8.

²³⁴ Council of the EU, 'Common Position 2000/346/CFSP' (26 April 2000) L 122/29; Dawidowicz, *Third Party Countermeasures* (n 14), 197.

²³⁵ Damrosch, 'Non-Forcible Measures' (n 224), 4; Cleveland Sarah, 'Human Rights Sanctions & International Trade: Theory of Compatibility' (2002) 5(1) *Journal of International Economic Law* 133, 135; Martin Michael, 'US Sanctions on Burma' (Congressional Research Service, 2012), 12–4.

²³⁶ Proukaki, *Problem of Enforcement* (n 88), 191.

by the GATT.²³⁷ Finally, as noted in *Chapter 5B* and further examined in *Chapter 9*, the travel restrictions and asset freezes levied against individuals are targeted measures that may not ‘fit within the scope of the [implementation of] responsibility’.²³⁸ These measures may breach duties owed by the imposing state to the measures’ targets which are non-state actors. If the imposing state breaches any duties owed to these individuals and entities, it commits a wrongful act.²³⁹ Furthermore, as they do not involve the suspension of duties owed to the wrongful state, they cannot be deemed countermeasures.²⁴⁰

²³⁷ Dawidowicz, *Third Party Countermeasures* (n 14), 196.

²³⁸ Hofer Alexandra, 'The "Curiouser & Curiouser" Legal Nature of Non-UN Sanctions: US Sanctions against Russia' (2018) 23 *Journal of Conflict & Security Law* 76, 78; Subedi Surya, 'Status of Unilateral Sanctions in International Law' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 49. *But see* Proukaki, *Problem of Enforcement* (n 88), 191; Dawidowicz, *Third Party Countermeasures* (n 14), 195.

²³⁹ Hofer, 'US Sanctions against Russia' (n 238), 89; Subedi, 'Status of Unilateral Sanctions' (n 238), 49. *See* Focarelli Carlo, *International Law as Social Construct: Struggle for Global Justice* (Oxford University Press 2012), 484

²⁴⁰ ILC, 'Report on the Work of the 53rd Session' (2001) (n 3), 130; ILC, 'Summary Records of the 52nd Session' (2000) I YbILC 1, 266, 271; Hofer Alexandra, 'Unilateral Sanctions as a Challenge to the Law of State Responsibility' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 190–1; Subedi, 'Status of Unilateral Sanctions' (n 238), 49. *Note* that states continued to impose unilateral measures against Myanmar until the 2010s. Some were retorsions such as Canada's arms embargo (SOR/2007-285, *Special Economic Measures (Burma) Regulations* (2007) (CAN)); and the EU's freezing of loans and development aid (Council of the EU, 'Common Position 2003/297/CFSP' (29 April 2003) L 106/36; Council of the EU, 'Common Position 2004/730/CFSP' (25 October 2004) L 323/17). Others, as they involve the imposing states' *a priori* breach of duties especially under the GATT, may be deemed countermeasures. These include: the US, EU, and Canada's import embargos (PL 108-61, *Burmese Freedom & Democracy Act* (2003) (US); Council of the EU, 'Common Position 2007/750/CFSP' (24 November 2007) L 308/1; SOR/2007-285 (CAN)); the EU and Canada's investment bans (Council of the EU, 'Common Position 2007/750/CFSP' (n 240); SOR/2007-285 (CAN)); and the EU export embargo on 'technology and equipment' for 'logging, timber, and mining of metals and minerals' (Council of the EU, 'Common Position 2007/750/CFSP' (n 240)). Finally, there were also targeted measures against certain officials such as the US, Australia, and Canada's travel restrictions (Dawidowicz, *Third Party Countermeasures* (n 14), 199); and the EU, Switzerland, US, Australia, and Canada's asset freezes (ibid, 197; Council of the EU, 'Common Position 2011/239/CFSP' (15 April 2011) L 101/24; *Burmese Freedom & Democracy Act* (US); Executive Order 13310, *Blocking Property of Burma & Prohibiting Certain Transactions* (2003) (US); Executive Order 13448, *Blocking Property of Burma & Prohibiting Certain Transactions* (2007) (US); Executive Order 13464, *Blocking Property of Burma & Prohibiting Certain Transactions* (2008) (US); Executive Order 13619, *Blocking Property of Burma & Prohibiting Certain Transactions* (2012) (US); SOR/2007-285 (CAN)). Some of these measures were lifted before 2016 (Dawidowicz, *Third Party Countermeasures* (n 14), 196–200; Executive Order 13047, *Termination of Emergency with Respect to Burma* (2016) (US); Council of the EU, 'Common Position 2013/184/CFSP' (23 April 2013) OJ 2013 L/111/75; SOR/2012-85, *Regulations Amending the Special Economic Measures (Burma) Regulations* (2012) (CAN)). However, as will be discussed in *Chapter 6B*, states again imposed unilateral measures against Myanmar for the racial discrimination and genocide against the Rohingya. Furthermore, in response to rights abuses that occurred after February 2021 coup, the EU, the US, Canada, and the UK also adopted targeted measures in the form of travel restrictions, and asset freezes against officials responsible for the 'brutal repression and serious human rights violations in the country' (Council of the EU, 'Council Decision 2021/711/CFSP' (29 April 2021) L 147/17; Council of the EU, 'Council Decision 2021/1000/CFSP' (21 June 2021) LI 219/57; Executive Order 14014 *Blocking Property With Respect to the Situation in Burma* (2021) (US); SOR/2021-18, *Regulations Amending the Special Economic Measures (Burma) Regulations* (2021) (CAN); SOR/2021-106, *Regulations Amending the Special Economic Measures (Burma) Regulations* (2021) (CAN); 2021 No 496, *Myanmar Sanctions Regulations* (2021) (UK)). Likewise, South Korea in a measure of retorsion, imposed an arms embargo against Myanmar (Kim Sea Young, 'Amplifying South Korea's response to the Myanmar coup' (East Asia Forum, 15 April 2021) <<https://www.eastasiaforum.org/2021/04/15/amplifying-south-koreas-response-to-the-myanmar-coup/>>).

F. Genocide against Bosniaks in the former Yugoslavia (1992–5)

As discussed in *Chapter 5A*, Yugoslavia's break-up led to several conflicts as Yugoslavia sought to prevent secession. It did so in Slovenia (June–July 1991),²⁴¹ and Croatia (March 1991–November 1995).²⁴² The same happened in Bosnia and Herzegovina as its predominantly Bosniak population declared independence in March 1992.²⁴³ Hostilities engulfed Bosnia and Herzegovina as Yugoslavia, and the Bosnian Serbs that it supported,²⁴⁴ acted to prevent secession by purging non-Serbs—largely Bosniak Muslims—from the territory.²⁴⁵ This resulted in the deaths of around 60,000 Bosniaks including 8,000 killed during the Srebrenica massacre in 1995.²⁴⁶

The Bosniaks are a 'national group' protected by the norm on genocide,²⁴⁷ and the atrocities committed against them are clearly genocidal acts.²⁴⁸ Yet, views differ on the scope of genocide in Bosnia due to diverging opinions on genocidal intent.²⁴⁹ For some, such as the SC-established Commission of Experts, the crimes committed by the Bosnian Serb forces against Bosniaks during the conflict as a whole constituted genocide.²⁵⁰ Indeed, the Bosnian Serb leaders' statements on the Bosniaks' killings and the pattern of commission evinces this

²⁴¹ Tagliabue John, 'Yugoslav Army Uses Force in Breakaway Republic' (New York Times, 28 June 1991) <<https://www.proquest.com/newspapers/yugoslav-army-uses-force-breakaway-republic/docview/428086344>>.

²⁴² Weller Marc & Bethlehem Daniel (eds), *Yugoslav Crisis*, vol I (Cambridge University Press 1997), xxvi.

²⁴³ Ibid, xxx–xxxiii. See Silber Laura, 'Bosnia Tense After Vote For Secession' (Washington Post, 4 March 1992) <<https://www.proquest.com/newspapers/bosnia-tense-after-vote-secession/docview/307512931>>; Riding Alan, 'Europe Nods to Bosnia, Not Macedonia' (New York Times, 7 April 1992) <<https://www.proquest.com/newspapers/europe-nods-bosnia-not-macedonia/docview/428473924>>.

²⁴⁴ Note that while the JNA withdrew from Bosnia and Herzegovina in May 1992, several JNA units remained and were integrated to the Bosnian Serb Army ('VRS'). See UNSG, 'Report pursuant to SC Res 749' (24 April 1992) UN Doc S/23844, 4.

²⁴⁵ Dimitrijevic Vojin & Milanovic Marko, 'Strange Story of the Bosnian Genocide case' (2008) 21 *Leiden Journal of International Law* 65, 67; Hoare Marko, 'Explanation for the Bosnian Genocide' (2014) 14 *Studies in Ethnicity & Nationalism* 516, 517–8; Ali Rabia & Lifschultz Lawrence, 'Why Bosnia' (1994) 14 *Third World Quarterly* 367, 368.

²⁴⁶ See Zwierzhowski Jan & Tabeau Ewa, 'War in Bosnia & Herzegovina: Census-Based Multiple System Estimation of Casualties' Undercount' (Research Workshop on 'The Global Costs of Conflict', Berlin) (1–2 Feb 2010), 5 ff; Shahi Agha, 'Lessons from Rwanda & Bosnia Genocide' (2005) 25 *Strategic Studies* 9, 10; Brunbord Helga, Lyngstad Torkild, & Urdal Henrik, 'How Many were Killed in Srebrenica?' (2003) 19 *European Journal of Population* 229.

²⁴⁷ *Prosecutor v Krstić* (Judgement) (ICTY, Trial Chamber, 93-33-T, 2 August 2001), ¶¶560 ff. See *Prosecutor v Krstić* (Judgement) (ICTY, Appeals Chamber, 93-33-A, 19 April 2004), ¶¶6 ff.

²⁴⁸ *Application of the Genocide Convention* [2007] (n 11), 144; Hoare, 'Bosnian Genocide' (n 245), 516.

²⁴⁹ Kreß Claus, 'International Court of Justice & the Elements of the Crime of Genocide' (2007) 18 *European Journal of International Law* 619, 628–9.

²⁵⁰ UNSC, 'Final Report of the Commission of Experts pursuant to SC Res 780' (27 May 1994) UN Doc S/1994/674, 43; UNSC, 'Interim report of the Commission of Experts pursuant to SC Res 780' (26 Jan 1993) UN Doc S/25274, 16.

intent.²⁵¹ In contrast, others, like the ICJ, limit the genocide to the Srebrenica massacre perpetrated by the Republika Srpska. Relying on ICTY's jurisprudence, the Court concluded that the 'necessary intent [...] [for] genocide has not been [...] shown' save for the Srebrenica massacre.²⁵² Nonetheless, even if the genocide is limited to Srebrenica, this still triggers Yugoslavia/Serbia and Montenegro's responsibility. It might not have breached its *duty not to commit genocide* as the perpetrators' acts are not attributable to it.²⁵³ Yet, given its 'influence over the Bosnian Serbs', awareness of the possibility of genocide, and failure to take action, it breached its *duty to prevent genocide*.²⁵⁴ Likewise, due to Yugoslavia/Serbia and Montenegro's failure to cooperate especially with the ICTY to prosecute those accused of genocide, it also breached its *duty to punish the perpetrators of genocide*.²⁵⁵

States responded to the conflict in Bosnia and Herzegovina through collective and unilateral measures. As early as 1991, the SC imposed an arms embargo against Yugoslavia following the conflict in Slovenia and Croatia.²⁵⁶ As the situation in Bosnia and Herzegovina deteriorated, the SC also established a peace-keeping force ('UNPROFOR') to 'create [...] conditions of peace and security' to settle the conflict.²⁵⁷ As the hostiles continued, it imposed an embargo against Yugoslavia in May 1992.²⁵⁸ It also adopted several resolutions authorising states to employ 'necessary measures' to ensure the delivery of humanitarian assistance,²⁵⁹ 'measures commensurate' and 'necessary' to ensure the embargo's observance;²⁶⁰ and 'all necessary

²⁵¹ Hoare Marko, 'Genocide in Yugoslavia Before & After Communism' (2010) 62 *Europe-Asia Studies* 1193, 1206. See *Application of the Genocide Convention* [2007] (n 11), 194 ('The Applicant [...] relies on the alleged [...] overall plan to commit genocide, indicated by the pattern of [...] acts of genocide committed [...] against persons identified [...] belonging to a specified group'). See also Verdirame, 'Genocide Definition in the Jurisprudence of the Ad Hoc Tribunal' (n 198), 586 citing *Kayishema & Ruzindana* (n 199), ¶¶91–4 ('The number of victims [...], the weapons employed and the extent of the bodily injury [...], the methodical way of planning, and the systematic manner of killing').

²⁵² *Application of the Genocide Convention* [2007] (n 11), 194–8 citing *Prosecutor v Brdanin* (Judgement) (ICTY, Trial Chamber, 99-36-T, 1 September 2004), ¶303; *Prosecutor v Stakić* (ICTY, Trial Chamber, 97-24-T, 31 July 2003), ¶¶546–61.

²⁵³ *Application of the Genocide Convention* [2007] (n 11), 202–15.

²⁵⁴ Ibid, 221–6. Note that Yugoslavia ratified the Genocide Convention on 29 August 1950.

²⁵⁵ Ibid, 226–9 citing *Genocide Convention* (n 5), art VI.

²⁵⁶ Res 713 UNSC (25 September 1991) UN Doc S/RES/713.

²⁵⁷ Res 743 UNSC (21 February 1992) UN Doc S/RES/743. See Res 721 UNSC (27 November 1991) UN Doc S/RES/721, Res 724 UNSC (15 December 1991) UN Doc S/RES/724; Res 727 UNSC (8 January 1992) UN Doc S/RES/727; Res 740 UNSC (7 February 1992) UN Doc S/RES/740.

²⁵⁸ Res 757 UNSC (30 May 1992) UN Doc S/RES/757. See Res 760 UNSC (18 June 1992) UN Doc S/RES/760 that exempted medical supplies and food stuffs. Note that SC Res 757 formed the basis for NATO's Operation Maritime Monitor that monitored the compliance with the sanctions against Yugoslavia. See also *Situation in Bosnia & Herzegovina* GA Res 47/121 UNGA (18 December 1992) UN Doc A/RES/47/121.

²⁵⁹ Res 776 UNSC (14 September 1992) UN Doc S/RES/776. See Res 752 UNSC (15 May 1992) UN Doc S/RES/752.

²⁶⁰ Res 787 UNSC (16 November 1992) UN Doc S/RES/787. Note that SC Res 787 formed the basis for the

measures' to ensure compliance with the flight ban over Yugoslavia.²⁶¹ As the killing of Bosniaks became apparent, euphemistically deemed 'ethnic cleansing',²⁶² the SC expanded the UNPROFOR's mandate to ensure aid delivery,²⁶³ and the protection of civilians.²⁶⁴

Before SC Resolution 757, some states already imposed unilateral measures against Yugoslavia. In 1991, the US levied retorsions by banning loan guarantees to US business activities in Yugoslavia and suspending export licenses for defence products.²⁶⁵ The EEC also suspended its cooperation agreement with Yugoslavia, levied quantitative restrictions in November 1991,²⁶⁶ and imposed an embargo against Yugoslavia in May 1992.²⁶⁷ The EEC's trade measures may be considered countermeasures as these were *a priori* breaches of its members' GATT duties.²⁶⁸ Indeed, Yugoslavia raised this to the GATT Council which declined to consider the claim.²⁶⁹ However, the cooperation agreement's suspension may be classified as a retorsion.²⁷⁰ Indeed, the EEC justified the agreement's suspension without observing the six-month notice requirement by appealing to *rebus sic stantibus*.²⁷¹ The European Court of Justice ('ECJ') later agreed with this view stating that the maintenance of a 'situation of peace

NATO's Operation Maritime Guard for the enforcement of the embargo. This was followed by the NATO and Western European Union's Operation Sharp Guard.

²⁶¹ Res 816 UNSC (16 April 1993) UN Doc S/RES/816. Note that SC Res 816 was the basis for NATO's Operation Deny Flight that enforced the no-fly zones over Yugoslavia. See Res 781 UNSC (16 April 1993) UN Doc S/RES/781 that imposed a flight ban over Yugoslavia and asked member states to monitor compliance. This was performed by the NATO through Operation Sky Monitor.

²⁶² See Res 771 UNSC (13 August 1992) UN Doc S/RES/771; Res 787 (n 260).

²⁶³ Res 776 (n 259)

²⁶⁴ See Res 819 UNSC (16 April 1993) UN Doc S/RES/819; Res 824 UNSC (6 May 1993) UN Doc S/RES/824; Res 836 UNSC (4 June 1993) UN Doc S/RES/836; Res 913 UNSC (22 April 1994) UN Doc S/RES/913; Res 987 UNSC (18 April 1995) UN Doc S/RES/987; Res 998 UNSC (16 June 1995) UN Doc S/RES/998. See also Klein Pierre, 'Intervention in Bosnia & Herzegovina—1992–5' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 497. Note that SC Res 836 was the basis for NATO's Operation 'Deliberate Force' against Bosnian Serb forces to protect UNPROFOR personnel and civilians in UN 'safe areas'.

²⁶⁵ —, 'Economic Sanctions & the Former Yugoslavia' (Congressional Research Service, 1996), 2.

²⁶⁶ Proukaki, *Problem of Enforcement* (n 88), 184 citing Council of the EC, 'Council Regulation 3300/91' (11 Nov 1991) L 315; Council of the EC, 'Council Decision 91/586/ECSC' (11 Nov 1991) L315/47; Council of the EC, 'Council Decision 91/587/ECSC' (11 Nov 1991) L315/48; Council of the EC, 'Council Decision 91/588/ECSC' (11 Nov 1991) L 315/49; Council of the EC, 'Council Decision 91/589/ECSC' (11 Nov 1991) L315/50; Council of the EC, 'Council Decision 91/602/EEC' (25 Nov 1991) L 325/23. See Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 343.

²⁶⁷ Proukaki, *Problem of Enforcement* (n 88), 184.

²⁶⁸ *Ibid*, 187.

²⁶⁹ *Ibid* citing Paasivirta E & Rosas A, 'Sanctions, Countermeasures, & Related Actions in the External Relations of the EU' in Cannizzaro Enzo (ed), *European Union as an Actor in International Relations* (Kluwer 2002), 212.

²⁷⁰ Proukaki, *Problem of Enforcement* (n 88), 186.

²⁷¹ See Council of the EC, 'Council Decision 91/586' (n 266).

[...] indispensable for neighbourly relations' and the 'existence of institutions [for the agreement's] implementation' are 'essential conditions' for the agreement.²⁷²

G. Torture, slavery, & forced labour in Sudan (1993–)

From 1993, Sudan, under Al-Bashir, practised widespread and systematic torture. Based on reports, the regime detained dissidents for extended periods without warrants or concrete charges.²⁷³ These persons were taken to 'ghost houses' and subjected to physical and mental mistreatment. The methods employed were particularly brutal and included beatings, burnings, electrocution, sexual assaults, and mock executions.²⁷⁴ These clearly amounted to torture. Thus, Sudan may be said to have breached its *duty not to commit torture*.²⁷⁵

There were also accounts of widespread and systematic abductions of persons for slavery and forcible recruitment of children for military activities. Since 1993, observers have reported that Sudanese forces took women and children from villages and refugee camps.²⁷⁶ The women ended up either as housekeepers or wives of their captors.²⁷⁷ The young males were forced to work as servants or participate in hostilities.²⁷⁸ These clearly amount to slavery both in its traditional and contemporary forms. As Lenzerini submits, they involve the exercise of any or all the powers of the right of ownership over a person.²⁷⁹ Alternatively, as Allain argues, these constitute 'control' that amounts to the 'loss of one's will or a considerable reduction of personal autonomy'.²⁸⁰ Confronted with reports of slavery and forced labour, Sudan merely

²⁷² *Racke GmbH & Co v Hauptzollamt Mainz* (1998) (ECJ, C-162/96, 16 June 1998), ¶55. *But see* Chinkin Christine, 'Legality of the Imposition of Sanctions by the European Union in International Law' in Evans Malcolm (ed), *Aspects of Statehood & Institutionalism in Contemporary Europe* (Dartmouth 1996), 197 *cited in* Proukaki, *Problem of Enforcement* (n 88), 185–6 ('While it [is] possible to argue that peace in Yugoslavia [is] a precondition for the continuation of the [...] Agreement, it [is] difficult to prove that the internal hostilities radically changed the EC's [duties] under the treaty').

²⁷³ Bíró Gáspár, 'Human Rights in Sudan' (1 Feb 1994) UN Doc E/CN.4/1994/48, 6, 11; Bíró Gáspár, 'Human Rights in Sudan' (20 Feb 1996) UN Doc E/CN.4/1996/62, 7; Bíró Gáspár, 'Human Rights in Sudan' (3 Feb 1997) UN Doc E/CN.4/1997/58, 7.

²⁷⁴ Bíró Gáspár, 'Human Rights in Sudan (Interim Report)' (18 Nov 1993) UN Doc A/48/601, 12–3; Bíró, 'Human Rights in Sudan' (1994) (n 273), 11; Bíró Gáspár, 'Human Rights in Sudan' (30 Jan 1998) UN Doc E/CN.4/1998/66, 9.

²⁷⁵ *Note* that Sudan ratified the ICCPR on 18 March 1986 but only ratified the Torture Convention on 30 April 2015.

²⁷⁶ Bíró, 'Human Rights in Sudan' (1994) (n 273), 18; Bíró Gáspár, 'Human Rights in Sudan' (16 Oct 1995) UN Doc A/50/569, 10. *See* CRC, 'Preliminary Observations: Sudan' (18 February 1993) UN Doc CRC/C/15/Add.6, 3. *See* Wiebalck Alison, 'Slavery in the Sudan' (1998) 31 *Comparative & International Law Journal of Southern Africa* 38, 39.

²⁷⁷ Bíró, 'Human Rights in Sudan' (1994) (n 273), 18; Bíró, 'Human Rights in Sudan' (1995) (n 276), 15.

²⁷⁸ Bíró, 'Human Rights in Sudan' (1994) (n 273), 18, 29, 33; Bíró, 'Human Rights in Sudan' (1995) (n 276), 15.

²⁷⁹ Lenzerini, 'Slavery under Custom' (n 8), 159–60.

²⁸⁰ Allain, 'Slavery & Obligations Erga Omnes' (n 8), 94 *citing* *Workers of Fazenda Brasil v Brazil* (n 72), ¶269.

stated it had already outlawed these practices.²⁸¹ As it failed to suppress these practices, Sudan arguably breached its conventional and customary *duties to prohibit and abolish slavery and forced labour*.²⁸²

States mostly condemned the human rights violations in Sudan. The GA and the CHR repeatedly condemned the ‘human rights violations’ in Sudan that included torture, slavery, slavery-like practices, and forced labour.²⁸³ The CHR also appointed a special rapporteur to examine the situation in Sudan.²⁸⁴ In contrast, the SC was more passive. It only acted in 1995 after Sudan was accused of supporting the extremists that attempted to assassinate Egyptian President Mubarak,²⁸⁵ and conducted attacks against Ethiopia, Eritrea, Egypt, and Uganda.²⁸⁶ The SC then called on Sudan to desist from supporting extremist activities,²⁸⁷ imposed travel bans, and threatened an embargo.²⁸⁸

Some states levied measures against Sudan. Several, in measures of retorsion, decreased their economic aid to Sudan.²⁸⁹ In 1990, the EEC called for the suspension of aid to Sudan due to serious human rights violations.²⁹⁰ The Netherlands, France, Denmark, Germany, Italy, the UK, the US, and Japan heeded this request.²⁹¹ The EEC/EU also imposed an arms embargo on Sudan.²⁹² For its part, the US levied a general trade embargo and froze all Sudanese government

²⁸¹ Bíró, ‘Human Rights in Sudan’ (1995) (n 276), 11; Bíró, ‘Human Rights in Sudan’ (1996) (n 273), 9

²⁸² Note that Sudan ratified the Slavery Convention on 15 September 1927, the Supplemental Convention on 9 September 1957, and Convention on the Rights of a Child on 3 August 1990.

²⁸³ Res 1996/73 UN CHR (23 April 1996) UN Doc E/CN.4/RES/1996/73. See Res 1993/60 UN CHR (10 March 1993) UN Doc E/CN.4/RES/1993/60; Res 1994/79 UN CHR (9 March 1994) UN Doc E/CN.4/RES/1994/79; Res 1995/77 UN CHR (8 March 1995) UN Doc E/CN.4/RES/1995/77; Res 1997/59 UN CHR (15 April 1997) UN Doc E/CN.4/RES/1997/59; Res 1998/67 UN CHR (21 April 1998) UN Doc E/CN.4/RES/1998/67; Res 1999/15 UN CHR (23 April 1999) UN Doc E/CN.4/RES/1999/15; Res 2000/27 UN CHR (18 April 2000) UN Doc E/CN.4/RES/2000/27. See also Res 48/147 UNGA (20 December 1993) UN Doc A/RES/48/147; Res 49/198 UNGA (13 March 1995) UN Doc A/RES/49/198; Res 50/197 UNGA (11 March 1996) UN Doc A/RES/50/197; Res 51/112 UNGA (12 Dec 1996) UN Doc A/RES/51/112; Res 52/140 (12 December 1997) UNGA (12 December 1997) UN Doc A/RES/52/140; Res 54/182 UNGA (17 December 1999) UN Doc A/RES/54/182; Res 55/116 UNGA (4 December 2000) UN Doc A/RES/55/116.

²⁸⁴ Res 1996/73 (n 283).

²⁸⁵ UNSC, ‘Letter from the Minister of Foreign Affairs of Ethiopia’ (12 October 1995) UN Doc S/1995/867

²⁸⁶ UNSC, ‘Report of the SG pursuant to SC Res 1044’ (11 March 1996) UN Doc S/1996/179, 2–4; 7–8; UNSC, ‘Statement by Uganda on the SG Report pursuant to SC Res 1044’ (16 April 1996) UN Doc S/1996/288, 2–4.

²⁸⁷ Res 1044 UNSC (31 January 1996) UN Doc S/RES/1044.

²⁸⁸ Res 1054 UNSC (26 April 1996) UN Doc S/RES/1054; Res 1070 UNSC (16 August 1996) UN Doc S/RES/1070.

²⁸⁹ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 277.

²⁹⁰ European Parliament, ‘Resolution on Human Rights Violation in Sudan’ (22 November 1990) C 324/207.

²⁹¹ Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 277.

²⁹² Council of the EC, ‘Council Decision 94/165/CFSP’ (15 March 1994) L 075.

assets within its jurisdiction,²⁹³ measures which Sudan and the OIC protested.²⁹⁴ As Sudan was not a GATT or WTO member, the embargo may be deemed a retorsion.²⁹⁵ However, the asset freeze is a breach of the inviolability of state property,²⁹⁶ and ‘required justification under general international law’ and ‘should be understood as a countermeasure’.²⁹⁷

III. ANALYSIS OF STATE PRACTICE & *OPINIO JURIS*

The survey above is not meant to be comprehensive. In the interest of space, it did not examine other breaches of certain duties safeguarding human rights like the torture under Haiti’s Duvaliers (1957–1986),²⁹⁸ genocide against Ache Indians in Paraguay under the Stroessner regime (1962–72),²⁹⁹ torture in the Philippines under the Marcos regime (1973–86),³⁰⁰ torture, forced labour, and genocide against minorities in Cambodia under the Khmer Rouge (1975–9),³⁰¹ torture in Argentina under the military *junta* (1974–83),³⁰² genocide against the Maya people in Guatemala under the Montt government (1982–3),³⁰³ torture in Chad under

²⁹³ Dawidowicz, *Third Party Countermeasures* (n 14), 179 citing Executive Order 13067, *Blocking Sudanese Government Property and Prohibiting Transactions* (1997) (US).

²⁹⁴ Islamic Conference of Foreign Ministers, ‘Final Communiqué: 25th Session’ (17 March 1998) UN Doc S/1998/311.

²⁹⁵ Dawidowicz, *Third Party Countermeasures* (n 14), 179.

²⁹⁶ See on inviolability: Criddle Evan, ‘Humanitarian Financial Intervention’ (2013) 24 *European Journal of International Law* 583, 596–7; Hofer, ‘US Sanctions against Russia’ (n 238), 91. On immunity: Ronzitti Natalino, ‘Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective’ in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (BRILL 2016), 22; Longobardo Marco, ‘State Immunity & Judicial Countermeasures’ (2021) 32 *European Journal of International Law* 457, 467. But see Bogdanova Iryna, *Unilateral Sanctions in International Law & the Enforcement of Human Rights: Impact of the Principle of Common Concern of Humankind* (BRILL 2022), 126.

²⁹⁷ Dawidowicz, *Third Party Countermeasures* (n 14), 179; Proukaki, *Problem of Enforcement* (n 88), 191.

²⁹⁸ See Williams, ‘Justice or Peace’ (n 158), 157.

²⁹⁹ See Greenawalt, ‘Rethinking Genocidal Intent’ (n 172), 2285; Gordon, ‘Economic Sanctions on Iraq & Accusation of Genocide’ (n 169), 63.

³⁰⁰ See Pangalangan Raphael, Fernandez Gemmo, & Tugade Roselle, ‘Marcosian Atrocities: Historical Revisionism & the Legal Constraints on Forgetting’ (2018) 19 *Asia-Pacific Journal on Human Rights & the Law* 140, 142; *In re: Estate of Marcos* (1995) (D Haw, 1995) 910 FSupp 1460 (USA), 1463; Williams, ‘Justice or Peace’ (n 158), 161.

³⁰¹ See on torture and forced labour: Kaing Guek Eav (*Duch*) (ECCC, 001/18-07-2007, 2011). On genocide: Abrams, ‘Atrocities in Cambodia & Kosovo’ (n 164), 307; Saul Ben, ‘Was the Conflict in East Timor “Genocide” & Why Does it Matter?’ (2001) 2 *Melbourne Journal of International Law* 470, 472; Linton Suzannah, ‘Putting Cambodia’s Extraordinary Chambers into Context’ (2007) 11 *Singapore Yearbook of International Law* 195, 229 citing UNGA, ‘Report of the Group of Experts for Cambodia established by GA Res 52/135’ (22 February 1999) UN Doc S/1999/231, ¶63; Van Shaack, ‘Political Genocide’ (n 164), 2271. *Contra* Schabas, ‘Cambodia: Was it Really Genocide?’ (n 164), 474.

³⁰² See *Personas omisión Nacional sobre la Desaparición de, Nunca Más: Report of the Commission* (Farrar, Straus, & Giroux 1986), 1; Guevara Valeria, ‘Prologue to Truth: Argentina’s National Commission on the Disappeared & Authority of International Law’ (2002) 35 *Leiden Journal of International Law* 105, 114. See also Feitlowitz Marguerite, *Lexicon of Terror: Argentina & Legacies of Torture* (Oxford University Press 1998).

³⁰³ See Comisión de Esclarecimiento Histórico, ‘Guatemala—Memory of Silence: Conclusions and

the Habré regime (1982–90),³⁰⁴ and genocide against the Tutsis in Rwanda (1994).³⁰⁵ However, it must be noted that in none of these cases did ‘states other than an injured state’ implement the duties imposed by certain human rights norms.³⁰⁶ These seem to suggest, as will be shown below, that at the time of the 2001 Draft Articles’ adoption, states, as to these norms, had not accepted as law the competence of ‘states other than an injured state’ to invoke another’s responsibility via judicial dispute resolution or enforce it via unilateral measures. Thus, as to certain human rights norms, the ILC correctly deemed 2001 Draft Article 48 progressive measure.³⁰⁷ It also appropriately ‘[left] the resolution’ of the question of the competence of ‘states other than an injured’ state to levy countermeasures to the ‘development of international law’.³⁰⁸

A. Invocation of Responsibility through Judicial Dispute Resolution

As with the norm on force discussed in *Chapter 5A*, the lack of instances in which ‘states other than an injured state’ invoked another’s responsibility via judicial dispute resolution is

Recommendations’ (1999) 74 *Schwerpunktthema: Umgang mit der Vergangenheit* 511, 539 ff; Blake Jillian, ‘Should Domestic Courts Prosecute Genocide: Examining the Trial of Efraim Rios Montt’ (2014) 39 *Brooklyn Journal of International Law* 563, 571; Perlin Jan, ‘Guatemalan Historical Clarification Commission Finds Genocide’ (2000) *ILSA Journal of International & Comparative Law* 389, 400.

³⁰⁴ See Commission of Inquiry into the Crimes & Misappropriations Committed, ‘Investigation of Crimes against the Physical & Mental Integrity of Persons & their Possessions’ in Kritz Neil (ed), *Transitional Justice*, vol III (US Institute of Peace Press 1995).

³⁰⁵ See Verdirame, ‘Genocide Definition in the Jurisprudence of the Ad Hoc Tribunal’ (n 198), 592; *Akayesu* (n 171), ¶¶511–6. *Kayishema & Ruzindana* (n 199), ¶¶91–8, 578; *Jelisić (Trial Judgement)* (n 199), ¶70; *Rutaganda* (n 199), ¶55; *Musema* (n 199), ¶¶161–2; Degni-Ségui René, ‘Human Rights in Rwanda’ (11 Nov 1994) UN Doc E/CN.4/1995/70, 5.

³⁰⁶ See on Haiti: Williams, ‘Justice or Peace’ (n 158), 157. On Paraguay: Gomar Konjit, ‘Heartbreak in Darfur: When Does Genocide become Genocide?’ (2004) *ILSA Journal of International & Comparative Law* 412, 169; Kuper Leo, *Prevention of Genocide* (Yale University Press 1985), 162. On the Philippines: Hawes Gary, ‘United States Support for the Marcos Administration and the Pressures that made for Change’ (1986) 8 *Contemporary Southeast Asia* 19, 19–23; Kessler Richard, ‘Marcos and the Americans’ (1986) *Foreign Policy* 40, 44; Orentlicher Diane, ‘Power of an Idea: Impact of US Human Rights Policy’ (1991) 1 *Transnational Law & Contemporary Problems* 44, 55. On Cambodia: Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 189; Dawidowicz, *Third Party Countermeasures* (n 14), 246; Hannum, ‘International Law & Cambodian Genocide’ (n 169), 137; Crawford James, ‘First Report on State Responsibility’ (1998) II(1) YbILC 1, 16. On Argentina: Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 374, 379, 385–6; Guevara, ‘Argentina’s National Commission’ (n 302), 125. On Guatemala: Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 151; Blake, ‘Examining the Trial of Efraim Rios Montt’ (n 303), 569, 571; Perlin, ‘Guatemalan Historical Clarification Commission’ (n 303), 397. See Comisión de Esclarecimiento Histórico, ‘Guatemala—Memory of Silence’ (n 303), 515. On Chad: Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 296, 371; Charney Jonathan, ‘Self-Determination: Chechnya, Kosovo, & East Timor’ (2001) 34 *Vanderbilt Journal of Transnational Law* 455, 456. On Rwanda: Keating Colin, ‘Rwanda: Political Failure of the UNSC’ (2018) 22 *Journal of International Peacekeeping* 17, 17, 20–7; Tams, *Enforcing Obligations Erga Omnes* (n 52), 3.

³⁰⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 117, 126–7.

³⁰⁸ Ibid, 139. See Crawford, ‘Third Report on State Responsibility’ (2000) (n 50), 105; Crawford James, ‘Fourth Report on State Responsibility’ (2000) II YbILC 3, 14; ILC, ‘Summary Records of the 52nd Session’ (2000) (n 240), 305; ILC, ‘Summary Records of the 53rd Session’ (2001) I YbILC 1, 35, 45.

apparent. Between 1970 and 2001, no such state instituted any judicial proceeding to implement the duties imposed by norms safeguarding human rights.³⁰⁹ This is despite the fact that norms safeguarding human rights have been the subject of instruments that contain compromissory clauses that grant tribunals jurisdiction over breaches of duties arising from these conventions.³¹⁰ Furthermore, some of the states discussed or referenced in this chapter have also lodged optional clause declarations which would have granted the ICJ jurisdiction over claims regarding breaches of these duties.³¹¹

As noted in *Chapter 5A*, this lack of practice, as scholars like Frowein submit, may have been due to the lack of clarity in the case law on the competence of ‘states other than an injured state’ to invoke another’s responsibility. Recall that while the ICJ, in *Barcelona Traction*, asserted that certain duties safeguarding human rights are owed *erga omnes*, it did not explain how these duties may be implemented,³¹² or the nature of the legal relations these norms create.³¹³ Indeed, in the few cases during this period in which the Court referred to duties owed *erga omnes*, the concept played ‘little or no relevance [on] the outcome’.³¹⁴

B. Enforcement through Unilateral Measures

As to countermeasures by ‘states other than an injured state’, there appears to be some semblance of practice and *opinio juris* that has led some scholars to generally conclude that states have accepted this prerogative as law or suggest that this acceptance is ‘emerging’.³¹⁵

³⁰⁹ Dawidowicz, *Third Party Countermeasures* (n 14), 40. Note that *Armed Activities on the Territory of the Congo* (DRC v Uganda) (Judgment) [2005] ICJ 168 and ‘Application’, *Legality of the Use of Force* (Serbia & Montenegro v USA) (Institution of Proceedings) (ICJ, General List No 115, 30 April 1985) were both instituted by the ‘injured state’—DRC and Yugoslavia (Serbia and Montenegro) respectively.

³¹⁰ See *Genocide Convention* (n 5), art IX; *Torture Convention* (n 5), art 30; *ICCPR* (n 5), art 41; *ICERD* (n 5), art 22; *ICSPCA* (n 61), art XII; *Slavery Convention* (n 5), art 8; *Supplementary Convention on Slavery* (n 74), art 10.

³¹¹ Note South Africa, ‘Optional Clause Declaration’ (12 September 1955) 216 UNTS 115; Cambodia, ‘Optional Clause Declaration’ (19 September 1957) 277 UNTS 77; Philippines, ‘Optional Clause Declaration’ (23 December 1971) 808 UNTS 3.

³¹² Frowein, ‘Reactions by Not Directly Affected States’ (n 2), 406; Nollkaemper André, ‘International Adjudication of Global Public Goods: Substance & Procedure’ (2012) 23 *European Journal of International Law* 769, 784; Tams, *Enforcing Obligations Erga Omnes* (n 52), 162; Annacker Claudia, ‘Legal Regime of Erga Omnes Obligations in International Law’ (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 133; Villalpando Santiago, ‘Legal Dimension of the International Community: How Community Interests are Protected in International Law’ (2010) 21 *European Journal of International Law* 387, 410.

³¹³ See Tams Christian, ‘Individual States as Guardians of Community Interests’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 385–6. See ILC, ‘Fragmentation of International Law’ (13 April 2006) UN Doc A/CN.4/L.682, 206.

³¹⁴ Dawidowicz, *Third Party Countermeasures* (n 14), 43.

³¹⁵ See *e.g.* Ibid, 242; Tams, *Enforcing Obligations Erga Omnes* (n 52), 209; Proukaki, *Problem of Enforcement* (n 88), 209; Sicilianos, ‘Classification of Obligations’ (n 88), 1143; Institut de Droit International, ‘Resolution: Obligations Erga Omnes in International Law’ (2005), art 5(c).

Yet, the survey above suggests the contrary as to norms safeguarding human rights. This competence had not crystallised into a customary rule by 2001. As the ILC correctly concluded, state practice was limited, inconsistent, and lacked evidence of *opinio juris*.³¹⁶

First, the practice was not widespread nor representative. The six instances in which ‘states other than an injured state’ imposed unilateral measures that are countermeasures involved mostly Western states.³¹⁷ Only in one did non-Western states levy countermeasures as opposed to retorsions—Ghana, Malaysia, Indonesia, Kuwait, Nigeria, Pakistan, Sierra Leone, Tanzania, Uganda, Hungary, and the Philippines in response to South Africa’s Apartheid (1948–91). Thus, the practice up to the 2001 Draft Articles’ adoption was arguably not extensive. Only a small minority imposed countermeasures as ‘states other than an injured state’ to enforce the duties imposed by certain human rights norms. Moreover, the practice was limited to certain groups of states that do not include states of ‘different political, economic, and legal systems’.³¹⁸

The point made in *Chapter 5A* regarding the conduct of ‘major’ or ‘leading’ states is worth stressing. It is counterproductive to limit the analysis to economically powerful states, mostly Western ones, deemed to have the capacity to levy unilateral measures. Doing so risks a ‘hegemonical approach to international relations’ with ‘certain states proclaiming themselves to be the sole representatives of the ‘community’’.³¹⁹ Crucially, it neglects that in some instances, other states have also imposed measures against wrongful states after collective decisions had been made thereby showing their capacity to do so.³²⁰ Case in point, non-Western states imposed measures against South Africa after the GA called on states to levy measures including trade embargos.³²¹

³¹⁶ Crawford, ‘Third Report on State Responsibility’ (2000) (n 50), 102–4.

³¹⁷ See Subedi, ‘Status of Unilateral Sanctions’ (n 238), 34.

³¹⁸ *North Sea Continental Shelf* [1969] (n 18) (Lachs, dissenting), 229; *Mondev International Ltd v US* (Award) (2002) (ICSID Additional Facility, 11 October 2002), ¶117.

³¹⁹ Corten Olivier, ‘Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate’ (2006) 16(5) *European Journal of International Law* 803, 811, 819–20 citing Byers Michael & Chesterman Simon, ‘Changing the Rules about Rules? Unilateral Intervention & the Future of International Law’ in Holzgrefe J & Keohane R (eds), *Humanitarian Intervention: Ethical, Legal, & Political Dilemmas* (Cambridge University Press 2003), 194. See Corten Olivier, *Law Against War: Prohibition on the Use of Force in Contemporary International Law* (Hart 2010), 24; Dubuisson François, ‘La problématique de la légalité de l’opération “Force alliée” contre la Yougoslavie’ in Corten Olivier & Delcourt B (eds), *Droit, légitimation et politique extérieure: l’Europe et la guerre du Kosovo* (Bruylant 2001), 179; Lagerwall Anne, ‘Kosovo, Afghanistan, Irak: le retour des guerres d’agression’ in Corten Olivier & Delcourt B (eds), *Les guerres anti terroristes* (Contradictions 2004). 95–7; Subedi, ‘Status of Unilateral Sanctions’ (n 238), 39–40.

³²⁰ See Hofer Alexandra, ‘Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’ (2017) 16 *Chinese Journal of International Law* 1, 17, 39.

³²¹ Res 1761 (n 104).

Second, state practice was not consistent nor uniform. There was too much discrepancy and inconsistency suggesting that the competence of ‘states other than an injured state’ to resort to countermeasures had not become customary by 2001.³²² The lack of regularity is evident. In comparable situations, the repetition of the conduct, even from Western states, had not been apparent. One may expect states to react similarly to gross and systematic violations of human rights. States imposed unilateral measures in response to Yugoslavia’s failure to prevent and punish genocide against Bosniaks (1992–5) and Uganda’s genocide of ethnic minorities (1971–8). Yet, none levied measures in response to the genocide against Ache Indians in Paraguay (1962–72), minorities in Cambodia (1975–9), and Tutsis in Rwanda (1994). Similarly, while states levied measures in response to the torture in the Central African Republic (1966–79), Myanmar (1988–), and Sudan (1993–2003), none did for the Philippines (1973–86), Cambodia (1975–9), and Chad (1982–90).

As in *Chapter 5A*, the discernible pattern of behaviour is that states tend not to act when the wrongful states serve their ‘strategic interests’ or the situation does not affect their interests.³²³ The first explains the Western states’ inaction to Guatemala’s genocide against the Maya (1982–3),³²⁴ Haiti’s (1957–1986),³²⁵ and the Philippines’ (1973–86) acts of torture,³²⁶ and Indonesia’s occupation of Timor Leste (1976–99).³²⁷ The second sheds light on their silence to the genocides in Paraguay (1962–72),³²⁸ Cambodia (1975–9),³²⁹ and Rwanda

³²² *Asylum* (Colombia v Peru) (Judgment) [1950] ICJ 266, 277; *North Sea Continental Shelf* [1969] (n 18), 45.

³²³ Brownlie Ian, ‘UN Charter & the Use of Force, 1945–1985’ in Cassese Antonio (ed), *Current Legal Regulation of the Use of Force* (Nijhoff 1986), 500 (‘Nearly always dictated by political and strategic interests’); Tomaševski, *Responding to HR Violations: 1946–99* (n 145), 369. See Hofer Alexandra, ‘Negotiating International Public Policy through Adoption & Contestation of Sanctions’ (2017) 50 *Revue Belge de Droit International* 440, 447; Koskenniemi Martti, ‘Solidarity Measures: State Responsibility as a New International Order?’ (2002) 71 *British Yearbook of International Law* 337, 344.

³²⁴ See Perlin, ‘Guatemalan Historical Clarification Commission’ (n 303), 397 (‘The [US] played a role in the [...] conflict [by interfering] in Guatemala’s internal affairs and [...] “direct support [for] some of the state’s illegal operations”’).

³²⁵ See Williams, ‘Justice or Peace’ (n 158) (‘[The Duvaliers] had the support of the [US] during their tenures because they were strongly anti-communist, and the US did not want another Cuba so close to its border.’).

³²⁶ See Hawes Gary, ‘US Support for the Marcos Administration & the Pressures that made for Change’ (1986) 8 *Contemporary Southeast Asia* 19, 19 (‘The importance of the US military bases in the Philippines, the intrusion of the superpower conflict into Southeast Asia, and the fear of a growing communist movement in the Philippines [placed] limits on [...] American foreign policy.’)

³²⁷ Howard Jessica, ‘Invoking State Responsibility for Aiding the Commission of International Crimes—Australia, the US, & East Timor’ (2001) 2 *Melbourne Journal of International Law* 1, 24 (‘The West’s need for a non-aligned power in Southeast Asia made [...] Indonesia the recipient of extensive military, financial and logistical support.’).

³²⁸ See Mora Franck, ‘From Dictatorship to Democracy: US & Regime Change in Paraguay, 1954–1994’ (1998) 17 *Bulletin of Latin American Research* 59, 61.

³²⁹ See Hannum, ‘International Law & Cambodian Genocide’ (n 169), 137–8.

(1994).³³⁰

Finally, there was a lack of a broad acknowledgement of the practice as law from states. Some states who appear to ‘consider themselves as [...] allies’ in responding to ‘situations that pose a threat to international values’ asserted the prerogative of ‘states other than an injured state’ to impose unilateral measures, including countermeasures, against wrongful states.³³¹ The US stated that it is ‘prepared to act unilaterally [...] when [its] core values are at issue’,³³² and to address ‘human rights abuses’.³³³ Similarly, the EEC/EU claimed that ‘every [...] state is at liberty to [restrict] trade [to] protect its [...] interests’.³³⁴ Some also asserted this competence in explaining their opposition to GA resolutions that broadly condemned unilateral measures.³³⁵ Some also enacted specific laws for the imposition of these measures: the US has the IEEPA that allows it to adopt unilateral measures in response to human rights violations;³³⁶ the EU under the TEU may implement a common foreign and security policy ‘to promote progress in Europe and in the world’;³³⁷ and Canada has the SEMA that permits it adopt unilateral measures in response to ‘gross violations of [...] human rights’.³³⁸

Yet, other states did not share this view. Unsurprisingly, targeted states, like Yugoslavia and Sudan, protested the measures levied against them.³³⁹ Crucially, while many states did not protest every imposition of unilateral measures including countermeasures,³⁴⁰ many condemned these measures in GA resolutions, declarations of institutional arrangements, and

³³⁰ See Straus Scott, *Order of Genocide: Race, Power, & War in Rwanda* (Cornell University Press 2013), 1 (‘Rwanda did not command enough economic or strategic interest to justify the risks of troop deployment’)

³³¹ Hofer, ‘Adoption & Contestation of Sanctions’ (n 323), 448.

³³² UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (21 October 1999) UN Doc A/54/486, 4.

³³³ UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (26 October 1998) UN Doc A/53/PV.43, 17.

³³⁴ Council of the EC, ‘Arab Economic Boycott of Israel (A3-0239/93)’ (16 November 1993) C 329/47, 48.

³³⁵ See e.g. UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (1999) (n 333), 17 (Austria on behalf of the EU), 17 (US); UNGA, ‘Verbatim Record, 55th Session, 41st Meeting’ (26 October 2000) UN Doc A/55/PV.41, 23 (France on behalf of the EU).

³³⁶ PL 95–223, *International Emergency Economic Powers Act* (1977) (US). See also PL 65-91, *Trading with the Enemy Act* (1917) (US).

³³⁷ *Treaty of the European Union* (adopted 7 February 1992, entered into force 1 November 1993) 1755 UNTS 1 (‘To implement a common foreign and security policy including the eventual framing of a common defence policy [...] to promote peace, security and progress in Europe and in the world’); *Treaty Establishing the European Community* (adopted 25 March 1957, entered into force 1 January 1958) 294 UNTS 3, art 108.

³³⁸ SC 1992 c 17, *Special Economic Measures Act* (1992) (CAN), §1.

³³⁹ See UNSC, ‘Verbatim Record, 3868th Meeting’ (31 March 1998) UN Doc S/PV.3868, 16; Islamic Conference of Foreign Ministers, ‘Final Communiqué: 25th Session’ (1998) (n 294).

³⁴⁰ Note Henry Etienne, ‘Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law’ (2017) 18 *Melbourne Journal of International Law* 1, 17, 19.

individual statements. These have already been examined in *Chapter 5A* but are worth repeating. First, there were the three sets of GA resolutions that states regularly adopted. There were resolutions that condemned the coercive nature of unilateral measures,³⁴¹ called upon the states ‘to eliminate their use against developing countries’, and criticised these measures for not being ‘authorised by the [UN’s] relevant organs’.³⁴² There were also resolutions that called for the ‘repeal of unilateral extraterritorial laws that impose sanctions’ and the non-recognition of unilateral extraterritorial coercive economic measures ‘imposed by any state’.³⁴³ Finally, there were resolutions that condemned unilateral measures due to their ‘negative effects on [...] human rights’.³⁴⁴

States also echoed these views in the declarations of institutional arrangements such as the

³⁴¹ See *Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 38/197 UNGA (30 December 1983) UN Doc A/RES/38/197; Res 39/210 UNGA (18 December 1984) UN Doc A/RES/39/210; Res 40/185 UNGA (17 December 1985) UN Doc A/RES/40/185; Res 41/165 UNGA (5 December 1986) UN Doc A/RES/41/165; Res 42/173 UNGA (11 December 1987) UN Doc A/RES/42/173; Res 44/215 UNGA (22 December 1989) UN Doc A/RES/44/215; Res 46/210 UNGA (20 December 1991) UN Doc A/RES/46/210; Res 48/168 UNGA (21 December 1993) UN Doc A/RES/48/168; Res 50/96 UNGA (20 December 1995) UN Doc A/RES/50/96. See *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 52/181 UNGA (18 Dec 1997) UN Doc A/RES/52/181; Res 54/200 UNGA (22 Dec 1999) UN Doc A/RES/54/200. See also UNGA, ‘Verbatim Record, 38th Session, 104th Meeting’ (20 December 1983) UN Doc A/38/PV.104, 1683 (German Democratic Republic); UNGA, ‘Verbatim Record, 51st Session, 67th Meeting’ (27 November 1996) A/51/PV.67, 15 (Ukraine), 17 (Iran), 18 (Iraq), 19 (Cuba); UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (1999) (n 333), 5 (Ghana), 7 (Iraq), 7 (Sudan), 11 (Qatar), 13 (North Korea), 13 (South Africa), 14 (Namibia), 15 (Malaysia), 15 (Nigeria); UNGA, ‘Verbatim Record, 54th Session, 87th Meeting’ (22 December 1999) A/54/PV.87, 22 (North Korea); UNGA, Second Committee, ‘Summary Record of the 54th Session, 43rd Meeting’ (26 November 1999) UN Doc A/C.2/54/SR.43, 4 (Armenia); UNGA, Third Committee, ‘Summary Record of the 51st Session, 47th Meeting’ (21 November 1996) UN Doc A/C.3/51/SR.47, 18 (China); UNGA, Third Committee, ‘Summary Record of the 51st Session, 52nd Meeting’ (26 November 1996) UN Doc A/C.3/51/SR.52, 4 (Iraq)

³⁴² See also UNGA, ‘Verbatim Record, 41st Session, 119th Meeting’ (10 December 1986) A/41/PV.119, 41 (Honduras); UNGA, ‘Verbatim Record, 46th Session, 79th Meeting’ (8 January 1992) A/46/PV.79, 63 (Honduras); UNGA, ‘Verbatim Record, 51st Session, 67th Meeting’ (1998) (n 341), 11 (Libya), 17 (Iran); UNGA, Third Committee, ‘Summary Record of the 51st Session, 47th Meeting’ (1996) (n 341), 18 (China); UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (1999) (n 333), 5 (Ghana), 8 (Iran), 10 (Burkina Faso), 18 (Argentina); UNGA, ‘Verbatim Record, 54th Session, 87th Meeting’ (1998) (n 341), 8 (Russia).

³⁴³ See *Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion* Res 51/22 UNGA (27 November 1996) UN Doc A/RES/51/22; Res 53/10 UNGA (26 October 1998) UN Doc A/RES/53/10; Res 55/6 UNGA (26 October 2000) UN Doc A/RES/55/6. See also UNGA, ‘Verbatim Record, 51st Session, 67th Meeting’ (1998) (n 341), 11 (Libya), 13 (France), 13 (Malaysia), 20 (Ireland on behalf of the European Union), 20 (Turkey), 21 (Australia), 22 (Canada), 22 (New Zealand); UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (1999) (n 333), 5 (India), 7 (Cuba), 23 (Austria on behalf of the EU); UNGA, ‘Verbatim Record, 55th Session, 41st Meeting’ (2000) (n 335), 22 (France on behalf of the EU), 25 (Japan)

³⁴⁴ See *Human Rights & Unilateral Coercive Measures* Res 51/103 UNGA (12 December 1996) UN Doc A/RES/51/103; Res 52/120 UNGA (12 December 1997) UN Doc A/RES/52/120; Res 53/141 UNGA (9 December 1998) UN Doc A/RES/53/141; Res 54/172 UNGA (17 December 1998) UN Doc A/RES/54/172; Res 55/110 UNGA (4 December 2000) UN Doc A/RES/55/110. See also UNGA, ‘Verbatim Record, 38th Session, 104th Meeting’ (1982) (n 341), 1683 (German Democratic Republic); UNGA, ‘Verbatim Record, 51st Session, 67th Meeting’ (1998) (n 341), 19 (Cuba); UNGA, Third Committee, ‘Summary Record of the 51st Session, 52nd Meeting’ (1996) (n 341), 3 (Iran); UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (1999) (n 333), 5 (India), 10 (Burkina Faso).

NAM, G77, and OIC.³⁴⁵ In these statements, states rejected economic measures that exert pressure or interfere in states' internal affairs;³⁴⁶ stressed their negative effects on the targeted states' populations;³⁴⁷ criticised the extra-territorial nature of some measures;³⁴⁸ and condemned actions based on 'power politics, hegemony, [and] unilateralism'.³⁴⁹

States have also repeated these criticisms—coercion and intervention,³⁵⁰ unlawful exercise of extra-territorial jurisdiction,³⁵¹ and negative effects on human rights,³⁵² in their individual statements and responses to the UN Secretary-General's requests for comments. Some also stated that the unilateral measures, even 'on the grounds [of] human rights', contravene the 'rules governing relations between states' and violate the 'human rights of the people of [the target] states'.³⁵³

³⁴⁵ See Conference of Heads of the NAM, 'Final Document of the 12th Summit' (3 September 1998) UN Doc S/1998/1071; G77 Foreign Ministers, 'Declaration Adopted at the 21st Meeting' (26 September 1997); G77 Foreign Ministers, 'Declaration Adopted at the 22nd Meeting' (25 September 1998); G77 Foreign Ministers, 'Declaration Adopted at the 23rd Meeting' (24 September 1999); OIC, 'Resolution 15/8-P(IS)' (11 December 1997).

³⁴⁶ Conference of Heads of the NAM, 'Final Document of the 12th Summit' (n 345), 13, 21, 51; G77 Foreign Ministers, 'Declaration Adopted at the 21st Meeting' (n 345); G77 Foreign Ministers, 'Declaration Adopted at the 22nd Meeting' (n 345), ¶11; G77 Foreign Ministers, 'Declaration Adopted at the 23rd Meeting' (n 345), ¶60;

³⁴⁷ Conference of Heads of the NAM, 'Final Document of the 12th Summit' (n 345), 122–3.

³⁴⁸ Ibid, 17, 52, 83; OIC, 'Resolution 15/8-P(IS)' (n 345).

³⁴⁹ Conference of Heads of the NAM, 'Final Document of the 12th Summit' (n 345), 20.

³⁵⁰ See e.g. UNGA, 'Economic Measures as a Means of Political & Economic Coercion: SG Report' (18 September 1995) UN Doc A/50/439, 3 (Cuba), 4 (Iraq); UNGA, 'Economic Measures as a Means of Political & Economic Coercion: SG Report' (14 October 1997) UN Doc A/52/459, 3 (Cuba), 5 (Gambia), 6 (Iran), 8 (Venezuela); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (1999) (n 332), 2 (Cuba); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (17 August 2000) UN Doc A/55/300, 3 (Iran), 3 (Libya), 7 (Mali); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2 November 1998) UN Doc A/53/293, 3 (Ecuador).

³⁵¹ See e.g. UNGA, 'Economic Measures as a Means of Political & Economic Coercion' (1997) (n 350), 3 (Belarus), 5 (Cuba), 5 (Libya), 7 (Mexico), 8 (Venezuela); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion' (2000) (n 350), 2 (Benin), 3 (Libya); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (1999) (n 332), 3 (Cuba), 4 (Paraguay).

³⁵² See e.g. UNGA, 'Economic Measures as a Means of Political & Economic Coercion' (1995) (n 350), 4 (Ecuador), 4 (Estonia); UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (4 January 1995) UN Doc E/CN.4/1996/45, 4 (Argentina); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (1999) (n 332), 3 (Mexico), 3 (Malta); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion' (2000) (n 350), 7 (Mexico), 7 (Yemen); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (1998) (n 350), 4 (Iran).

³⁵³ UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (1995) (n 352), 2 (China). See UNGA, Third Committee, 'Summary Record of the 51st Session, 47th Meeting' (1996) (n 341), 3 (North Korea: 'Categorically reject[s] any attempt to use human rights issues as a precondition for [...] economic relations'), 7 (Moldova: 'Using the protection of the rights of persons [...] as a pretext for interfering in the internal affairs of [...] Moldova'); 18 (China); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (26 September 2000) UN Doc A/55/214/Add.1, 3 (Libya: 'The use of human rights [...] to obtain from them the subordination of the exercise of their sovereign rights').

Nevertheless, as discussed in *Chapter 5A*, these statements must not be construed as an ‘unqualified proposition’ that all unilateral measures are unlawful.³⁵⁴ Rather, these views must be nuanced ‘precisely to understand’ the measures condemned.³⁵⁵ From the previous analysis, the unilateral measures states consider to be ‘not in accordance with international law’ are arguably measures that are not retorsions and are not countermeasures taken by the ‘injured state’. These include those that involve breaches but whose wrongfulness cannot be precluded such as measures levied not in response to wrongful acts;³⁵⁶ not levied against the wrongful state but on third states,³⁵⁷ or against individuals or entities;³⁵⁸ or measures that go beyond the limits of countermeasures such as those that are not proportional;³⁵⁹ or breach human rights duties.³⁶⁰

More importantly, in contrast with a few states,³⁶¹ most states continue, as scholars like Hofer observe, appear to require collective decisions for the imposition of enforcement measures,³⁶² and thus prefer collective measures.³⁶³ This explains the repeated condemnation of unilateralism and the measures taken by the ‘minority of the powerful states’ purporting to act on the community’s behalf.³⁶⁴ Thus, it seems that most states had not accepted the

³⁵⁴ See Barber Rebecca, ‘An Exploration of the General Assembly’s Troubled Relationship with Unilateral Sanctions’ (2021) 70 *International & Comparative Law Quarterly* 343, 359.

³⁵⁵ Ibid.

³⁵⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 130 citing *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 55; *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa* (Naulilaa) (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1027.

³⁵⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 130; Ruys Tom & Ryngaert Cedric, ‘Secondary Sanctions: A Weapon out of Control? Legality of, & European Responses to, US Secondary Sanctions’ (2020) *British Yearbook of International Law* 1, 4

³⁵⁸ ILC, ‘Summary Records of the 52nd Session’ (2000) (n 240), 266, 271; Crawford, ‘Third Report on State Responsibility’ (2000) (n 50), 84.

³⁵⁹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 134; *Naulilaa* (n 356), 1028; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 448.

³⁶⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 3), 131–3.

³⁶¹ Hofer, ‘Adoption & Contestation of Sanctions’ (n 323), 448. See UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (1999) (n 332), 4 (US); UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (1999) (n 333), 17 (EU).

³⁶² Hofer, ‘Divide on Unilateral Coercive Measures’ (n 320), 17. See e.g. UNGA, ‘Economic Measures as a Means of Political & Economic Coercion’ (1995) (n 350), 4 (Estonia); UN CHR, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (1995) (n 352), 4 (Argentina); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (1998) (n 350), 4 (Iran); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (1999) (n 332), 3 (Mexico), 3 (Malta); UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion’ (2000) (n 350), 7 (Mexico), 7 (Yemen).

³⁶³ Hofer, ‘Adoption & Contestation of Sanctions’ (n 323), 447, 466. See Henry, ‘Revisionist Claims of Custom’ (n 340), 17.

³⁶⁴ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 320), 39; Hofer, ‘Adoption & Contestation of Sanctions’ (n 323), 446.

competence of ‘states other than an injured state’ to impose countermeasures and, in the absence of a positive rule that provides such competence,³⁶⁵ states deem that the imposing state’s breach of duty will not be precluded.

CHAPTER CONCLUSION

This chapter examined if states have accepted the competence of ‘states other than an injured state’ to implement duties arising from human rights at the time of the 2001 Draft Articles’ adoption. First, it clarified the scope of the duties claimed to be owed *erga omnes* or *erga omnes partes*. Not all these norms impose similar duties in their customary and conventional forms. The rules on racial discrimination (*duty to eliminate racial discrimination in all its forms*) and slavery (*duty to prohibit and abolish slavery*) arguably share similarities. This is not the case for genocide (*duty to prevent and punish* under treaty law and *duty not to commit* under customary law) and torture (*duty to prevent, punish, and provide remedies* under conventional law and *duty not to commit genocide* under customary law).

This chapter then analysed the state practice and *opinio juris* on the implementation of duties imposed by certain human rights norms before the 2001 Draft Articles’ adoption. A survey of breaches of the duty between 1970 and 2001 and the actions that states took to implement this duty suggests that states have not accepted as law the competence of ‘states other than an injured state’ to implement duties owed *erga omnes* and *erga omnes partes*. During this period, no ‘states other than an injured state’ invoked the responsibility of another through judicial dispute resolution. Similarly, only in a few instances did ‘states other than an injured state’ enforce the duty through countermeasures. In these few cases, the states that imposed these unilateral measures were predominantly Western states. Others considered such measures unlawful. This suggests that the state practice is limited, inconsistent, and lacks evidence of *opinio juris*. Thus, the chapter submits that, as to certain human rights norms, the ILC correctly considered 2001 Draft Article 48 as a ‘progressive measure’ and appropriately left the issue posed under 2001 Draft Article 54 to the further ‘development of international law’. ■

³⁶⁵ See Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1, 5; Alland Denis, 'Countermeasures of General Interest' (2002) 13 *European Journal of International Law* 1220, 1233. But see Sicilianos, 'Classification of Obligations' (n 88), 1143; Huesa Vinaixa Rosario 'Plurality of Injured States' in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 954; Ni Kuei-Jung, 'Third-State Countermeasures for Enforcing International Common Environmental Interests: The Implication and Inspiration of the ILC's Articles on State Responsibility' (2004) 22 *Chinese (Taiwan) Yearbook of International Law and Affairs* 1, 41.

CHAPTER 6B: SOME NORMS SAFEGUARDING HUMAN RIGHTS (2001–23)

Chapter 6A submitted that given the divergent state practice and *opinio juris* before 2001, the ILC, as to certain human rights norms, correctly deemed 2001 Draft Article 48 as a progressive measure,¹ and correctly reserved its position on countermeasures by ‘states other than an injured state in 2001 Draft Article 54.’² This chapter turns to the state practice and *opinio juris* after the 2001 Draft Articles’ adoption to determine if states have since accepted the competence of ‘states other than an injured state’ to implement these duties. It observes that between 2001 and 2023, there may have been a trend towards the recognition of the competence of ‘states other than an injured state’ to invoke another’s responsibility through judicial dispute resolution. As such, the state practice and *opinio juris* relating to the 2001 Draft Article 48 appears to be ‘evolving’.³ However, the state practice and *opinio juris* regarding the prerogative of these states to enforce responsibility through countermeasures remain sporadic and divergent. Thus, this chapter submits as to norms that safeguard certain human rights, the status of 2001 Draft Article 54 remains unsettled.⁴

I. IMPLEMENTATION BY ‘STATES OTHER THAN AN INJURED STATE’ AFTER THE 2001 DRAFT ARTICLES’ ADOPTION

A. *Failure to prosecute torture in Chad by Senegal (2001–12)*

Between 1982 and 1990, Habré’s government brutally repressed the human rights in Chad.⁵ The government detained thousands of its opponents many of whom were tortured or executed.⁶ Yet, despite these abuses, states took no action against Chad. Only after Habré’s ouster did Chad come under the CHR’s scrutiny.⁷ As for Habré, the former dictator obtained asylum from

¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) II(2) YbILC 20, 117, 126–7.

² Ibid, 139.

³ *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192 (Xue, dissenting), 1–2. *But see Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v UK) (Preliminary Objections) [2016] ICJ 833 (Crawford, dissenting), 110.

⁴ *But see* Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 252, 266; Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 390–1; Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 207.

⁵ Andenas Mads & Weatherall Thomas, ‘Questions relating to the Obligation to Extradite or Prosecute’ (2013) 62 *International & Comparative Law Quarterly* 753, 751.

⁶ Magliveras Konstantinos, ‘Critique of the African Union’s Handling of the Hissene Habre Affair’ (2014) 22 *African Journal of International & Comparative Law* 420, 422. Shah Sangeeta, ‘Questions Relating to the Obligation to Prosecute or Extradite’ (2013) 13 *Human Rights Law Review* 351, 351. *See* Commission of Inquiry into the Crimes & Misappropriations Committed, ‘Investigation of Crimes against the Physical & Mental Integrity of Persons & their Possessions’ in Kritz Neil (ed), *Transitional Justice*, vol III (US Institute of Peace Press 1995).

⁷ Tomaševski Katarina, *Responding to Human Rights Violations: 1946–1999* (Kluwer 2000), 296, 371. *See Situation of Human Rights in Chad* Res 1994/19 UN CHR (25 August 1994) UN Doc E/CN.4/Sub.2/RES/1994/19.

Senegal where he resided since his ouster.⁸

In January 2000, charges were filed against Habré in Senegal,⁹ leading to his house arrest in February.¹⁰ However, in July, the Senegalese Court of Appeals dismissed the charges citing lack of jurisdiction which its Court de Cassation upheld in March 2001.¹¹ In May 2003, several Belgian citizens of Chadian descent sued Habré in Belgium.¹² In September 2005, Belgium issued an arrest warrant against Habré and lodged an extradition request from Senegal.¹³

Senegal brought the issue concerning Belgium's request to the AU's attention which in January 2006 set up a Committee of African Jurists to deal with the matter.¹⁴ The Committee concluded that Habré may be tried 'on behalf of Africa' in Senegal or Chad.¹⁵ Yet, despite this finding and the AU Assembly's decision calling Senegal to proceed with Habré prosecution,¹⁶ Senegal did not do so. The situation was further complicated by the ECOWAS Court of Justice's 2010 decision stating that Habré could only be tried by a 'special and *ad hoc* procedure of international character'.¹⁷ To this end, the AU began negotiations with Senegal over the special tribunal's creation. Yet, Senegal rejected the proposals and withdrew from the talks in May 2011.¹⁸

As the Committee against Torture observed, Senegal, by not prosecuting Habré, breached its *duty to prosecute and punish acts of torture*.¹⁹ Belgium shared this view. Thus, while no

⁸ *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422, 431.

⁹ Vick Karl, 'Former Chad Dictator Faces Pinochet Test' (Washington Post, 27 January 2000) <<https://www.proquest.com/newspapers/former-chad-dictator-faces-pinochet-test/docview/408593402>>.

¹⁰ —, 'Ex-Chad Ruler Is Charged By Senegal With Torture' (New York Times, 4 February 2000) <<https://www.proquest.com/newspapers/ex-chad-ruler-is-charged-senegal-with-torture/docview/431374807>>.

¹¹ —, 'L'ancien président tchadien Habré ne sera pas poursuivi par la justice sénégalaise' (Le Monde, 22 March 2001) <<https://www.proquest.com/newspapers/lancien-président-tchadien-hissène-habré-ne-sera/docview/2584090696>>.

¹² Magliveras, 'AU's Handling of the Hissene Habre Affair' (n 6), 424, 426.

¹³ Simons Marlise, 'Ex-dictator of Chad is indicted in Belgium' (International Herald Tribune, 30 September 2005) <<https://www.proquest.com/newspapers/ex-dictator-chad-is-indicted-belgium/docview/31869609>>; Simons Marlise, 'Belgium Sues To Compel Prosecution Of a Chadian' (New York Times, 22 February 2009) <<https://www.proquest.com/newspapers/belgium-sues-compel-prosecution-chadian/docview/434040875>>.

¹⁴ Schmidt Roland, 'Types of Jurisdiction over the Offence of Torture' in Nowak Manfred, *et al.* (eds), *UN Convention against Torture & its Optional Protocol: Commentary* (Oxford University Press 2019), 222.

¹⁵ African Union, 'Report of the Committee of Eminent African Jurists on the case of Habré' (2 July 2006), 3 ff.

¹⁶ AU Assembly, 'Decision on the Habre Case & the AU' (2 July 2006) Assembly/AU/Dec.127(VII), ¶5.

¹⁷ *See Hissène Habré c Senegal* (Judgement) (2010) (ECOWAS CJ, ECW/CCJ/JUD/06/10, 18 November 2010).

¹⁸ Magliveras, 'AU's Handling of the Hissene Habre Affair' (n 6), 439.

¹⁹ CAT, *Comm No 181/2001*, 36th sess, UN Doc CAT/C/36/D/181/2001 (17 May 2006) ('*Guengueng v*

state imposed any measure against Senegal, Belgium invoked Senegal's responsibility before the ICJ citing its failure to prosecute Habré and respond to requests for extradition.²⁰ In 2012, the ICJ ruled that Senegal failed in its conventional duties to inquire into Habré's case and submit him to competent authorities for prosecution.²¹ This put further pressure on Senegal. After negotiations with the AU, it agreed to create the 'Extraordinary African Chambers' within the 'Senegalese court system' in August 2012.²²

The decision is crucial as it recognised the competence of 'states other than an injured state' to invoke, through judicial dispute resolution, duties owed *erga omnes partes contractes*.²³ For the ICJ, the states' 'common interest' in the 'compliance with the [duties] under the [Torture] Convention' entitles every 'party to [...] to make a claim concerning [another's] alleged breach'.²⁴ Yet, it should be noted that Belgium stressed that it was 'not simply a "state other than an injured state"'. As 'some of [Habré's] victims are of Belgian nationality', it claimed to be 'specially affected [...] by [Senegal's] breach in a way which distinguishes it from the [...] other states to which the [duty] is owed'.²⁵ Whatever motivated the Court not to decide admissibility on this ground is not known.²⁶ It could have ruled on Belgium's competence solely on its claim as an 'injured' state.²⁷ Yet, it did not. This attracted criticism from several judges who expressed scepticism as to the legal status of the competence to invoke based on a duty owed *erga omnes partes contractes* suggesting that the matter is far from settled.²⁸ Indeed, this issue again materialised in The Gambia's suit against Myanmar discussed below.

Senegal'), ¶¶7.10–17. Note that Senegal ratified the Torture Convention on 21 August 1986 and the ICCPR on 13 February 1978.

²⁰ 'Memorial of Belgium', *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Merits) (ICJ, General List No 144, 1 July 2010), 53 ff.

²¹ *Obligation to Prosecute or Extradite* [2012] (n 8), 462–3.

²² Magliveras, 'AU's Handling of the Hissene Habre Affair' (n 6), 442–3.

²³ Bordin Fernando Lusa, 'Reflection of Customary International Law: Authority of Codifications & ILC Draft Articles' (2014) 63 *International & Comparative Law Quarterly* 535, 545; de Wet Erika, 'Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction' (2013) 38 *South African Yearbook of International Law* 1, 15–6.

²⁴ *Obligation to Prosecute or Extradite* [2012] (n 8), 450.

²⁵ 'Memorial of Belgium', *Obligation to Prosecute or Extradite* (n 20), 79–80; 'Verbatim Record 2012/3', *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Merits) (ICJ, General List No 144, 13 March 2012), 45; 'Verbatim Record 2012/6', *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Merits) (ICJ, General List No 144, 19 March 2012), 48 ('La Belgique est [...] non seulement "un Etat autre qu'un Etat lésé", mais elle est aussi en droit d'invoquer la responsabilité du Sénégal en tant qu'«Etat lésé», en application de [2001 Projet] l'article 42(b)(i)').

²⁶ Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 369.

²⁷ Schmidt, 'Types of Jurisdiction over the Offence of Torture' (n 14), 218.

²⁸ See *Obligation to Prosecute or Extradite* [2012] (n 8) (Xue, dissenting), 575; (Sur, dissenting), 614; (Skotnikov, separate opinion), 484–5.

B. Genocide against the people of Darfur in Sudan (2003)

In 2002, while Sudan and the Sudan's People's Liberation Movement ('SPLM') were negotiating to end the Second Sudanese Civil War, another conflict began in Sudan's Darfur region.²⁹ Due to the region's marginalisation, two rebel groups, the Sudan Liberation Movement ('SLM') and the Justice and Equality Movement ('JEM'), emerged and began attacking Sudanese forces.³⁰ This overwhelmed Sudan which was still in conflict with the SPLM. Thus, it mobilised militias and formed the Popular Defence Forces ('PDF').³¹ The PDF, to which Darfur's residents as the 'Janjaweed'—a traditional Darfurian term denoting an armed bandit',³² along with the Sudanese military, began a campaign against the rebels in Darfur. However, they also attacked civilians especially those belonging to the Fur, Massalit, and Zaghawa groups from which the rebels came.³³ Reports of massacres, sexual violence, poisoning of food sources, and destruction of villages soon emerged.³⁴ Based on estimates, the attacks led to 120,000 to 400,000 deaths and the displacement of two million people.³⁵

Many, including the Commission on Inquiry on Darfur, agree that genocidal acts were committed in Darfur.³⁶ Sudanese forces killed members of the Fur, Massalit, and Zaghawa groups.³⁷ They also inflicted serious bodily and mental harm on them through torture and rape.³⁸ Finally, they subjected them to conditions that would have led to their destruction by forcibly displacing them and contaminating their food supply.³⁹ Furthermore, these peoples are a

²⁹ Hapgood Matthew, 'Darfur, the SC, & the ICC' (2006) 55 *International & Comparative Law Quarterly* 226, 226.

³⁰ UNSG, 'Report of the International Commission of Inquiry on Darfur' (2005), 22; Byron Christine, 'Comment on the Report of the International Commission of Inquiry on Darfur' (2005) 5 *Human Rights Law Review* 352, 351

³¹ UNSG, 'Report of the International Commission of Inquiry on Darfur' (n 30), 28.

³² *Ibid*, 24.

³³ Byron, 'International Commission of Inquiry on Darfur' (n 30), 351; Hapgood, 'Darfur, SC, & ICC' (n 29), 226.

³⁴ Kasfir Nelson, 'Sudan's Darfur: Is it Genocide?' (2005) 104 *Current History* 195, 195. See *Prosecutor v Al Bashir* (First Decision on Warrant of Arrest) (ICC, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009), 18, 32–3; *Prosecutor v Al Bashir* (Second Decision on Warrant of Arrest) (ICC, Pre-Trial Chamber I, ICC-02/05-01/09, 12 July 2010), 10–24.

³⁵ Totten Samuel, 'Commission of Inquiry on Darfur: New & Disturbing Findings' (2009) 4 *Genocide Studies & Prevention* 354, 363; Byron, 'International Commission of Inquiry on Darfur' (n 30), 351, 357. See Charbonneau Louis, 'UN says Darfur dead may be 300,000' (Reuters, 23 April 2008) <<https://www.reuters.com/article/us-sudan-darfur-un-idUSN2230854320080422>>.

³⁶ UNSG, 'Report of the International Commission of Inquiry on Darfur' (n 30), 129.

³⁷ *Al Bashir* (Second Decision on Warrant of Arrest) (n 34), 17.

³⁸ UNSG, 'Report of the International Commission of Inquiry on Darfur' (n 30), 129; *Al Bashir* (Second Decision on Warrant of Arrest) (n 34), 17.

³⁹ UNSG, 'Report of the International Commission of Inquiry on Darfur' (n 30), 129; *Al Bashir* (Second Decision on Warrant of Arrest) (n 34), 24; Byron, 'International Commission of Inquiry on Darfur' (n 30), 354.

protected group.⁴⁰ While they share some similarities with Darfur's Arab people,⁴¹ they speak their own language and 'perceive themselves as a [...] separate group'.⁴² Yet, views differ on the genocidal intent's existence. For the Commission on Inquiry, while genocidal acts occurred in Darfur, the 'genocidal intent appears to be missing'.⁴³ The International Criminal Court ('ICC'), in its first decision on Sudanese President Al Bashir's arrest warrant, also concluded the same.⁴⁴ Yet, others disagree. Admittedly, the military activities in Darfur occurred in the context of counter-insurgency operations against the SLM and JEM.⁴⁵ However, as scholars like Byron point out, the motive needs to be delineated from the intent.⁴⁶ As the ICC in its second decision on Bashir's arrest warrant observed, the fact that other villages inhabited by rebels were bypassed and those populated by Fur, Massalit, and Zaghawa peoples were attacked suggests a campaign against these groups.⁴⁷ Also, the creation of severe conditions against these groups and the obstruction of humanitarian aid imply intent to cause their destruction.⁴⁸ Finally, the systematic attacks against persons on account of their ethnicity seem to confirm that they were specifically targeted.⁴⁹ Thus, Sudan arguably violated its *duty not to commit genocide and to prevent and punish its commission*.⁵⁰

States quickly responded to the violence in Darfur. The SC condemned the violence and demanded that Sudan disarm the PDF and prosecute those responsible for human rights

⁴⁰ Byron, 'International Commission of Inquiry on Darfur' (n 30), 356 citing *Prosecutor v Bagilishema* (Judgement) (ICTR, Trial Chamber, 95-1A-T, 7 June 2001), ¶65; *Prosecutor v Akayesu* (Judgement) (ICTR, Trial Chamber, 96-4-T, 2 September 1998), ¶¶511–6.

⁴¹ UNSG, 'Report of the International Commission of Inquiry on Darfur' (n 30), 129.

⁴² Byron, 'International Commission of Inquiry on Darfur' (n 30), 356

⁴³ UNSG, 'Report of the International Commission of Inquiry on Darfur' (n 30), 4, 128.

⁴⁴ *Al Bashir (First Decision on Warrant of Arrest)* (n 34), 51–2.

⁴⁵ UNSG, 'Report of the International Commission of Inquiry on Darfur' (n 30), 4. See *Al Bashir (First Decision on Warrant of Arrest)* (n 34), 29, 51–2.

⁴⁶ Byron, 'International Commission of Inquiry on Darfur' (n 30), 356. See Loewenstein Andrew & Kostas Stephen, 'Divergent Approaches to Determining Responsibility for Genocide' (2007) 5 *Journal of International Criminal Justice* 839, 851; Kreß Claus, 'Darfur Report & Genocidal Intent' (2005) 3 *Journal of International Criminal Justice* 562, 566 noting Greenawalt Kent, 'Rethinking Genocidal Intent: Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259, 2288; Gil Alicia, *Especial consideracion del delito de genocidi* (Tecnos 1999), 259 ff; Vest H, *Genozid durch organisatorische Machtapparate* (Verlagsgesellschaft 2002), 104 ff.

⁴⁷ *Al Bashir (Second Decision on Warrant of Arrest)* (n 34), 11, 13;

⁴⁸ Byron, 'International Commission of Inquiry on Darfur' (n 30), 358.

⁴⁹ Totten, 'Commission of Inquiry on Darfur' (n 35), 361–6; *Al Bashir (Second Decision on Warrant of Arrest)* (n 34), 13. See *Prosecutor v Jelisić* (Judgement) (ICTY, Appeals Chamber, 95-10-A, 5 July 2001), ¶47.

⁵⁰ Note that Sudan acceded to Genocide Convention on 13 October 2003. See UNSG, 'Report of the International Commission of Inquiry on Darfur' (n 30), 36–7 ('Militias [acting] jointly with the armed forces [are] under the [government's] effective control [...] When [...] incorporated in the PDF, they [may be deemed Sudan's] organs').

violations.⁵¹ After lifting the sanctions imposed in 2001,⁵² the SC, in 2004, levied an arms embargo against non-state armed groups operating in Darfur.⁵³ It also endorsed and urged states to assist the AU-envisioned protection force.⁵⁴ In 2005, it imposed travel bans and asset freezes against Sudanese officials and other individuals.⁵⁵ Finally, it referred to the situation in Darfur to the ICC.⁵⁶

Some also levied unilateral measures against Sudan. The EU retained its arms embargo in place since 1994.⁵⁷ For its part, the US kept its freeze of Sudanese assets and trade embargo imposed in 1997,⁵⁸ measures which Sudan protested.⁵⁹ As previously discussed, the asset freeze may be deemed a countermeasure.⁶⁰ However, the embargo, as Sudan is not a GATT party, may be a retorsion.⁶¹

C. Torture & other human rights violations in Belarus (2004–)

After winning the 1994 Belarussian elections, President Lukashenko consolidated governmental power in the presidency.⁶² This control permitted him to dominate later elections such that none has been considered ‘free and fair’.⁶³ Like most dictatorial regimes discussed in this chapter, this led to human rights violations including torture.⁶⁴ Observers report that

⁵¹ Res 1502 UNSC (26 Aug 2003) UN Doc S/RES/1502; Res 1591 UNSC (29 March 2005) UN Doc S/RES/1591.

⁵² Res 1372 UNSC (28 September 2001) UN Doc S/RES/1372.

⁵³ Res 1556 UNSC (30 July 2004) UN Doc S/RES/1556.

⁵⁴ Ibid; Res 1564 UNSC (18 September 2004) UN Doc S/RES/1564.

⁵⁵ Res 1591 (n 51).

⁵⁶ Res 1593 UNSC (31 March 2005) UN Doc S/RES/1593.

⁵⁷ See Council of the EC, ‘Council Decision 94/165/CFSP’ (15 March 1994) L 075.

⁵⁸ Executive Order 13412, *Blocking Property & Prohibiting Transactions with the Government of Sudan* (2006) (US). See UNGA, ‘Verbatim Record, 59th Session, 3rd Meeting’ (21 September 2004) UN Doc A/59/PV.3, 9.

⁵⁹ See UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (22 July 2013) UN Doc A/68/211, 6.

⁶⁰ Dawidowicz, *Third Party Countermeasures* (n 4), 178; Proukaki, *Problem of Enforcement* (n 4), 191. See Ruys Tom, ‘Immunity, Inviolability, & Countermeasures’ in Angelet Nicolas & Ferro Luca (eds), *Cambridge Handbook of Immunities & International Law* (Cambridge University Press 2019), 689, 691; Criddle Evan, ‘Humanitarian Financial Intervention’ (2013) 24 *European Journal of International Law* 583, 5917.

⁶¹ Dawidowicz, *Third Party Countermeasures* (n 4), 179–80; Proukaki, *Problem of Enforcement* (n 4), 191.

⁶² Marin Anaïs, ‘Human Rights in Belarus’ (15 February 2021) UN Doc A/HRC/46/4, 2; Severin Adrian, ‘Human Rights in Belarus’ (16 January 2006) UN Doc E/CN.4/2005/36, 9.

⁶³ Marin, ‘Human Rights in Belarus’ (2021) (n 62), 2. See Severin, ‘Human Rights in Belarus’ (2006) (n 62), 8; Severin Adrian, ‘Human Rights in Belarus’ (15 January 2007) UN Doc A/HRC/4/16, 6; Haraszi Miklós, ‘Human Rights in Belarus’ (18 April 2013) UN Doc A/HRC/23/52, 3; Haraszi Miklós, ‘Human Rights in Belarus’ (21 April 2016) UN Doc A/HRC/32/48, 3–4; Marin Anaïs, ‘Human Rights in Belarus’ (8 May 2019) UN Doc A/HRC/41/52, 2.

⁶⁴ Marin, ‘Human Rights in Belarus’ (2021) (n 62), 2; CAT, ‘Concluding Observations: Belarus’ (7 December

Lukashenko's regime has subjected its opponents to harsh treatment to suppress dissent.⁶⁵ The methods employed are brutal and involve physical abuse and psychological maltreatment.⁶⁶ These, as the Committee against Torture observe, amount to torture.⁶⁷ Yet, despite states' condemnations, shown below, Belarus has refused to investigate and prosecute these cases.⁶⁸ Belarus is also yet to define torture as a 'specific crime' and provide 'penalties commensurate with its [...] nature'.⁶⁹ Thus, Belarus has arguably breached its *duty not to commit torture and to prevent and punish acts of torture*.⁷⁰

States have expressed their concerns regarding torture in Belarus. In 2004, the CHR urged Belarus to take 'all [...] measures to investigate' cases of 'enforced disappearance, summary execution, and torture' and prosecute its perpetrators. It has also appointed rapporteurs to examine the situation in Belarus.⁷¹ Its successor, the HRC, continued these steps.⁷² Similarly, the GA has also expressed its 'concern [on] the [...] the human rights situation in Belarus' and urged it to investigate cases of summary executions and torture.⁷³

Some also imposed unilateral measures against Belarus. Some were retorsions. The EU and UK imposed an embargo on arms and equipment used for repressing the rights of Belarus' population.⁷⁴ There were also countermeasures. The EU withdrew some trade preferences

2011) UN Doc CAT/C/BLR/CO/4, 2–3. *See* Severin, 'Human Rights in Belarus' (2006) (n 62), 8; Severin, 'Human Rights in Belarus' (2007) (n 63), 6; Haraszti, 'Human Rights in Belarus' (2013) (n 63), 11; Haraszti Miklós, 'Human Rights in Belarus' (22 April 2014) UN Doc A/HRC/26/44, 3; Haraszti Miklós, 'Human Rights in Belarus' (21 April 2017) UN Doc A/HRC/35/40, 3.

⁶⁵ CAT, 'Concluding Observations: Belarus' (2011) (n 64), 2; Haraszti, 'Human Rights in Belarus' (2013) (n 63), 11.

⁶⁶ Haraszti, 'Human Rights in Belarus' (2014) (n 64), 8; Haraszti Miklós, 'Human Rights in Belarus' (29 April 2015) UN Doc A/HRC/29/43, 8; Haraszti, 'Human Rights in Belarus' (2017) (n 64), 12; Marin, 'Human Rights in Belarus' (2019) (n 63), 7, 8, 11; Marin Anaïs, 'Human Rights in Belarus' (8 April 2020) UN Doc A/HRC/44/55, 7.

⁶⁷ CAT, 'Concluding Observations: Belarus' (2011) (n 64), 2–3.

⁶⁸ *Ibid.*, 3; CAT, 'Concluding Observations: Belarus' (7 June 2018) UN Doc CAT/C/BLR/CO/5, 4; Haraszti, 'Human Rights in Belarus' (2013) (n 63), 11; Haraszti, 'Human Rights in Belarus' (2015) (n 66), 8; Haraszti, 'Human Rights in Belarus' (2016) (n 63), 14; Haraszti, 'Human Rights in Belarus' (2017) (n 64), 12.

⁶⁹ Marin, 'Human Rights in Belarus' (2019) (n 63), 7; Marin, 'Human Rights in Belarus' (2020) (n 66), 6.

⁷⁰ *Note* that Belarus ratified the Torture Convention on 13 March 1987 and the ICCPR on 12 November 1973.

⁷¹ *Situation of Human Rights in Belarus* Res 2004/14 UN CHR (15 April 2004) E/CN.4/RES/2004/14. *See* Res 2003/14 UN CHR (17 April 2003) E/CN.4/RES/2003/14; Res 2005/13 UN CHR (14 April 2005) E/CN.4/RES/2005/13.

⁷² *See Situation of Human Rights in Belarus* Res 17/24 HRC (14 July 2011) A/HRC/RES/17/24; Res 20/13 HRC (16 July 2012) A/HRC/RES/20/13; Res 26/25 HRC (16 July 2014) A/HRC/RES/26/25; Res 29/17 HRC (22 July 2015) A/HRC/RES/29/17; Res 32/26 HRC (15 July 2016) A/HRC/RES/32/26; Res 35/27 HRC (11 July 2017) A/HRC/RES/35/27; Res 38/14 HRC (16 July 2018) A/HRC/RES/38/14.

⁷³ *See Situation of Human Rights in Belarus* Res 61/175 UNGA (19 December 2006) UN Doc A/RES/61/175; Res 62/169 UNGA (18 December 2007) UN Doc A/RES/62/169.

⁷⁴ Council of the EU, 'Council Decision 2021/1031/CFSP' (24 June 2021) LI 224/15.

afforded to Belarus.⁷⁵ The EU and Canada levied an embargo on tobacco and petroleum products.⁷⁶ For its part, the UK also imposed restrictions on tobacco, minerals, iron, steel, oil, wood, rubber, and luxury goods.⁷⁷ The EU, US, and UK further limited investments in Belarus,⁷⁸ and restricted certain financial transactions.⁷⁹ Finally, the EU, US, and UK also imposed targeted measures on those responsible for the ‘crackdown on [...] the democratic opposition’ through travel restrictions,⁸⁰ and asset freezes’.⁸¹

Yet, not all agreed with these measures. Unsurprisingly, Belarus condemned the measures imposed on it.⁸² Moreover, in 2008, NAM members also protested the unilateral measures taken against Belarus arguing that these threatened Belarus’ sovereignty and independence.⁸³

D. Torture & other human rights violations in Libya (2011)

As in other Arab states,⁸⁴ protests against decades of repression and demand for reforms,

⁷⁵ Council of the EU, ‘Council Regulation 1933/2006’ (30 December 2006) L 405/35.

⁷⁶ Council of the EU, ‘Council Decision 2021/1031/CFSP’ (n 74); SOR/2020-214, *Special Economic Measures (Belarus) Regulations* (2020) (CAN)

⁷⁷ 2019 No 600, *Belarus (Sanctions) (EU Exit) Regulations 2019* (2019) (UK); 2021 No 1146, *Belarus (Sanctions) (EU Exit) Amendment (No 2) Regulations 2021* (2021) (UK).

⁷⁸ Council of the EU, ‘Council Decision 2021/1031/CFSP’ (n 74); PL 112-82, *Belarus Democracy & Human Rights Act* (2012) (US); *Belarus (Sanctions) (EU Exit) Regulations 2019* (UK);

⁷⁹ Council of the EU, ‘Council Decision 2021/1031/CFSP’ (n 74); Executive Order 13405, *Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus* (2006) (US); Executive Order 14038, *Blocking Property of Persons Contributing to the Situation in Belarus* (2021) (US); *Belarus (Sanctions) (EU Exit) Regulations 2019* (UK). See also SOR/2020-214 (CAN); SOR/2021-184, *Regulations Amending the Special Economic Measures (Belarus) Regulations* (2021) (CAN).

⁸⁰ Council of the EU, ‘Common Position 2004/661/CFSP’ (24 September 2004) L 301/67; Council of the EU, ‘Common Position 2006/276/CFSP’ (10 April 2006) L 101/5; *Executive Order 14038* (US)

⁸¹ Council of the EU, ‘Common Position 2010/639/CFSP’ (25 October 2020) L 280/18. See Council of the EU, ‘Council Decision 2012/642/CFSP’ (15 October 2012) L 285/1; Council of the EU, ‘Council Decision 2016/280/CFSP’ (25 February 2016) L 52/30; Council of the EC, ‘Council Decision 94/165/CFSP’ (n 57); PL 108-347, *Belarus Democracy Act of 2004* (2004) (US); *Belarus Democracy & Human Rights Act* (US); *Executive Order 13405* (US); *Executive Order 14038* (US); 2013 No 164, *The Belarus (Asset-Freezing) Regulations 2013* (2013) (UK); *Belarus (Sanctions) (EU Exit) Regulations 2019* (UK); 2020 No 590, *Sanctions (EU Exit) (Miscellaneous Amendments) (No 2) Regulations 2020* (2020) (UK); *Belarus (Sanctions) (EU Exit) Amendment (No 2) Regulations 2021* (UK)

⁸² UNSC, ‘Letter from the Permanent Representative of Belarus’ (7 April 2012) UN Doc S/2012/242; UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (5 August 2011) UN Doc A/66/272; UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2013) (n 59), 3.

⁸³ UNSC, ‘Letter from the Permanent Representative of Cuba (on behalf of NAM)’ (26 March 2008) UN Doc S/2008/199.

⁸⁴ See Kirkpatrick David, ‘Protests Spread to Tunisia’s Capital and a Curfew Is Decreed’ (New York Times, 13 Jan 2011) <<https://www.proquest.com/historical-newspapers/protests-spread-tunisia-s-capital/docview/1634191815>>; Nossiter Adam & Williams Timothy, ‘Algerian Riot Police Break Up Protest’ (New York Times, 13 February 2011) <<https://www.proquest.com/newspapers/algerian-riot-police-break-up-protest/docview/851394235>>; Worth Robert, ‘As Unrest Encircles Saudi Arabia, a Sense of Insecurity Bubbles Up’ (New York Times, 20 February 2011) <<https://www.proquest.com/newspapers/as-unrest-encircles-saudi-arabia-sense-insecurity/docview/852845603>>; Fahim Kareem & El-Naggar Mona, ‘Across Egypt, Protests Direct

referred to as the ‘Arab Spring’,⁸⁵ occurred in Libya in 2011.⁸⁶ Like most governments, Libya, under Qaddafi forcibly responded to these protests.⁸⁷ Yet, this only exacerbated the situation. By March 2011, a ‘conflict had developed [in Libya] between armed opposition [groups] and government forces’.⁸⁸ This lasted until October when rebel forces, aided by the SC-authorised and NATO-led intervention,⁸⁹ overthrew Qaddafi.⁹⁰

The crisis in Libya was marked by abuses including those committed by government forces.⁹¹ Based on reports, Libya’s response to the uprising was marked by summary executions, arbitrary detentions, and torture.⁹² As for torture, the government, based on accounts, subjected persons to beatings, electric shocks, and sexual violence.⁹³ These acts were committed primarily to extract information regarding the opposition forces from detainees.⁹⁴ These clearly amounted to torture.⁹⁵ Thus, Libya breached its *duty not to commit torture and to prevent and*

Fury at Leader' (New York Times, 26 January 2011) <<https://www.proquest.com/newspapers/across-egypt-protests-direct-fury-at-leader/docview/847254901>>.

⁸⁵ See also Kalkidan Obse, 'Arab Spring & Question of Legality of Democratic Revolution in Theory & Practice' (2014) 27 *Leiden Journal of International Law* 817, 818–9; Spengerman Sven, 'Liberal Project: East & West' (2012) 8 *Leiden Journal of International Law* 62, 62.

⁸⁶ Wikstrom Cajs, 'Calls for weekend protests in Syria' (Al Jazeera, 4 February 2011) <<https://www.aljazeera.com/news/2011/2/4/calls-for-weekend-protests-in-syria>>. —, 'Middle East unrest: Silence broken in Syria' (BBC News, 19 March 2011) <<https://www.bbc.com/news/world-middle-east-12794882>>

⁸⁷ Dawidowicz, *Third Party Countermeasures* (n 4), 220

⁸⁸ HRC, 'Report of the Commission of Inquiry to Investigate alleged Violations of Human Rights in Libya' (12 January 2012) UN Doc A/HRC/17/44, 11–2.

⁸⁹ Deeks Ashley, 'NATO Intervention in Libya—2011' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 752 citing Res 1973 UNSC (17 March 2011) UN Doc S/RES/1973 ('Authorising [...] all necessary measures [...] to protect civilians [...] in Libya'). But note 755 ('There is considerable dispute [on] whether all of the actions undertaken by NATO in Libya fit within the resolution's authorisation') citing *De Cara Jean-Yves, 'Arab Uprisings Under the Light of Intervention' (2012) 55 German Yearbook of International Law 11*. See also UNSC, 'Verbatim Record, 6498th Meeting' (17 March 2011) UN Doc S/PV/6498.

⁹⁰ Nossiter Adam, 'Jubilant Fighters Return To Cradle of Libya's Revolt' (New York Times, 23 October 2011) <<https://www.proquest.com/newspapers/jubilant-fighters-return-cradle-libya-s-revolt/docview/900167867>>; Gladstone Rick, 'UN Votes to End Foreign Intervention in Libya' (New York Times, 28 October 2011) <<https://www.nytimes.com/2011/10/28/world/middleeast/security-council-ends-libya-intervention-mandate.html>>.

⁹¹ See HRC, 'Report of the Commission on Libya' (2012) (n 89), 19–20, 23 ff. Note that this chapter focuses on the acts of the government during the relevant period. Yet, human rights violations by opposition forces, under 2001 Draft Article 10(2) are also attributable to the state after it succeeded the Qaddafi regime.

⁹² HRC, 'Report of the Commission on Libya' (28 January 2014) UN Doc A/HRC/19/68, 6 ff.

⁹³ Ibid, 10–11. Note Libya's past practices on torture had already been reported international organisations: CAT, 'Report to the General Assembly' (24 June 1993) UN Doc A/48/44(SUPP), 36; CAT, 'Report to the General Assembly' (26 July 1995) UN Doc A/50/44(SUPP), 16; CAT, 'Report to the General Assembly' (26 June 1999) UN Doc A/54/44(SUPP), 21; HRC, 'Concluding Observations: Libya' (15 November 2007) UN Doc CCPR/C/LYB/CO/4, 4.

⁹⁴ HRC, 'Report of the Commission on Libya' (2014) (n 92), 11, 13–4.

⁹⁵ Zach Gerrit, 'Article 1: Definition of Torture' in Nowak Manfred, *et al.* (eds), *UN Convention Against Torture & its Optional Protocol: Commentary* (Oxford University Press 2019), 43–4, 54.

*punish its commission.*⁹⁶

States quickly responded to the situation in Libya in 2011. Within the UN, the HRC condemned the ‘human rights violations committed in Libya’ that included ‘extrajudicial killings, arbitrary arrests, detention, and torture’.⁹⁷ The GA also suspended Libya’s membership in the HRC.⁹⁸ For its part, the SC demanded that Libya ‘fulfil [its population’s] legitimate demands’ and referred the situation to the ICC.⁹⁹ Under Article 41, it also imposed an arms embargo, levied travel bans against officials, and imposed asset freezes against certain individuals and entities.¹⁰⁰ Later, it also authorised, under Chapter VII, the taking of ‘all necessary measures’ and the establishment of a ‘no-fly zone’ over Libya to protect civilians.¹⁰¹ Many states,¹⁰² including members of the Arab League,¹⁰³ and the OIC supported these actions.¹⁰⁴ Furthermore, it was based on this authorisation, as noted above, that NATO states intervened in Libya.¹⁰⁵ Elsewhere, the Arab League suspended Libya.¹⁰⁶ In addition, the AU, through the African Commission on Human and People’s Rights (‘ACmHPR’), also urged states to take ‘all necessary political and legal measures [to protect] Libya’s population’.¹⁰⁷

Some states also levied measures against Libya prior to those imposed by the SC. Canada, in a measure of retorsion, banned all transactions with the Libyan government and its institutions and agencies.¹⁰⁸ The US and Switzerland, in what may be construed as

⁹⁶ Note that Libya ratified the Torture Convention on 16 May 1989 and the ICCPR on 15 May 1970.

⁹⁷ *Situation of Human Rights in Libya* Res S-15/1 HRC (25 February 2011) UN Doc A/HRC/RES/S-15/1. See Res 17/17 HRC (14 July 2017) UN Doc A/HRC/RES/17/17.

⁹⁸ Res 65/265 UNGA (3 March 2011) UN Doc A/RES/65/265.

⁹⁹ Res 1970 UNSC (26 February 2011) UN Doc S/RES/1970.

¹⁰⁰ Ibid.

¹⁰¹ Res 1973 (n 89) (‘Excluding a foreign occupation force of any form on any part of Libyan territory’)

¹⁰² See UNSC, ‘Verbatim Record, 6498th Meeting’ (2011) (n 89), 3 (France), 4 (Lebanon), 4 (UK), 5 (US), 7 (Bosnia & Herzegovina), 7 (Colombia), 9 (Portugal), 9 (Nigeria), 10 (South Africa); *But note* that several states abstained citing the lack of details regarding the measures contemplated: 5 (Germany), 6 (India), 6 (Brazil), 8 (Russia), 10 (China).

¹⁰³ Ibid, 8.

¹⁰⁴ Organisation of Islamic Cooperation, ‘Final Communiqué: Emergency Ministerial Meeting on the Alarming Developments in Libya’ (18 March 2011).

¹⁰⁵ Deeks, ‘NATO Intervention in Libya’ (n 89), 752.

¹⁰⁶ —, ‘Arab League suspends Libya’ (Reuters, 23 February 2011). *Note* that Libya was reinstated in August 2011.

¹⁰⁷ ACHPR, ‘Resolution on the Human Rights Situation in Libya’ (1 Mar 2011) ACHPR/RES181(EXT.OS/IX)2011.

¹⁰⁸ SOR/2011-52, *Special Economic Measures (Libya) Permit Authorization Order* (2011) (CAN). *Note* SOR/2011-51, *Regulations Implementing the UN Resolution on Libya & Taking Special Economic Measures* (2011) (CAN).

countermeasures,¹⁰⁹ froze the Libyan Central Bank's assets.¹¹⁰ In addition, in what may be considered targeted measures, the US and the EU also froze the assets of certain senior Libyan officials.¹¹¹

E. Torture & other human rights violations in Syria (2011–)

Syria had its own 'Arab Spring' in February 2011,¹¹² to which it responded forcefully.¹¹³ Hostilities soon followed as some Syrian Armed Forces members defected from the government and joined armed opposition groups.¹¹⁴ By 2015, as discussed in the previous chapter, the situation had evolved into a multi-faceted conflict,¹¹⁵ involving states intervening at the Al-Assad government's request,¹¹⁶ states providing material support for Syrian rebels,¹¹⁷ and states acting against violent extremist groups in the region.¹¹⁸

Like Libya, the Syrian response to the protests was marked by abuses such as executions, arbitrary detention, and torture.¹¹⁹ Observers reported that the government tortured persons

¹⁰⁹ Dawidowicz, *Third Party Countermeasures* (n 4), 220.

¹¹⁰ Executive Order 13566, *Blocking Property & Prohibiting Certain Transactions Related to Libya* (2011) (US);

¹¹¹ Ibid; Council of the EU, 'Council Decision 2011/137/CFSP' (3 March 2011) L 58/53.

¹¹² Spindle Bill, 'Syria cracks down on rally plans' (Wall Street Journal, 7 February 2011) <<https://www.proquest.com/newspapers/turmoil-egypt-syria-cracks-down-on-rally-plans/docview/849412218>>; Ignatius David, 'Syria tries to keep the lid on revolution' (Washington Post, 27 February 2011) <<https://www.proquest.com/newspapers/syria-tries-keep-lid-on-revolution/docview/853915163>>.

¹¹³ Slackman Michael & Stack Liam, 'In Syria, Tension and Grief After Protests and Government Retaliation' (New York Times, 27 March 2011) <<https://www.proquest.com/newspapers/syria-tension-grief-after-protests-government/docview/858695231>>; —, 'Syria sets out to crush hopes of Arab Spring' (The Age, 2 August 2011) <<https://www.proquest.com/newspapers/syria-sets-out-crush-hopes-arab-spring/docview/880159603>>.

¹¹⁴ Zoepf Katherine, 'Long Repressed in Syria, an Internal Opposition Takes Shape' (New York Times, 28 April 2011) <<https://www.proquest.com/newspapers/long-repressed-syria-internal-opposition-takes/docview/863740297>>; Macleod Hugh, 'Split in Syrian army as troops defect to defend protesters' (Sunday Times, 1 May 2011) <<https://www.proquest.com/newspapers/split-syrian-army-as-troops-defect-defend/docview/864145324>>; Stack Liam, 'Thousands Flee As Syria Retakes Rebellious Town' (New York Times, 13 June 2011) <<https://www.proquest.com/newspapers/thousands-flee-as-syria-retakes-rebellious-town/docview/871356123>>.

¹¹⁵ See Gil Terry, 'Classifying the Conflict in Syria' (2016) 92 *International Legal Studies* 353.

¹¹⁶ See Borger Julian, 'Russian military presence in Syria poses challenge to US-led intervention' (The Guardian, 24 December 2012) <<https://www.theguardian.com/world/2012/dec/23/syria-crisis-russian-military-presence>>; Payne Ed & Starr Barbara, 'Russia launches first airstrikes in Syria' (CNN, 1 October 2015) <<https://edition.cnn.com/2015/09/30/politics/russia-syria-airstrikes-isis/index.html>>.

¹¹⁷ See Miller Greg & DeYoung Karen, 'Secret CIA effort in Syria faces large funding cut' (Washington Post, 12 June 2015) <https://www.washingtonpost.com/world/national-security/lawmakers-move-to-curb-1-billion-cia-program-to-train-syrian-rebels/2015/06/12/b0f45a9e-1114-11e5-adec-e82f8395c032_story.html>; Zengerle Patricia & Lawder David, 'US Congress approves arming Syrian rebels, funding government' (Reuters, 19 September 2014) <<https://www.reuters.com/article/us-iraq-crisis-congress-vote-idUSKBN0HD2P820140919>>.

¹¹⁸ See Corten Olivier, 'Military Operations Against the "Islamic State"' (ISIL or Da'esh)—2014' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2014).

¹¹⁹ *Current Human Rights Situation in Syria* Res S-16/1 HRC (29 April 2011) UN Doc A/HRC/RES/S-16/1.

suspected of participating in anti-government activities.¹²⁰ Torture was not only used for interrogation but to ‘terrorise the population’.¹²¹ As with other states discussed in this chapter, the methods were particularly brutal and inflicted severe physical pain and suffering. Based on accounts, government agents routinely chained victims to beds, subjected them to beatings, electric shocks, and sexual assaults, and denied them food and medical attention.¹²² Clearly, Syria breached its *duty not to commit torture and to prevent and punish its commission*.¹²³

States condemned the human rights violations in Syria. The HRC repeatedly expressed its concern regarding the ‘killings, arrests, and [...] torture [...] by Syrian authorities’.¹²⁴ It also established a commission to investigate abuses in Syria.¹²⁵ For its part, the GA condemned the ‘human rights violations by [...] Syrian authorities’ including ‘arbitrary detentions, enforced disappearances, [and] torture’.¹²⁶ The SC, in several resolutions and presidential statements, also condemned the ‘human rights violations by [...] Syrian authorities, as well [...] by armed

¹²⁰ CAT, ‘Concluding Observations: Syria’ (29 June 2012) UN Doc CAT/C/SYR/CO/1/Add.2, 4; HRC, ‘Report of the Commission of Inquiry on the Syria’ (23 November 2011) UN Doc A/HRC/S-17/2/Add.1, 8, 11, 12–4; HRC, ‘Report of the Commission of Inquiry on the Syria’ (22 February 2012) UN Doc A/HRC/19/69, 11, 13–5.

¹²¹ CAT, ‘Concluding Observations: Syria’ (2012) (n 120), 4.

¹²² HRC, ‘Report of the Commission of Inquiry on the Syria’ (2012) (n 120), 14; HRC, ‘Report of the Commission of Inquiry on the Syria’ (2011) (n 120), 13–4.

¹²³ Note that Syria ratified the Torture Convention on 19 August 2004 and the ICCPR on 21 April 1969.

¹²⁴ Res S-16/1 (n 119); Res S-18/1 HRC (2 December 2011) UN Doc A/HRC/RES/S-18/1; Res 19/1 HRC (1 March 2012) UN Doc A/HRC/RES/19/1; Res 19/22 HRC (23 March 2012) UN Doc A/HRC/RES/19/22; Res S-19/1 HRC (1 June 2012) UN Doc A/HRC/RES/S-19/1; Res 20/22 HRC (6 July 2012) UN Doc A/HRC/RES/20/22; Res 21/26 HRC (28 September 2012) UN Doc A/HRC/RES/21/26; Res 22/24 HRC (22 March 2013) UN Doc A/HRC/RES/22/24; Res 23/1 HRC (29 May 2013) UN Doc A/HRC/RES/23/1; Res 23/26 HRC (14 June 2013) UN Doc A/HRC/RES/23/26; Res 24/22 HRC (27 September 2013) UN Doc A/HRC/RES/24/22; Res 25/23 HRC (28 March 2014) UN Doc A/HRC/RES/25/23; Res 26/23 HRC (27 June 2014) UN Doc A/HRC/RES/26/23; Res 27/16 HRC (25 September 2014) UN Doc A/HRC/RES/27/16; Res 28/20 HRC (27 March 2015) UN Doc A/HRC/RES/28/20; Res 29/16 HRC (2 July 2015) UN Doc A/HRC/RES/29/16; Res 30/10 HRC (1 October 2015) UN Doc A/HRC/RES/30/10; Res 31/17 HRC (23 March 2016) UN Doc A/HRC/RES/31/17; Res 32/25 HRC (1 July 2016) UN Doc A/HRC/RES/32/25; Res 33/23 HRC (30 September 2016) UN Doc A/HRC/RES/33/23; Res S-25/1 HRC (21 October 2016) UN Doc A/HRC/RES/S-25/1; Res 34/26 HRC (24 March 2017) UN Doc A/HRC/RES/34/26; Res 35/26 HRC (23 June 2017) UN Doc A/HRC/RES/35/26; Res 36/20 HRC (29 September 2017) UN Doc A/HRC/RES/36/20; Res 39/15 HRC (28 September 2018) UN Doc A/HRC/RES/39/15.

¹²⁵ *Situation of Human Rights in Syria* Res S-17/1 HRC (23 August 2011) UN Doc A/HRC/RES/S-17/1.

¹²⁶ *Situation of Human Rights in Syria* Res 66/176 UNGA (19 December 2011) UN Doc A/RES/66/176. See also Res 66/253A UNGA (16 February 2012) UN Doc A/RES/66/253A; Res 66/253B UNGA (3 August 2012) UN Doc A/RES/66/253B; Res 67/183 HRC (20 December 2012) UN Doc A/HRC/RES/67/183; Res 67/262 UNGA (15 May 2013) UN Doc A/RES/67/262; Res 68/182 UNGA (18 December 2013) UN Doc A/RES/68/182; Res 69/189 UNGA (18 December 2014) UN Doc A/RES/69/189; Res 70/234 UNGA (23 December 2015) UN Doc A/RES/70/234; Res 71/130 UNGA (9 December 2016) UN Doc A/RES/71/130; Res 71/203 UNGA (19 December 2016) UN Doc A/RES/71/203; Res 71/248 UNGA (21 December 2016) UN Doc A/RES/71/248; Res 73/182 UNGA (17 December 2018) UN Doc A/RES/73/182; Res 74/169 UNGA (18 December 2019) UN Doc A/RES/74/169.

groups.¹²⁷ Yet, aside from establishing an observer mission to Syria,¹²⁸ it did not take any enforcement action against Syria due to China and Russia's vetoes.¹²⁹ Elsewhere, the Arab League and the OIC suspended Syria.¹³⁰

Several states levied unilateral measures against Syria. Some of these were retorsions such as the EU, UK, and Canada's arms embargos;¹³¹ and the EU, UK, Arab League, Canada, and Australia's restrictions on trade or investment.¹³² Note that in Syria's case, the restrictions on trade and investment may be retorsions as 'Syria is not a [party to the GATT or GATS] and no other treaties are seemingly at issue'.¹³³ There were also countermeasures. These include the

¹²⁷ Res 2042 UNSC (14 August 2012) UN Doc S/RES/2042. *See* Res 2118 UNSC (27 Sept 2013) UN Doc S/RES/2118; Res 2139 UNSC (22 February 2014) UN Doc S/RES/2139; Res 2165 UNSC (14 July 2014) UN Doc S/RES/2165; Res 2191 UNSC (17 December 2014) UN Doc S/RES/2191; Res 2209 UNSC (6 March 2015) UN Doc S/RES/2209; Res 2235 UNSC (7 August 2015) UN Doc S/RES/2235; Res 2254 UNSC (18 December 2015) UN Doc S/RES/2254; Res 2258 UNSC (22 December 2015) UN Doc S/RES/2258; Res 2286 UNSC (3 May 2016) UN Doc S/RES/2286; Res 2314 UNSC (31 Oct 2016) UN Doc S/RES/2314; Res 2319 UNSC (17 Nov 2016) UN Doc S/RES/2319; Res 2393 UNSC (19 December 2017) UN Doc S/RES/2393; Res 2401 UNSC (24 February 2018) UN Doc S/RES/2401; Res 2449 UNSC (13 December 2018) UN Doc S/RES/2449. *See also* UNSC, 'Statement of the SC President' (3 August 2011) UN Doc S/PRST/2011/16; UNSC, 'Statement of the SC President' (2 October 2013) UN Doc S/PRST/2013/15; UNSC, 'Statement of the SC President' (17 August 2015) UN Doc S/PRST/2015/15; UNSC, 'Statement of the SC President' (8 October 2019) UN Doc S/PRST/2019/12.

¹²⁸ Res 2043 UNSC (21 April 2012) UN Doc S/RES/2043.

¹²⁹ *See* UNSC, 'Draft Resolution (France, et al)' (4 October 2011) UN Doc S/2011/612; UNSC, 'Draft Resolution (Bahrain et al)' (4 February 2012) UN Doc S/2012/77; UNSC, 'Draft Resolution (France et al)' (19 July 2012) UN Doc S/2012/538; UNSC, 'Draft Resolution (Albania et al)' (28 February 2017) UN Doc S/2017/172. *See vetoed by Russia and China:* UNSC, 'Draft Resolution (Albania et al)' (22 May 2014) UN Doc S/2014/348; UNSC, 'Draft Resolution (France & Spain)' (8 October 2016) UN Doc S/2016/846; UNSC, 'Draft Resolution (Egypt et al)' (5 December 2016) UN Doc S/2016/1026; UNSC, 'Draft Resolution (Belgium, et al)' (19 September 2019) UN Doc S/2019/756; UNSC, 'Draft Resolution (Belgium & Germany)' (7 July 2020) UN Doc S/2020/654. *See vetoed by Russia:* UNSC, 'Draft Resolution (UK, USA)' (12 April 2017) UN Doc S/2017/315; UNSC, 'Draft Resolution (Albania et al)' (2017) (n 219); UNSC, 'Draft Resolution (US)' (16 November 2017) UN Doc S/2017/962; UNSC, 'Draft Resolution (Japan)' (17 November 2017) UN Doc S/2017/970; UNSC, 'Draft Resolution (US)' (10 April 2018) UN Doc S/2018/321.

¹³⁰ League of Arab States, 'Res 7523' (5 September 2012); Organisation of Islamic Cooperation, 'Final Communiqué: 4th Extraordinary Session' (15 August 2012), 7–8.

¹³¹ Council of the EU, 'Council Decision 2011/273/CFSP' (9 May 2011) L 121/1; Council of the EU, 'Council Decision 2011/782/CFSP' (1 December 2011) L 319/56; 2019 No 792, *Syria (Sanctions) (EU Exit) Regulations 2019* (2019) (UK); SOR/2014-11, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2014) (CAN).

¹³² Council of the EU, 'Council Decision 2012/739/CFSP' (30 November 2012) L 282/50; Council of the EU, 'Council Decision 2013/255/CFSP' (31 May 2013) L 147/14; Council of the EU, 'Council Decision 2014/309/CFSP' (28 May 2014) L 160/37; Council of the EU, 'Council Decision 2015/837/CFSP' (28 May 2015) L 132/82; Council of the EU, 'Council Decision 2016/850/CFSP' (27 May 2016) L 141/25; 2019 No 792 (UK); League of Arab States, 'Res 7442' (27 November 2011); SOR/2011-220, *Special Economic Measures (Syria) Regulations* (2011) (CAN); SOR/2011-330, *Special Economic Measures (Syria) Regulations* (2011) (CAN); SOR/2012-35, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2012) (CAN); SOR/2012-107, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2012) (CAN); SOR/2012-145, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2012) (CAN); C2014G00119, *Autonomous Sanctions (Export Sanctioned Goods–Syria) Specification* (2012) (AUS); C2014G00120, *Autonomous Sanctions (Import Sanctioned Goods–Syria) Specification* (2012) (AUS)

¹³³ Dawidowicz, *Third Party Countermeasures* (n 4), 222.

EU, UK, and Arab League's aviation bans which contravened the imposing states' air services agreements with Syria.¹³⁴ There were also the EU, UK, US, Arab League, and Turkey's asset freezes levied on the Syrian government.¹³⁵ As previously discussed, these involve *a priori* breaches of the imposing states' duties under the laws on the inviolability of state property.¹³⁶ There were also targeted measures such as the EU, US, Canada, Arab League, and Japan's travel restrictions on some individuals;¹³⁷ and the EU, US, UK, Arab League, Canada, Australia, Japan, and Turkey's asset freezes against certain individuals and entities.¹³⁸

It is important to note that while some supported these measures,¹³⁹ others criticised their imposition. Aside from Syria,¹⁴⁰ other states like China, Iran, Niger, South Africa,¹⁴¹ and Russia,¹⁴² opposed the unilateral measures against Syria.

Some also implemented Syria's responsibility via judicial proceedings. In 2023, Canada

¹³⁴ Council of the EU, 'Council Decision 2012/634/CFSP' (15 October 2012) L 282/50; 2019 No 792 (UK); League of Arab States, 'Res 7442' (n 132). See Dawidowicz, *Third Party Countermeasures* (n 4), 226.

¹³⁵ Council of the EU, 'Council Decision 2012/122/CFSP' (27 February 2012) L 54/14; 2019 No 792 (UK); Executive Order 13582, *Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria* (2011) (US); League of Arab States, 'Res 7442' (n 132); — —, 'Turkey imposes Sanctions on Syria' (The Guardian, 30 November 2011) <<https://www.guardian.co.uk/world/2011/nov/30/turkey-imposes-sanctions-on-syria>>.

¹³⁶ See Dawidowicz, *Third Party Countermeasures* (n 4), 179; Proukaki, *Problem of Enforcement* (n 4), 191.

¹³⁷ Council of the EU, 'Council Decision 2011/273/CFSP' (n 131); Council of the EU, 'Council Decision 2011/782/CFSP' (n 131); Executive Order 13606, *Blocking Property & Suspending Entry into the US of Certain Persons With Respect to Grave Human Rights Abuses by Iran & Syria* (2011) (US); League of Arab States, 'Res 7442' (n 132); Ministry of Foreign Affairs of Japan, 'Addition of Lists for the Measures to Freeze the Assets of individuals and entities in Syria' (27 Nov 2012) <https://www.mofa.go.jp/announce/announce/2012/11/1127_01.html>.

¹³⁸ Council of the EU, 'Council Decision 2011/273/CFSP' (n 131); Council of the EU, 'Council Decision 2011/782/CFSP' (n 131); Council of the EU, 'Council Decision 2011/302/CFSP' (24 May 2012) L 136/91; Executive Order 13572, *Blocking Property of Certain Persons with Respect to Human Rights Abuses in Syria* (2011) (US); Executive Order 13573, *Blocking Property of Senior Officials of Syria* (2011) (US); Executive Order 13606 (US); Executive Order 13608, *Prohibiting Certain Transactions With and Suspending Entry Into the US of Foreign Sanctions Evaders With Respect to Iran and Syria* (2011) (US); 2019 No 792 (UK); League of Arab States, 'Res 7442' (n 132); SOR/2011-166, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2011) (CAN); SOR/2012-166, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2012) (CAN); SOR/2017-62, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2017) (CAN); SOR/2019-61, *Regulations Amending Certain Regulations Made Under the Special Economic Measures Act* (2019) (CAN); F2018C00133, *Autonomous Sanctions (Designated Persons & Entities & Declared Persons—Syria)* (2018); Ministry of Foreign Affairs of Japan, 'Addition of Lists for the Measures to entities in Syria' (n 137); — —, 'Turkey imposes Sanctions on Syria' (n 135).

¹³⁹ See Group of Friends of the Syrian People, 'Conclusions of the Conference' (24 February 2012); Group of Friends of the Syrian People, 'Conclusions of the Second Conference' (1 April 2012).

¹⁴⁰ UNGA, Second Committee, 'Summary Record of the 66th Session, 37th Meeting' (1 December 2011) UN Doc A/C.2/66/SR.37, 4; UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (29 July 2013) UN Doc A/68/218, 13; UNGA, Second Committee, 'Verbatim Record, 70th Session, 31st Meeting' (28 September 2015) UN Doc A/C.2/70/SR.31, 5.

¹⁴¹ UNSC, 'Letter from the SC President' (27 July 2020) UN Doc S/2020/743, 11, 17, 19, 27.

¹⁴² UNSC, 'Verbatim Record, 6627th Meeting' (4 October 2011) UN Doc S/PV.6627, 5

and the Netherlands invoked Syria's responsibility under the Torture Convention before the ICJ. In their Joint Application, the two states asserted the competence of a 'state other than the injured state' and that they 'seek [Syria's] compliance with its [duties under the Torture Convention] which are [owed] *erga omnes partes* [contractes]'.¹⁴³ The case is still pending before the ICJ. Yet, in its order on provisional measures, the Court ruled that Canada and the Netherlands 'have a plausible right' to invoke Syria's responsibility as the duties under the Convention are owed '*erga omnes partes* [contractes]'.¹⁴⁴ Syria's view on Canada and the Netherlands' competence to invoke its duties remains to be seen as it chose not to participate in the proceedings on provisional measures.¹⁴⁵

F. Torture & other human rights violations in Venezuela (2014–)

Maduro, who assumed power in 2013 in Venezuela, continued his predecessor's autocratic leadership.¹⁴⁶ In 2014, his government forcibly responded to protests against socioeconomic policies and corruption.¹⁴⁷ In 2015, the opposition won the majority in the National Assembly.¹⁴⁸ However, the Supreme Court—composed of Maduro-appointed judges—struck down the laws that the legislature passed. Maduro then convened a Constituent Assembly usurping the National Assembly's functions. Since then, Maduro has declared states of emergency across Venezuela.¹⁴⁹ This allowed him to maintain power while the human rights situation in Venezuela continued to deteriorate.¹⁵⁰

¹⁴³ 'Joint Application Instituting Proceedings', *Application of the Torture Convention* (Canada & The Netherlands v Syria) (ICJ, General List No 188, 8 June 2023), 3 citing *Obligation to Prosecute or Extradite* [2012] (n 8), 450.

¹⁴⁴ *Application of the Torture Convention* (Canada & The Netherlands v Syria) (Provisional Measures) [2023] General List No 188, 16. *But see* (Xue, dissenting), 1 ('[Canada and the Netherlands] are purportedly acting on behalf of the states parties to the Convention [...] which is similar to *actio popularis* in certain domestic legal systems [...] Whether states parties accepted the jurisdiction of the Court for *actio popularis* cases is determined [...] by the intention of the parties at the time when the Convention was negotiated and concluded [...] Conferral of such standing will likely give a policing role to the states parties in the implementation of the [Torture Convention]. In the human rights field, such role is often questioned and criticized for the selective and biased manner in which it is performed')

¹⁴⁵ *Ibid.*, 6.

¹⁴⁶ —, 'Maduro inaugurated in Venezuela as opposition awaits recount' (EFE News Services, 19 April 2013) <<https://www.proquest.com/wire-feeds/maduro-inaugurated-venezuela-as-opposition-awaits/docview/1330112805>>.

¹⁴⁷ HRC, 'Report of the International Fact-Finding Mission on Venezuela' (25 September 2020) UN Doc A/HRC/45/33, 4.

¹⁴⁸ Neuman William, 'Opposition Gains a Rare Victory in Venezuela Election' (New York Times, 7 December 2015) <<https://www.proquest.com/newspapers/opposition-gains-rare-victory-venezuela-election/docview/1744604504>>.

¹⁴⁹ HRC, 'Report of the International Fact-Finding Mission on Venezuela' (2020) (n 147), 3.

¹⁵⁰ *Ibid.*; OAS, 'Annual Report of the Inter-American Commission on Human Rights' (2017), 4. *See* —, —,

The situation in Venezuela is marked by abuses including torture. Based on accounts, the government has detained its critics and subjected them to torture.¹⁵¹ These are done to extract confessions, acquire information on anti-government activities, or incriminate ‘high-profile opposition leaders’.¹⁵² The methods used—beatings, choking, electric shocks, and sexual abuse—undoubtedly caused severe physical and mental pain.¹⁵³ Yet, despite requests from international bodies, the government has not acted on allegations of torture.¹⁵⁴ Clearly, Venezuela breached its *duty not to commit torture and to prevent and punish its commission*.¹⁵⁵

Several states expressed concern regarding the situation in Venezuela. Within the UN, the HRC repeatedly condemned the human rights violations in Venezuela,¹⁵⁶ including the ‘arbitrary detention, torture, ill-treatment, and enforced disappearances [committed] by security forces’.¹⁵⁷ Yet, efforts within the SC had little success due to Russia and China’s opposition.¹⁵⁸ Elsewhere, the OAS abandoned its neutral stance towards Venezuela,¹⁵⁹ and in 2017 urged Venezuela to ‘restore the [...] [National Assembly’s] authority’.¹⁶⁰ In 2019, it condemned the ‘grave and systematic human rights violations’ including torture and urged states to adopt ‘political, economic, and financial measures’ to restore ‘democratic order in Venezuela’.¹⁶¹ For its part, Southern Common Market (‘MERCOSUR’) in 2017 suspended Venezuela citing its

“‘Lima Group’ urges Venezuela to suspend election’ (Reuters, 15 May 2018) <<https://www.reuters.com/article/us-venezuela-election/regional-lima-group-leaders-urge-venezuela-to-suspend-election-idUSKCN1IF2R1>>; European Parliament, ‘Resolution on the elections in Venezuela’ (3 May 2018) 2018/2695(RSP); OAS, ‘Rejection of the Parliamentary Elections held on 6 December in Venezuela’ (10 December 2020) CP/RES.1164 (2309/20) rev.1

¹⁵¹ HRC, ‘Report of the International Fact-Finding Mission on Venezuela’ (2020) (n 147), 5; de Zayas Alfred, ‘Promotion of a Democratic & Equitable Order in Venezuela & Ecuador’ (3 Aug 2017) UN Doc A/HRC/39/47/Add.1, 7

¹⁵² HRC, ‘Report of the International Fact-Finding Mission on Venezuela’ (2020) (n 147), 7, 8, 16.

¹⁵³ Ibid, 5, 6, 8; HRC, ‘Human Rights in Venezuela’ (16 June 2021) UN Doc A/HRC/47/55, 4, 5; CAT, ‘Concluding Observations: Venezuela’ (12 December 2014) UN Doc CAT/C/VEN/CO/3-4, 4, 5, 7.

¹⁵⁴ CAT, ‘Concluding Observations: Venezuela’ (2014) (n 153), 3–4; HRC, ‘Human Rights in Venezuela’ (2021) (n 153), 4.

¹⁵⁵ Note that Venezuela ratified the ICCPR on 10 May 1978 and the Torture Convention on 29 July 1991.

¹⁵⁶ *Promotion & Protection of Human Rights in Venezuela* Res 39/1 HRC (27 Sept 2018) UN Doc A/HRC/RES/39/1.

¹⁵⁷ *Situation of Human Rights in Venezuela* Res 42/45 HRC (26 September 2019) UN Doc A/HRC/42/45.

¹⁵⁸ UNSC, ‘Draft Resolution (US)’ (28 Feb 2019) UN Doc S/2019/186. See also UNSC, ‘Draft Resolution (Russia)’ (28 Feb 2019) UN Doc S/2019/190; UNSC, ‘Verbatim Record, 8476th Meeting’ (28 Feb 2019) UN Doc S/PV.8476.

¹⁵⁹ OAS, ‘Declaration of the Permanent Council on the Situation in Venezuela’ (1 June 2016) CP/DEC.63 (2076/16) (‘Reiterating its respect for the non-intervention principle in the [...] affairs of states’)

¹⁶⁰ OAS, ‘Resolution on Recent Events in Venezuela’ (2 April 2017) CP/RES.1078 (2108/17).

¹⁶¹ OAS, ‘Res 1164 (2309/20)’ (n 150); OAS, ‘Resolution on the Human Rights Situation in Venezuela’ (28 August 2019) CP/RES.1133 (2244/19); OAS, ‘Resolution on Venezuela’ (10 January 2019) CP/RES.1117 (2200/19).

human rights record including acts of torture.¹⁶²

Some levied measures against Venezuela. There were retorsions like the EU and Lima Group's arms embargo.¹⁶³ There were also countermeasures such as the US and Lima Group's restrictions on financial transactions in Venezuela,¹⁶⁴ the US' freezing of Venezuelan assets,¹⁶⁵ and the US' restrictions on the export of naphtha and import of gold.¹⁶⁶ There were also targeted measures by the US, EU, UK, and the Lima Group in the form of travel bans against those responsible for the abuses in Venezuela,¹⁶⁷ and asset freezes against certain individuals and entities.¹⁶⁸

While some states supported these measures and even urged others to adopt the same,¹⁶⁹ other states disagreed. Unsurprisingly, Venezuela argued that these violated 'principles of respect for sovereignty [...] and non-interference in [states'] internal affairs'.¹⁷⁰ It also alleged

¹⁶² —, 'Mercosur suspends Venezuela' (Reuters, 6 August 2017) <<https://www.reuters.com/article/us-venezuela-politics-mercotur-idUSKBN1AL0IB>>. See OAS General Secretariat, 'General Secretariat Supports the Decision by the MERCOSUR' (5 August 2017) <https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-062/17>.

¹⁶³ Council of the EU, 'Council Decision 2017/2074/CFSP' (14 November 2017) L 295/60; Government of Canada, 'Lima Declaration' (8 August 2017) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/latin_america-amerique_latine/2017-08-08-lima_group-groupe_lima.aspx>.

¹⁶⁴ Executive Order 13808, *Imposing Additional Sanctions with Respect to the Situation in Venezuela* (2017) (US); Executive Order 13835, *Prohibiting Certain Additional Transactions With Respect to Venezuela* (2018) (US); Executive Order 13850, *Blocking Property of Persons Contributing to the Situation in Venezuela* (2018) (US); Ministerio de Relaciones Exteriores de Peru, 'Declaración del Grupo de Lima' (4 January 2019) <<https://www.gob.pe/institucion/rree/noticias/24270-declaracion-del-grupo-de-lima>>. Note that the Lima Group includes Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Panama, Paraguay, and Peru.

¹⁶⁵ Executive Order 13884, *Blocking Property of the Government of Venezuela* (2019) (US).

¹⁶⁶ *Executive Order 13850* (US); Kassai Lucia & Zerpa Fabiola, 'Russia Comes to Maduro's Rescue After US Sanctions Hit' (Bloomberg, 5 March 2019) <<https://www.bloomberg.com/news/articles/2019-03-04/maduro-gets-oil-lifeline-from-russia-after-u-s-sanctions-hit#xj4y7vzkg>>.

¹⁶⁷ Executive Order 13692, *Blocking Property & Suspending Entry of Certain Persons Contributing to the Situation in Venezuela* (2015) (US); Council of the EU, 'Council Decision 2017/2074/CFSP' (n 163); 2019 No 135, *Venezuela (Sanctions) (EU Exit) Regulations* (2019) (UK); Government of Canada, 'Lima Declaration' (n 163).

¹⁶⁸ *Executive Order 13692* (US); Executive Order 13827, *Taking Additional Steps to Address the Situation in Venezuela* (2018) (US); Council of the EU, 'Council Decision 2017/2074/CFSP' (n 163); *Venezuela (Sanctions) (EU Exit) Regulations* (UK); SOR/2017-20, *Special Economic Measures (Venezuela) Regulations* (2017) (CAN); SOR/2019-61 (CAN); SOR/2019-106, *Regulations Amending the Special Economic Measures (Venezuela) Regulations* (2019) (CAN); SOR/2019-263, *Regulations Amending the Special Economic Measures (Venezuela) Regulations* (2019) (CAN); AS 2018 1217, *Verordnung über Massnahmen gegenüber Venezuela* (2018) (SUI); Ministerio de Relaciones Exteriores de Peru, 'Declaración del Grupo de Lima' (n 164).

¹⁶⁹ Ministerio de Relaciones Exteriores de Peru, 'Declaración del Grupo de Lima' (n 164).

¹⁷⁰ —, 'Venezuela Rejects Sanctions of the European Union against the Country' (Venezuela News Agency, 14 November 2017) <<http://www.avn.info.ve/contenido/venezuela-rejects-sanctions-council-european-union-against>>.

that enforcement measures are only lawful when levied by competent organs like the SC.¹⁷¹ Venezuela found support from the members of the Community of Latin American & Caribbean States ('CELAC') and G77 which condemned the unilateral measures.¹⁷² The Union of South American Nations ('UNASUR') also denounced these measures as a 'threat to [states'] sovereignty and the principle of non-interference in [their] internal affairs'.¹⁷³

G. Genocide & Racial discrimination against the Rohingya in Myanmar (2016–)

The Rohingya had long suffered discrimination and persecution in Myanmar.¹⁷⁴ For one, Myanmar classifies Rohingyas as 'immigrants' not citizens.¹⁷⁵ To be considered citizens under a 1982 law, they must prove that their ascendants lived in Myanmar before 1823.¹⁷⁶ Successive laws further restricted their political rights. By the 1990s, Myanmar had restricted Rohingyas' marriage, number of children, exercise of religion, access to healthcare, and travel outside of Rakhine. The Rohingyas have also been subjected to arbitrary arrests, forced labour, ill-treatment, and sexual violence.¹⁷⁷

Myanmar's persecution of Rohingyas intensified in 2012 when violence erupted in Rakhine between Rohingyas and other ethnic groups.¹⁷⁸ Myanmar alleged that it deployed its military to deal with the situation.¹⁷⁹ However, based on reports, the military participated in a 'campaign

¹⁷¹ See 'Referral Pursuant to Rome Statute Article 14', *Situation in Venezuela* (ICC, ICC-01/20, 4 March 2020), ¶41; Venezuela, 'US—Measures relating to trade in goods & services (Request)' (16 March 2021) WT/DS574/2/Rev.1.

¹⁷² —, 'CELAC condemns US unilateral coercive measures against Venezuela' (Venezuelan News Agency, 12 February 2012) <<http://www.avn.info.ve/contenido/celac-condemns-us-unilateral-coercive-measures-against>>.

¹⁷³ —, 'South American nations reject US measures against Venezuela officials' (Reuters, 15 March 2015) <<https://www.reuters.com/article/uk-venezuela-usa-unasur/south-american-nations-reject-u-s-measures-against-venezuela-officials-idUKKBN0MB01820150315>>. See also Summit of the Americas, 'Seventh Summit: Remarks by the President of Argentina' (April 2015) OEA/Ser.E CA-VII/INF.7/15, 3–4; Summit of the Americas, 'Seventh Summit: Remarks by the President of Ecuador' (April 2015) OEA/Ser.E CA-VII/INF.13/15, 2.

¹⁷⁴ Alam Jobair, 'Rohingya Minority of Myanmar: Status & Protection in International Law' (2018) 25 *International Journal on Minority & Groups* 157, 157; Hossain Mohammed, 'Rohingya Genocide: Theoretical & Empirical Study' (2021) 35 *Holocaust & Genocide Studies* 211, 213. See Quintana Tomàs, 'Human Rights in Myanmar' (2 April 2014) UN Doc A/HRC/25/64, 11; Yanghee Lee, 'Human Rights in Myanmar' (23 March 2015) UN Doc A/HRC/28/72, 12; HRC, 'Report of the Independent Fact-Finding Mission on Myanmar' (12 September 2018) UN Doc A/HRC/39/64, 6 ff.

¹⁷⁵ Hossain, 'Rohingya Genocide' (n 174), 213.

¹⁷⁶ Alam, 'Rohingya Minority of Myanmar' (n 174), 160; Foster Michelle & Baker Timnah, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11 *Columbia Journal of Race and Law* 83, 94.

¹⁷⁷ HRC, 'Report of the Independent Fact-Finding Mission on Myanmar' (2018) (n 174), 6.

¹⁷⁸ *Ibid.*, 6–8.

¹⁷⁹ Van Shaack Beth, 'Determining the Commission of Genocide in Myanmar: Legal and Policy Considerations' (2019) 17 *Journal of International Criminal Justice* 285, 298.

of hate and dehumanisation of Rohingyas'.¹⁸⁰ It not only failed to stop the violence against Rohingyas, it also arrested and killed Rohingyas and destroyed their properties.¹⁸¹ The violence escalated in 2016 with the emergence of the Arakan Rohingya Salvation Army ('ARSA') driven by the Rohingyas' 'systemic oppression'.¹⁸² In response, Myanmar conducted 'clearance operations' where thousands of Rohingya civilians were injured, sexually assaulted, brought to concentration camps, or killed.¹⁸³ Such violence continues with reports of assaults on Rohingya villages, schools, and religious sites.¹⁸⁴

Myanmar's conduct, as the HRC points out, amounted to racial discrimination if not apartheid and constitutes a breach of Myanmar's customary duties.¹⁸⁵ Myanmar has created an 'oppressive regime that is both institutionalised and systematic' founded on a 'discriminatory ideology' against Rohingyas.¹⁸⁶ Indeed, this system restricts all aspects of Rohingyas' life,¹⁸⁷ including their citizenship, access to state services, education, and employment.¹⁸⁸

Myanmar's actions against Rohingyas since 2012 may also amount to genocide.¹⁸⁹ The Rohingya is a 'protected [...] group being a Muslim minority in a [...] Buddhist society'.¹⁹⁰ Moreover, the killings, infliction of harm, [...] and creation of conditions leading to their physical destruction [...] are clearly genocidal acts.¹⁹¹ Finally, despite Myanmar's denial,¹⁹²

¹⁸⁰ HRC, 'Report of the Independent Fact-Finding Mission on Myanmar' (2018) (n 174), 7; 'Request for authorisation of an investigation pursuant to article 15', *Situation in Myanmar* (ICC, ICC-01/19, 4 July 2019), ¶31.

¹⁸¹ HRC, 'Report of the Independent Fact-Finding Mission on Myanmar' (2018) (n 174), 7.

¹⁸² Van Shaack, 'Determining the Commission of Genocide in Myanmar' (n 179), 298.

¹⁸³ HRC, 'Report of the Independent Fact-Finding Mission on Myanmar' (2018) (n 174), 8–9.

¹⁸⁴ HRC, 'Human Rights in Myanmar' (3 September 2020) UN Doc A/HRC/45/5, 3–4.

¹⁸⁵ See Res 39/2 HRC (3 October 2018) UN Doc A/HRC/Res/39/2 ('[The] abuses committed in Rakhine State [...] may amount to [...] Apartheid'). Note that Myanmar is not a party to the ICERD, Apartheid Convention, and the ICCPR.

¹⁸⁶ See Dugard John & Reynolds John, 'Apartheid, International Law, & the Occupied Palestinian Territory' (2013) 24 *European Journal of International Law* 867, 904; Hossain, 'Rohingya Genocide' (n 174), 213.

¹⁸⁷ Alam, 'Rohingya Minority of Myanmar' (n 174), 162–3 citing Lindholm Alina, *et al.*, 'Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State? A Legal Analysis' (Yale Law School, 2015).

¹⁸⁸ Raj Vatsal, 'The Gambia v Myanmar' (2021) 3 *De Lega Ferenda* 42, 44.

¹⁸⁹ Res 39/2 (n 185) ('Expresses concern at the findings of the [...] mission that there is sufficient information to warrant the investigation and prosecution of senior officials [...] [to] determine their liability for genocide'). Note that Myanmar ratified the Genocide Convention on 14 March 1956.

¹⁹⁰ Van Shaack, 'Determining the Commission of Genocide in Myanmar' (n 179), 292; HRC, 'Report of the Independent Fact-Finding Mission on Myanmar' (2018) (n 174), 16.

¹⁹¹ HRC, 'Detailed Findings of the International Fact-Finding Mission on Myanmar' (16 Sept 2019) UN Doc A/HRC/42/CRP.5, 71; Van Shaack, 'Determining the Commission of Genocide in Myanmar' (n 179), 293.

¹⁹² See 'Verbatim Record 2019/19', *Application of the Genocide Convention* (The Gambia v Myanmar) (Provisional Measures) (ICJ, General List No 178, 11 December 2019), 38.

there appears to be genocidal intent. The violence against Rohingyas is ‘similar in nature, gravity, and scope’ in other contexts where genocidal intent has been deemed to exist.¹⁹³ Seen in the ‘broader oppressive context’ of repressive policies and ‘hate rhetoric’,¹⁹⁴ the acts’ organised nature, the violence’s scale, and failure to investigate and prosecute violations evince intent ‘to destroy the Rohingya’.¹⁹⁵

Responses to Myanmar’s conduct were mixed. The SC, paralysed by threats of China’s veto, only expressed its concern about the abuses in Myanmar in a presidential statement.¹⁹⁶ In contrast, the HRC repeatedly condemned the human rights violations and called upon Myanmar to protect the rights of all persons including Rohingyas.¹⁹⁷ It also created a fact-finding mission on the situation.¹⁹⁸ The GA also condemned the violence against the Rohingyas,¹⁹⁹ and noted the HRC mission’s findings that there exists sufficient information that genocide occurred.²⁰⁰

Some states also levied measures against Myanmar. Some were retorsions such as the EU, Australia, and Canada’s arms embargos.²⁰¹ There were also countermeasures like the US’ restriction on the importation of some precious stones.²⁰² Still, some were targeted measures such as the EU and Australia’s travel restrictions on certain persons;²⁰³ and the EU, UK, US,

¹⁹³ HRC, ‘Report of the Independent Fact-Finding Mission on Myanmar’ (2018) (n 174), 16.

¹⁹⁴ Ibid, 16 noting the ‘specific utterances of commanders and direct perpetrators [and] exclusionary policies, including the [alteration] of the demographic composition of Rakhine State’. See *Jelisić (Appeals Judgement)* (n 49), ¶47.

¹⁹⁵ HRC, ‘Detailed Findings of the International Fact-Finding Mission on Myanmar’ (2019) (n 191), 73.

¹⁹⁶ Barber Rebecca, ‘Accountability for Crimes against the Rohingya: Possibilities for the GA where the SC Fails’ (2019) 17 *Journal of International Criminal Justice* 557, 562 citing UNSC, ‘Statement of the SC President’ (6 November 2017) UN Doc S/PRST/2017/22 (‘The SC [...] expresses grave concern over reports [...] abuses in Rakhine [...] including by the Myanmar security forces [...] against [...] the Rohingya community’).

¹⁹⁷ See HRC, ‘Human Rights in Myanmar’ (27 June 2013) UN Doc A/HRC/PRST/23/1; *Situation of Human Rights in Myanmar* Res 29/21 HRC UN (22 July 2016) UN Doc A/HRC/RES/29/21; Res 34/22 HRC (3 April 2017) UN Doc A/HRC/RES/34/22; Res S-27/1 HRC (8 December 2017) UN Doc A/HRC/Res/S-27/1; Res 39/2 (n 185); Res 40/29 HRC (11 April 2019) UN Doc A/HRC/RES/40/29; Res 42/3 HRC (3 October 2019) UN Doc A/HRC/RES/42/3. Note Res 19/21 HRC (23 March 2012) UN Doc A/HRC/RES/19/21; Res 22/14 HRC (21 March 2013) UN Doc A/HRC/RES/22/14; Res 25/26 HRC (28 March 2014) UN Doc A/HRC/RES/25/26.

¹⁹⁸ Res 34/22 (n 197)

¹⁹⁹ *Situation of Human Rights in Myanmar* Res 72/248 UNGA (23 Jan 2018) UN Doc A/RES/72/248. Note Res 67/233 UNGA (24 Dec 2012) UN Doc A/RES/67/233; Res 68/242 UNGA (27 Dec 2013) UN Doc A/RES/68/242; Res 69/248 UNGA (29 Dec 2014) UN Doc A/RES/69/248; Res 70/233 UNGA (23 Dec 2015) UN Doc A/RES/70/233.

²⁰⁰ *Situation of Human Rights in Myanmar* Res 73/264 UNGA (22 January 2019) UN Doc A/RES/73/264

²⁰¹ Council of the EU, ‘Council Decision 2018/655/CFSP’ (26 April 2018) L 108/29; F2018L01409, *Autonomous Sanctions (Designated & Declared Persons – Myanmar) List* (2018) (AUS); SOR/2018-135, *Regulations Amending the Special Economic Measures (Burma) Regulations* (2018) (CAN); SOR/2019-61 (CAN).

²⁰² Executive Order 13651, *Prohibiting Certain Imports of Burmese Jadeite and Rubies* (2013) (US).

²⁰³ Council of the EU, ‘Council Decision 2018/655/CFSP’ (n 201); *Autonomous Sanctions (Designated & Declared Persons – Myanmar) List* (AUS).

and Canada's asset freezes on some individuals and entities.²⁰⁴

Elsewhere, the Gambia, with the support of the OIC,²⁰⁵ instituted proceedings before the ICJ against Myanmar in 2019.²⁰⁶ The Gambia alleged that Myanmar breached its duties under the Genocide Convention.²⁰⁷ In its grant of the Gambia's request for provisional measures, the Court stated that 'there is a correlation between the rights of members of groups protected under the Genocide Convention, the [duties] incumbent on [...] parties thereto, and the right of any [...] party to seek compliance therewith by another [...] party'.²⁰⁸ This foreshadowed its judgement on Myanmar's preliminary objections.²⁰⁹ Affirming its ruling in *Obligation to Prosecute and Extradite*, the Court ruled that the 'common interest in compliance' with the duties under the Convention entails that any state is 'entitled to invoke the responsibility of another state'.²¹⁰

²⁰⁴ Council of the EU, 'Council Decision 2018/655/CFSP' (n 201); 2021 No 496, *Myanmar Sanctions Regulations* (2021) (UK); — —, 'US Restrictions on Relations with Burma' (Congressional Research Service, 2020), 5–11; Executive Order 13619, *Blocking Property of Burma & Prohibiting Certain Transactions* (2012) (US); *SOR/2018-135* (CAN); *SOR/2019-61* (CAN).

²⁰⁵ Organisation of Islamic Cooperation, 'Final Communiqué: 14th Islamic Conference' (15 August 2012) OIC/SUM-14/2019/FC/FINAL, 11 ('[The] Conference urged upon the *ad hoc* Ministerial Committee led by the Gambia to take immediate measures to launch the case at the [ICJ] on behalf of the OIC')

²⁰⁶ 'Application', *Application of the Genocide Convention* (The Gambia v Myanmar) (ICJ, General List No 178, 11 November 2019), ¶15. See also 'Joint Declaration of Intervention of Canada, Denmark, France, Germany, and the UK', *Application of the Genocide Convention* (The Gambia v Myanmar) (Intervention) (ICJ, General List No 178, 15 November 2023), 2 ('All states parties have a common interest in the accomplishment of the high purposes of the Genocide Convention'); 'Declaration of Intervention of Maldives', *Application of the Genocide Convention* (The Gambia v Myanmar) (Intervention) (ICJ, General List No 178, 15 November 2023), 4 ('They are central to the Convention, are owed *erga omnes partes* [contractes], and also form part of customary international law').

²⁰⁷ 'Application', *Application of the Genocide Convention* (n 206), ¶15. See 'Verbatim Record 2019/18', *Application of the Genocide Convention* (The Gambia v Myanmar) (Provisional Measures) (ICJ, General List No 178, 10 December 2019), 51 ('Puisque les obligations en cause étaient *erga omnes partes*, tout état partie à cette convention pouvait "invoquer la responsabilité d'un autre partie dans le but de faire constater le manquement allégué de celui-ci à [ces] obligations"'); 'Verbatim Record 2019/20', *Application of the Genocide Convention* (The Gambia v Myanmar) (Provisional Measures) (ICJ, General List No 178, 11 Dec 2019), 40.

²⁰⁸ *Application of the Genocide Convention* (Gambia v Myanmar) (Provisional Measures) [2019] (ICJ, 11 November 2019), 16. *Contra* (Xue, separate opinion), 2.

²⁰⁹ See 'Preliminary Objections of Myanmar', *Application of the Genocide Convention* (The Gambia v Myanmar) (Provisional Measures) (ICJ, General List No 178, 21 January 2021), 68 ('State practice and *opinio juris* [...] confirm that there needs to be at least some form of a "connecting" factor in order for a state to have standing before the Court to enforce obligations which are of an *erga omnes partes* character'), 71, 73. See 'Verbatim Record 2019/19', *Application of the Genocide Convention* (n 192), 53 ('Myanmar accepts that at least some [duties] under the Genocide Convention are *erga omnes partes* [...] However, even if the Gambia has an interest in Myanmar's compliance with [duties owed] *erga omnes partes* under that Convention, it does not follow without more that the Gambia also has standing to bring a case [...] without being specially affected'); 'Verbatim Record 2019/21', *Application of the Genocide Convention* (The Gambia v Myanmar) (Provisional Measures) (ICJ, General List No 178, 12 December 2019), 14.

²¹⁰ *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022), 35, 37.

H. Genocide against the Palestinians in Gaza (2023–)

The events discussed below occurred in the context of Israel's continued occupation of the Palestinian Territories and its denial of the Palestinian people's right to self-determination. These are further examined in *Chapter 7*.²¹¹ This section focuses on Israel's ongoing military campaign in Gaza which began in 2023 where genocidal acts are alleged to be occurring.

On 7 October 2023, Hamas and other extremist groups in Gaza attacked Israel ('Operation Al Aqsa Flood').²¹² Based on Israel's figures, the attack killed over 1,200 Israeli and foreign nationals and injured thousands.²¹³ The armed groups also took around 240 persons as hostages into Gaza.²¹⁴ In response, Israel stated that it would 'crush and eliminate' the 'hostile forces that [attacked Israel] and restore the security'.²¹⁵ Thereafter, it launched a campaign ('Operation Swords of Iron') to destroy the armed groups in Gaza, free the hostages, and establish control over the territory.²¹⁶

Israel's ongoing campaign has caused 'massive civilian casualties, extensive destruction of civilian infrastructure, and the displacement of [Gaza's] population'.²¹⁷ By December 2023, it was estimated that the operation killed around 21,000 Palestinians and injured over 55,000.²¹⁸ Based on reports, Israel has dropped an extensive amount of munitions in the densely populated Gaza Strip,²¹⁹ even in areas that it designated as 'safe zones'.²²⁰ There were also reports that

²¹¹ 'Application', *Application of the Genocide Convention in Gaza* (South Africa v Israel) (ICJ, General List No 192, 28 December 2023), 3.

²¹² Federman Josef & Adwan Issam, 'Hamas militant group launches unprecedented operation against Israel' (Associated Press, 7 October 2023) <<https://apnews.com/article/israel-palestinians-gaza-hamas-rockets-airstrikes-tel-aviv-11fb98655c256d54ecb5329284fc37d2>>

²¹³ Boxerman Aaron, 'Israel-Hamas War: Israel Lowers Oct. 7 Death Toll Estimate to 1,200' (New York Times, 10 November 2023) <<https://www.nytimes.com/live/2023/11/10/world/israel-hamas-war-gaza-news>>.

²¹⁴ —, 'Hamas says it has enough Israeli captives to free all Palestinian prisoners' (Al Jazeera, 7 October 2023) <<https://www.aljazeera.com/news/2023/10/7/hamas-says-it-has-enough-israeli-captives-to-free-all-palestinian-prisoners>>

²¹⁵ —, 'Joint Statement by PM Netanyahu and National Unity Chairman MK Gantz' (Government of Israel, 11 October 2023) <<https://www.gov.il/en/departments/news/spoke-joint111023>>.

²¹⁶ Magid Jacob, 'Netanyahu says IDF will control Gaza after war' (Times of Israel, 10 November 2023) <<https://www.timesofisrael.com/netanyahu-says-idf-will-control-gaza-after-war-rejects-notion-of-international-force/>>

²¹⁷ *Application of the Genocide Convention in Gaza* [2024] (n 3), 7.

²¹⁸ 'Application', *Application of the Genocide Convention in Gaza* (n 211), 3, 15.

²¹⁹ Stein Robin, *et al.*, 'A Times Investigation Tracked Israel's Use of One of Its Most Destructive Bombs in South Gaza' (New York Times, 21 December 2023) <<https://www.nytimes.com/2023/12/21/world/middleeast/israel-gaza-bomb-investigation.html>>; —, 'UN experts call on international community to prevent genocide against the Palestinian people' (OHCHR, 16 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>>.

²²⁰ Borger Julian & Michaelson Ruth, 'IDF instructions on Gaza refuge zones cruel "mirage", say aid agencies'

Israel's forces indiscriminately used force and performed summary executions.²²¹ In addition, Israel also destroyed Gaza's infrastructure,²²² rendering Gaza 'largely unliveable'.²²³ It has also restricted aid coming into Gaza limiting access to food, water, and medicine.²²⁴

Several scholars,²²⁵ and some states,²²⁶ submit that Israel's actions in Gaza amount to genocide in breach of its *duty not to commit genocide and to prevent or punish its commission*. Indeed, the ICJ, in its grant of provisional measures in the *Application of the Genocide Convention in Gaza*, recognised that this view may be 'plausible'.²²⁷ Undoubtedly, the Palestinians constitute 'a protected group'.²²⁸ Second, Israel's actions in Gaza may be considered genocidal acts—killing Palestinians, harming them, and creating conditions of life calculated to bring about their physical destruction.²²⁹ Finally, as some submit, genocidal intent may be evinced from the Israeli officials' 'statements [...] [regarding] the military operation in Gaza' and from the 'clear pattern' of Israel's conduct.²³⁰ As some scholars note, the 'language

(The Guardian, 8 December 2023) <<https://www.theguardian.com/world/2023/dec/07/idf-israel-gaza-refuge-zones-cruel-mirage-say-aid-agencies>>; Tacchi Jake, 'Israel struck some areas it directed civilians to in Gaza' (CNN, 21 December 2023) <<https://edition.cnn.com/2023/12/21/middleeast/israel-strikes-evacuation-zones-gaza-intl-cmd/index.html>>.

²²¹ — —, 'Unlawful killings in Gaza City' (OHCHR, 20 December 2023) <<https://www.un.org/unispal/document/unlawful-killings-in-gaza-city-ohchr-press-release/>>; — —, 'Palestinians accuse Israeli forces of executing 19 civilians in Gaza' (Al Jazeera, 20 January 2024) <<https://www.aljazeera.com/news/2024/1/20/palestinians-accuse-israeli-forces-of-executing-19-civilians-in-gaza>>.

²²² UNSG, 'Letter by the SG to the SC invoking UN Charter Article 99' (6 December 2023) UN Doc S/2023/962; — —, 'Israel & the Occupied Territories' (ICRC, 28 October 2023) <<https://www.icrc.org/en/document/israel-and-occupied-territories-deescalate-now-prevent-further-human-suffering>>.

²²³ 'Application', *Application of the Genocide Convention in Gaza* (n 211), 39.

²²⁴ UNSG, 'Nowhere Is Safe, Secretary-General Tells Security Council, Pleading for Humanitarian Ceasefire' (UNSG, 8 December 2023) <<https://press.un.org/en/2023/sgsm22076.doc.htm>>; — —, 'War & health crisis in Gaza a "recipe for epidemics" warns WHO' (UN News, 20 November 2023) <<https://news.un.org/en/story/2023/11/1143802>>

²²⁵ — —, 'Public Statement: Scholars Warn of Potential Genocide in Gaza' (Opinio Juris, 18 October 2023) <<https://opiniojuris.org/2023/10/18/public-statement-scholars-warn-of-potential-genocide-in-gaza/>>; — —, 'UN experts call on international community to prevent genocide against the Palestinian people' (n 219).

²²⁶ See 'Application', *Application of the Genocide Convention in Gaza* (n 211), 3, 4 ('South Africa and other parties to the Convention have [...] made clear that Israel's actions in Gaza constitute genocide against Palestinians'), 30 ff.

²²⁷ *Application of the Genocide Convention in Gaza* [2024] (n 3), 18.

²²⁸ Ibid, 15.

²²⁹ 'Application', *Application of the Genocide Convention in Gaza* (n 211), 3. *Contra* Cohen Amichai & Shany Yuval, 'Selective Use of Facts and the Gaza Genocide Debate' (Just Security, 2 January 2024) <<https://www.justsecurity.org/90939/selective-use-of-facts-and-the-gaza-genocide-debate>> ('Israel [...] claims that its military attacks and other means and methods of warfare are compatible with international humanitarian law') *citing* — —, 'Hamas-Israel Conflict 2023: Key Legal Aspects' (Israel Ministry of Foreign Affairs, 3 December 2023) <<https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects>>.

²³⁰ 'Application', *Application of the Genocide Convention in Gaza* (n 211), 13.

used by Israeli [officials] [...] reproduce rhetoric and tropes associated with genocide and incitement to genocide'.²³¹ Examples of such expressions include, among others,²³² Israel's Prime Minister telling Israeli soldiers to 'spare no one, but kill alike men, women, [and] infants',²³³ and Israel's President arguing that there is no distinction between civilians and armed groups in Gaza.²³⁴ Moreover, based on the jurisprudence of tribunals like the ICTY,²³⁵ some authors argue that the 'amount of destruction [caused by] the Israeli campaign is also indicative of genocidal intent'.²³⁶ That is, Israel's military attacks' 'nature, scope and extent', including its 'sustained bombardment' of Gaza and failure to ensure the delivery of humanitarian assistance, implies genocidal intent.²³⁷

States within the UN expressed concern over the ongoing conflict in Gaza.²³⁸ The GA, in

²³¹ — —, 'Public Statement: Scholars Warn of Potential Genocide in Gaza' (n 225); — —, 'UN Committee calls for immediate ceasefire and urges end to hate speech amid fears of broader conflict' (OHCHR, 27 October 2023) <releases>. *Contra* Cohen & Shany, 'Selective Use of Facts and the Gaza Genocide Debate' (n 229) ('Some of the assertions are ambiguous'); Flasch Olivia, 'Rebutting Allegations of Genocide Against Israel' (EJIL: Talk!, 10 January 2024) <<https://www.ejiltalk.org/rebutting-allegations-of-genocide-against-israel/>> ('At least some of them may have been misinterpreted as directed at the civilian population of Gaza').

²³² 'Application', *Application of the Genocide Convention in Gaza* (n 211), 60 ff. *See e.g.* Israeli Minister of Defence: 'Gaza won't return to what it was before. We will eliminate everything' (— —, 'Gaza/Palestine: States have a Duty to Prevent Genocide' (International Commission of Jurists, 17 November 2023) <<https://www.icj.org/gaza-occupied-palestinian-territory-states-have-a-duty-to-prevent-genocide/>>); Israeli Minister for National Security: 'They're all terrorists, and they should also be destroyed' (Sharon Jeremy, 'Israel faces peril at The Hague in Gaza "genocide" case' (Times of Israel, 10 January 2024) <<https://www.timesofisrael.com/we-should-be-worried-israel-faces-peril-at-the-hague-in-gaza-genocide-case/>>); Israeli Deputy Speaker of the Knesset: 'We all have one common goal—erasing the Gaza Strip from the face of the earth' (Segal Raz, 'Israel must stop weaponising the Holocaust' (The Guardian, 25 October 2023) <<https://www.theguardian.com/commentisfree/2023/oct/24/israel-gaza-palestinians-holocaust>>).

²³³ Hendrix Steve & Balousha Hazem, 'Netanyahu & Hamas depended on each other. Both may be on the way out.' (Washington Post, 26 Nov 2023) <<https://www.washingtonpost.com/world/2023/11/26/netanyahu-hamas-israel-gaza/>>

²³⁴ Omaar Rageh, 'Herzog says Gazans could have risen up to fight "evil" Hamas' (ITV, 13 October 2023) <<https://www.itv.com/news/2023-10-13/israeli-president-says-gazans-could-have-risen-up-to-fight-hamas>>

²³⁵ *See Jelisić (Appeals Judgement)* (n 49), ¶47; *Prosecutor v Kayishema & Ruzindana* (Judgement) (ICTR, Trial Chamber, 95-1-T, 21 May 1999), ¶¶91–4, 98.

²³⁶ Kuttat Jonathan, 'The Case for Prosecuting Israel for Genocide in Gaza' (Arab Centre, 14 December 2023) <<https://arabcenterdc.org/resource/the-case-for-prosecuting-israel-for-genocide-in-gaza/>>.

²³⁷ 'Application', *Application of the Genocide Convention in Gaza* (n 211), 3. *Contra* 'Verbatim Record 2024/2', *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) (ICJ, General List No 192, 12 January 2024), 19 ('[The Court is not told of the] extensive Israeli efforts to mitigate civilian harm, of the humanitarian initiatives being undertaken to enable the flow of supplies and provide medical attention to the wounded'), 20, 34, 37, 41, 46; Cohen & Shany, 'Selective Use of Facts and the Gaza Genocide Debate' (n 229) ('[These] put into question the existence of a consistent pattern: [...] (a) the extent to which a host of measures taken by Israel to minimize civilian casualties [...] (b) whether tactical or strategic reasons other than an intent to destroy the Palestinian people "as such," such as military necessity, force protection or deterrence, can be plausibly inferred from the attacks made and measures taken; [...] (c) given Israel's capacity to inflict much more harm to civilians in Gaza than it has done, whether the military campaign cannot be more plausibly explained as one that is directed against Hamas')

²³⁸ *Application of the Genocide Convention in Gaza* [2024] (n 3), 7.

several resolutions, emphasised the need to protect civilians, called for the parties to comply with their duties under international law, and demanded an immediate ceasefire.²³⁹ For its part the SC, after several resolutions demanding a ceasefire were vetoed by the US and the UK,²⁴⁰ issued a resolution calling for ‘urgent and extended humanitarian pauses and corridors throughout Gaza’ to ‘facilitate the continuous, sufficient, and unhindered provision of essential goods and services’.²⁴¹

While no ‘state other than an injured state’ levied unilateral measures against Israel, South Africa invoked Israel’s responsibility before the ICJ. In its application, it asserted the *erga omnes partes contractes* character of the duties under the Genocide Convention as the basis of its competence to invoke Israel’s responsibility.²⁴² It is important to stress that South Africa did not simply allege that it has an interest in Israel’s performance of its duties under the Genocide Convention.²⁴³ Citing the ICTY’s judgement in *Furundžija*—one that recognised the synallagmatic view of legal relations imposed by duties owed *erga omnes*,²⁴⁴ South Africa asserted that it sought to protect its ‘individual right’ under the Convention.²⁴⁵ The ICJ, in its decision on provisional measures, *prima facie* concluded that South Africa has the competence to invoke Israel’s responsibility.²⁴⁶

Some states criticised the merits of South Africa’s application. The US deemed it ‘without any basis’.²⁴⁷ The same goes for Germany, Guatemala, Canada, the UK, Australia, and

²³⁹ *Protection of civilians & upholding legal and humanitarian obligations* Res ES-10/21 UNGA (27 October 2023) UN Doc A/RES/ES-10/21; *Protection of civilians & upholding legal and humanitarian obligations* Res ES-10/22 UNGA (19 December 2023) UN Doc A/RES/ES-10/22.

²⁴⁰ UNSC, ‘Draft Resolution (Bahrain et al)’ (16 Oct 2023) UN Doc S/2023/772; UNSC, ‘Draft Resolution (Brazil)’ (18 Oct 2023) UN Doc S/2023/773; UNSC, ‘Draft Resolution (Russia)’ (18 Oct 2023) UN Doc S/2023/775.

²⁴¹ Res 2712 UNSC (15 Nov 2023) UN Doc S/RES/2712. See Res 2728 UNSC (25 Mar 2024) UN Doc S/RES/2728.

²⁴² ‘Application’, *Application of the Genocide Convention in Gaza* (n 211), 3, 6, 9, 78; ‘Verbatim Record 2024/1’, *Application of the Genocide Convention in Gaza* (South Africa v Israel) (ICJ, General List No 192, 11 January 2024), 42, 53–4.

²⁴³ ‘Verbatim Record 2024/1’, *Application of the Genocide Convention in Gaza* (n 242), 53

²⁴⁴ *Prosecutor v Furundžija* (Judgment) (ICTY, Trial Chamber, 95-17/1, 10 December 1998), ¶151 (‘The violation of such an [*erga omnes* duty] simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued’).

²⁴⁵ ‘Verbatim Record 2024/1’, *Application of the Genocide Convention in Gaza* (n 242), 54 (‘South Africa is asserting both a collective and an individual right’).

²⁴⁶ *Application of the Genocide Convention in Gaza* [2024] (n 3), 12. See (Xue, declaration), 1–2 (‘While the law and practice are still evolving, for a protected group such as the Palestinian people, it is least controversial that the international community has a common interest in its protection.’)

²⁴⁷ Smith Elliot, ‘US slams “meritless” Israel genocide suit, reigniting tensions with South Africa’ (CNBC, 9 January 2024) <<https://www.cnbc.com/2024/01/09/us-slams-south-africas-meritless-israel-genocide-suit.html>>

France.²⁴⁸ Yet, more supported South Africa's case,²⁴⁹ without necessarily distinguishing between the merits of the application and the assertion of competence to invoke responsibility. These include the members of the OIC and Arab League.²⁵⁰ Others did the same including Malaysia, Turkey, Jordan, Maldives, Bolivia, Nicaragua, Namibia, Venezuela, Brazil, Colombia, Indonesia, Cuba, Iran, Syria, Bangladesh, Iraq, Pakistan, and Zimbabwe.²⁵¹

²⁴⁸ See Goren Biranit, 'Germany says it'll intervene in ICJ case on Israel's behalf, blasting genocide accusation' (Times of Israel, 12 January 2024) <https://www.timesofisrael.com/liveblog_entry/germany-rejects-un-genocide-charge-asserting-israel-defending-itself-after-inhuman-oct-7-attacks/>; — —, 'Guatemala gov't issues statement rejecting South Africa's genocide claims' (Jerusalem Post, 9 January 2024) <<https://www.jpost.com/breaking-news/article-781345>>; — —, 'Canadian, UK leaders reject premise of ICJ genocide case against Israel' (Times of Israel, 13 January 2024) <<https://www.timesofisrael.com/canadian-uk-leaders-reject-premise-of-icj-genocide-case-against-israel/>>; Andrew Tilett, 'Australia doesn't accept 'premise' of Israel genocide claim: Wong' (Financial Review, 16 January 2024) <<https://www.afr.com/world/middle-east/albanese-ducks-taking-a-stand-on-israeli-genocide-court-case-20240116-p5exlk>>; — —, 'French FM: Accusing Israel of genocide "crosses moral threshold"' (Times of Israel, 18 January 2024) <<https://www.timesofisrael.com/french-fm-accusing-israel-of-genocide-crosses-moral-threshold-is-exploitative/>>. See also Jones Mared, 'Why is the EU mostly silent on South Africa's genocide case against Israel?' (Euroe News, 12 January 2024) <<https://www.euronews.com/my-europe/2024/01/12/where-do-eu-countries-stand-on-south-africas-genocide-case-against-israel>>.

²⁴⁹ — —, 'World Court to hear Genocide Case Against Israel' (Human Rights Watch, 10 January 2024) <<https://www.hrw.org/news/2024/01/10/world-court-hear-genocide-case-against-israel>>; Smith Elliot, 'South Africa's genocide case against Israel has "global support", finance minister says' (CNBC, 15 January 2024) <<https://www.cnbc.com/2024/01/15/south-africas-genocide-case-against-israel-has-global-support.html>>.

²⁵⁰ — —, 'OIC Welcomes South Africa's International Court of Justice Suit against Israel Over Genocide' (OIC, 30 December 2023) <https://www.oic-oci.org/topic/?t_id=40161&t_ref=26840&lan=en>; — —, 'League of Arab States endorses South Africa's legal action against Israel' (League of Arab States, 10 January 2024) <<http://www.leagueofarabstates.net/en/news/Pages/NewsDetails.aspx?RID=2541%3E>>.

²⁵¹ See — —, 'Malaysia welcomes the application by South Africa instituting proceedings against Israel' (Malaysian Ministry of Foreign Affairs, 2 January 2024) <<https://www.kln.gov.my/web/guest/-/malaysia-welcomes-the-application-by-south-africa-before-the-international-court-of-justice-against-israel-on-alleged-genocide-violations-in-the-gaza>>; — —, 'Statement of the Spokesperson' (Turkey Ministry of Foreign Affairs, 3 January 2024) <https://www.mfa.gov.tr/sc_-1_-disisleri-bakanligi-sozcusu-uncu-keceli-nin-guney-afrika-cumhuriyeti-tarafindan-israil-aleyhine-uluslararası-adalet-divani-na-yapilan-basvuru-hk-bir-soruya-cevabi.en.mfa>; — —, 'Jordan backs South Africa ICJ genocide file against Israel over Gaza atrocities' (New Arab, 5 January 2024) <<https://www.newarab.com/news/jordan-backs-south-africa-icj-genocide-file-against-israel>>; — —, 'Maldives supports ICJ inquiry into alleged Israeli genocide' (PSM News, 4 January 2024) <<https://psmnews.mv/en/131048>>; — —, 'Comunicado en respaldo a la solicitud presentada por Sudáfrica ante la Corte Internacional de Justicia' (Bolivia Ministerio de Relaciones Exteriores, 7 January 2024) <<https://cancilleria.gob.bo/mre/2024/01/07/13483/>>; — —, 'Nicaragua acoge con satisfacción demanda de Sudáfrica ante la Corte Internacional de Justicia' (Nicaragua Ministerio de Defensa, 9 January 2024) <<https://www.midef.gob.ni/2024/01/nicaragua-acoge-con-satisfaccion-demanda-de-sudafrica-ante-la-corte-internacional-de-justicia-cij>>; — —, 'Venezuela respalda acción emprendida por Sudáfrica contra Israel ante la CIJ en defensa del pueblo palestino' (Venezuela Ministerio para Relaciones Exteriores, 9 January 2024) <<https://mppre.gob.ve/comunicado/venezuela-respalda-accion-emprendida-sudafrica-contra-israel-cij-defensa-pueblo-palestino>>; — —, 'Brazil's Lula expresses support for South Africa ICJ submission' (Al Jazeera, 10 January 2024) <<https://www.aljazeera.com/news/liveblog/2024/1/10/israels-war-on-gaza-us-laments-gaza-deaths-but-opposes-ceasefire?update=2609413>>; Gamba Laura, 'Colombia backs South Africa's legal action against Israel at world court' (Anadolu Ajansi, 11 January 2024) <<https://www.aa.com.tr/en/americas/colombia-backs-south-africa-s-legal-action-against-israel-at-world-court/3106142>>; Ul Khaliq Riyaz, 'Morally, politically: Indonesia backs South Africa against Israel at ICJ' (Anadolu Ajansi, 10 January 2024) <<https://www.aa.com.tr/en/asia-pacific/-morally-politically-indonesia-backs-south-africa-against-israel-at-icj/3105258>>; — —, 'Cuba apoya la demanda de Sudáfrica ante la Corte Internacional de Justicia contra el genocidio de Israel en Palestina' (Cuba Ministerio Relaciones Exteriores, 11 January 2024) <<https://cubaminrex.cu/es/cuba-apoya-la-demanda-de-sudafrica-ante-la-corte-internacional-de-justicia-contra-el>>.

Nicaragua went further and applied to intervene ‘as a party’.²⁵² It claimed that as the duties under the Convention are owed ‘*erga omnes partes* [contractes]’, it ‘will necessarily be affected by the Court’s decision’.²⁵³ Thus, it sought to intervene to ‘protect [its] rights’ and to ‘invoke Israel’s responsibility’.²⁵⁴

Nicaragua also instituted a related case against Germany claiming that Germany breached its duties under the Genocide Convention by providing Israel with aid with ‘full knowledge of [Israel’s] ongoing plausible breaches of [its duties]’.²⁵⁵ Like South Africa, Nicaragua asserted that it ‘seeks [to] protect its [...] rights’ that correlate to Germany’s duties owed *erga omnes partes contractes* under the Convention and *erga omnes* under customary law.²⁵⁶ Yet, whether the case would prosper remains to be seen. Nicaragua’s case against Germany ‘rests on a finding that genocide is being committed in Gaza’ which requires the Court to ‘make findings about [Israel’s] actions’—an ‘indispensable third party’ not impleaded.²⁵⁷ Thus, the ICJ may deem the case inadmissible.²⁵⁸

II. ANALYSIS OF STATE PRACTICE & *OPINIO JURIS*

Like *Chapter 6B* which dealt with the period between 1970 and 2001, the survey of cases between 2021 and 2023 was not meant to be comprehensive. In the interest of space, this chapter

genocidio-de>; — —, 'Iran hails South Africa's genocide lawsuit against Israel at ICJ' (Islamic Republic News Agency, 11 January 2024) <<https://en.irna.ir/news/85350521/Iran-hails-South-Africa-s-genocide-lawsuit-against-Israel-at>>; — —, 'Syria condemns US-British aggression on Yemen' (Syrian Arab News Agency, 12 January 2024) <<https://sana.sy/en/?p=323468>>; — —, 'Bangladesh backs South Africa's genocide claims against Israel' (Times of Israel, 15 January 2024) <<https://www.timesofisrael.com/bangladesh-backs-south-africas-genocide-claims-against-israel/amp/>>; — —, 'Iraq backs South Africa's ICJ genocide case against Israel over Gaza war' (Middle East Monitor, 18 January 2024) <<https://www.middleeastmonitor.com/20240118-iraq-backs-south-africas-icj-genocide-case-against-israel-over-gaza-war/>>; — —, 'Pakistan Welcomes the Provisional Measures Ordered by the ICJ in Gaza' (Pakistan Ministry of Foreign Affairs, 26 January 2024) <<https://mofa.gov.pk/press-releases/pakistan-welcomes-the-provisional-measures-ordered-by-the-international-court-of-justice-icj-in-gaza>>; — —, 'Zanu PF hails SA suit against Israeli genocide' (The Herald, 2 February 2024) <<https://www.herald.co.zw/zanu-pf-hails-sa-suit-against-israeli-genocide/amp>>.

²⁵² McIntyre Juliette, 'Why Nicaragua’s Article 62 Intervention in South Africa v Israel is Potentially Unhelpful' (Verfassungsblog, 11 February 2024) <<https://verfassungsblog.de/why-nicaraguas-article-62-intervention-in-south-africa-v-israel-is-potentially-unhelpful/>>.

²⁵³ ‘Application to Intervene of Nicaragua’, *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Intervention) (ICJ, General List No 192, 23 January 2024), 8.

²⁵⁴ *Ibid.*, 10.

²⁵⁵ ‘Application Instituting Proceedings’, *Proceedings between Nicaragua & Germany* (Nicaragua v Germany) (Institution of Proceedings) (ICJ, 1 March 2024), 6, 23.

²⁵⁶ *Ibid.*, 10, 31, 36.

²⁵⁷ Saunders Imogen, 'Nicaragua v Germany, Monetary Gold principle, & the Genocide Convention at the ICJ' (ANU College of Law, 6 March 2024) <<https://law.anu.edu.au/interventions-and-inadmissibility-nicaragua-v-germany-monetary-gold-principle-and-genocide>>; Wentker Alexander & Stendel Robert, 'Indispensable Third Party Principle at the ICJ in Nicaragua v Germany' (Verfassungsblog, 13 March 2024) <<https://verfassungsblog.de/conspicuously-absent/>>.

²⁵⁸ See *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90, 104–5 citing *Monetary Gold Removed from Rome in 1943* (Italy v France, UK, & US) (Judgment) [1954] ICJ 2, 32.

did not delve into the other violations of duties arising from certain human rights norms like the torture and forced labour in North Korea (2001–);²⁵⁹ torture committed in the US and its allies’ ‘War on Terror’ (2001–),²⁶⁰ and the racial discrimination and forced labour against Uighurs in China (2014–).²⁶¹ Yet, it must be pointed out that in none of these cases did ‘states other than an injured state’ implement the duties imposed by certain human rights norms.²⁶²

²⁵⁹ See Muntarborn Vitit, ‘Situation in North Korea’ (7 February 2007) UN Doc A/HRC/4/15, 5; Muntarborn Vitit, ‘Situation in North Korea’ (15 February 2008) UN Doc A/HRC/7/20, 9; Darusman Marzuki, ‘Situation in North Korea’ (21 February 2011) UN Doc A/HRC/16/58, ¶53; HRC, ‘Report of the Commission of Inquiry on Human Rights in North Korea’ (7 February 2014) UN Doc A/HRC/25/64, 3, 14; HRC, ‘Report of the Detailed Findings of the Commission of Inquiry on Human Rights in North Korea’ (7 February 2014) UN Doc A/HRC/25/CRP.1, 60, 213, 280, 326–7; Quintana Tomàs, ‘Human Rights in North Korea’ (30 May 2019) UN Doc A/HRC/ 40/66, 11.

²⁶⁰ See *Hamdan v Rumsfeld* (2006) 548 US 557 (US); *US v Husayn* (2022) 142 S Ct 959 (US); von Schorlemer Sabine, ‘Substantive & Institutional Implications of the War against Terrorism’ (2003) 14 *European Journal of International Law* 265, 277–8; Sands Philippe, ‘Extraordinary Rendition, Complicity, & its Consequences’ (2006) 4 *European Human Rights Law Review* 408, 413; Ross James, ‘US Legal Response to Torture since 9/11’ (2007) 89 *International Review of the Red Cross* 561, 569 ff.

²⁶¹ See on racial discrimination: OHCHR, ‘Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region’ (2022), 26, 30, 32, 40; CERD, ‘Concluding Observations: China’ (15 September 2018) UN Doc CERD/C/CHN/CO/14–7, 7; Dooley Connor, ‘Silencing Xinjiang: The Chinese Government’s Campaign against the Uyghurs’ (2019) 48 *Georgia Journal of International & Comparative Law* 233, 272; Stark Rebecca, ‘China’s Use of Artificial Intelligence in Their War against Xinjiang’ (2021) 29 *Tulane Journal of International & Comparative Law* 153, 166. On forced labour: Obokata Tomoya, ‘Report of the Special Rapporteur Contemporary Forms of Slavery’ (19 July 2022) UN Doc A/HRC/51/26, 7–8; OHCHR, ‘Assessment of Human Rights Concerns in the XUAR’ (n 261), 40.

²⁶² See generally Hofer Alexandra, ‘Negotiating International Public Policy through Adoption & Contestation of Sanctions’ (2017) 50 *Revue Belge de Droit International* 440, 447; Nowak Manfred, Birk Mortiz, & Monina Giuliana (eds), *UN Convention against Torture & its Optional Protocol: Commentary* (2nd edn, Oxford University Press 2019), 679. Note as to North Korea, several states have imposed measures against the state (See Council of the EU, ‘Council Regulation 329/2007’ (27 March 2007) L 88/1; Council of the EU, ‘Council Regulation 2017/1509’ (30 August 2017) L 224/1) Yet, these were due to its nuclear weapons programme and pursuant to SC resolutions (See e.g. Res 1695 UNSC (15 July 2006) UN Doc S/RES/1695; Res 1718 UNSC (14 October 2006) UN Doc S/RES/1718; Res 1874 UNSC (12 June 2009) UN Doc S/RES/1874; Res 1887 UNSC (24 September 2009) UN Doc S/RES/1887; Res 2087 UNSC (22 January 2013) UN Doc S/RES/2087; Res 2094 UNSC (7 March 2013) UN Doc S/RES/2094; Res 2270 UNSC (2 March 2016) UN Doc S/RES/2270; Res 2321 UNSC (30 November 2016) UN Doc S/RES/2321; Res 2356 UNSC (2 June 2017) UN Doc S/RES/2356; Res 2371 UNSC (5 August 2017) UN Doc S/RES/2371; Res 2375 UNSC (11 September 2017) UN Doc S/RES/2375; Res 2397 UNSC (22 December 2017) UN Doc S/RES/2397). The US kept certain Cold War-era trade measures against North Korea (Cleveland Sarah, ‘Human Rights Sanctions & International Trade: Theory of Compatibility’ (2002) 5(1) *Journal of International Economic Law* 133, 143). However, as North Korea is not a party to the GATT, these are arguably retorsions. In 2016, the US also levied measures against individuals and entities responsible for human rights abuses (PL 114-122, *North Korea Sanctions and Policy Enhancement Act* (2016) (US)). Yet, these are targeted measures and not countermeasures. As to China, some states levied targeted measures in response to the abuses against the Uighurs. These include the US, EU, UK, and Canada’s travel restrictions against individuals responsible for or have contributed to the human rights violations against the Uighurs (See PL 116-145, *Uyghur Human Rights Policy Act* (2020) (US); PL 114-328, *Global Magnitsky Human Rights Accountability Act* (2016) (US); Council of the EU, ‘Council Decision (CFSP) 2020/1999’ (7 December 2020) LI 410/13; Council of the EU, ‘Council Regulation (EU) 2020/1998’ (7 December 2020) OJ L 410/1; European Parliament, ‘Resolution on the situation of the Uyghurs in Xinjiang’ (17 December 2020) 2020/2913(RSP); Council of the EU, ‘Council Decision 2021/481/CFSP’ (22 March 2021) LI 99/25; 2020 No 680, *Global Human Rights Sanctions Regulations* (2020) (UK); SOR/2021-49, *Special Economic Measures (China) Regulations* (2021) (CAN)); asset freeze against certain individuals and entities (See *Uyghur Human Rights Policy Act* (US); *Global Magnitsky Act* (US)); and financial restrictions against entities involved in the ‘defence and related materiel sector’ or ‘the surveillance technology sector of the economy’ of China (See *Uyghur Human Rights Policy Act* (US); Executive Order 14032, *Addressing*

Based on this survey, as will be shown below, it seems that for these norms, the state practice and *opinio juris* as to the invocation of responsibility via judicial dispute resolution by ‘states other than an injured state’ may be ‘evolving’.²⁶³ However, these states’ competence to enforce responsibility via unilateral measures remains unsettled.

A. Invocation of Responsibility through Judicial Dispute Resolution

As to invocation via judicial dispute resolution, there had been five instances, after 2001, in which ‘states other than an injured state’ invoked another’s responsibility as to certain human rights norms before the ICJ. The first was in *Obligation to Prosecute or Extradite* where Belgium invoked Senegal’s responsibility for its failure to prosecute Habré for torture in Chad (2001–12).²⁶⁴ Here, the ICJ ruled that the ‘common interest in compliance’ with the duties under the Torture Convention implies the ‘entitlement of each [...] party’ to claim ‘an alleged breach by another’.²⁶⁵ The second was in the *Application of the Genocide Convention* where Gambia sued Myanmar for the Rohingya genocide (2016–).²⁶⁶ In its ruling on preliminary objections, the ICJ again stated that the ‘common interest in compliance’ with the duties under the Genocide Convention means that any party is ‘entitled to invoke [another’s] responsibility’.²⁶⁷ The third was in *Application of the Torture Convention* where the Netherlands and Canada sued Syria for breach of the Torture Convention (2011–).²⁶⁸ The ICJ, in its decision on provisional measures, indicated that Canada and the Netherlands ‘have a plausible right’ to invoke Syria’s responsibility as the duties under the Torture Convention are owed *erga omnes partes contractes*.²⁶⁹ Fourth, there was the *Application of the Genocide Convention in Gaza* in which South Africa invoked Israel’s responsibility for the genocide in Gaza (2023–).²⁷⁰ Here, the ICJ also stated in its ruling on provisional measures that South

the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China (2021) (US); Executive Order 13818, *Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption* (2018) (US); Council of the EU, ‘Council Decision (CFSP) 2020/1999’ (n 262); Council of the EU, ‘Council Regulation (EU) 2020/1998’ (n 262); European Parliament, ‘Resolution on the situation of the Uyghurs in Xinjiang’ (n 262); Council of the EU, ‘Council Decision 2021/481/CFSP’ (n 262); *Global Human Rights Sanctions Regulations* (UK); *SOR/2021-49* (CAN)).

²⁶³ *Application of the Genocide Convention in Gaza* [2024] (n 3) (Xue, declaration), 1–2

²⁶⁴ ‘Memorial of Belgium’, *Obligation to Prosecute or Extradite* (n 20), 53 ff.

²⁶⁵ *Obligation to Prosecute or Extradite* [2012] (n 8), 460.

²⁶⁶ ‘Application’, *Application of the Genocide Convention* (n 206), ¶15. See also ‘Joint Declaration of Intervention’, *Application of the Genocide Convention* (n 206), 2 (‘All states parties have a common interest in the accomplishment of the high purposes of the Genocide Convention’); ‘Declaration of Intervention of Maldives’, *Application of the Genocide Convention* (n 206), 4 (‘They are central to the Convention, are owed *erga omnes partes*, and also form part of customary international law’).

²⁶⁷ *Application of the Genocide Convention* [2022] (n 210), 35, 37.

²⁶⁸ ‘Joint Application Instituting Proceedings’, *Application of the Torture Convention* (n 143), 3.

²⁶⁹ *Application of the Torture Convention* [2023] (n 144), 16. But see (Xue, dissenting), 1.

²⁷⁰ ‘Application’, *Application of the Genocide Convention in Gaza* (n 211), 3, 6, 9, 78; ‘Verbatim Record 2024/1’, *Application of the Genocide Convention in Gaza* (n 242), 42, 53–4.

Africa has *prima facie* competence to invoke Israel's responsibility.²⁷¹ Finally, there was the *Proceedings between Nicaragua and Germany* where Nicaragua invoked Germany's responsibility for aiding the commission of genocide and failing to prevent genocide in Gaza.²⁷²

These seem to suggest that as to certain human rights norms, the state practice and *opinio juris* on the competence of 'states other than an injured state' to invoke another's responsibility via judicial dispute resolution is 'evolving'.²⁷³ This is evinced by the number of instances in which 'states other than an injured state' invoked another's responsibility and the support that these cases received from other states of different political, economic, and legal systems. For instance, the Gambia's institution of the *Application of the Genocide Convention* was supported by members of the OIC,²⁷⁴ and later by Canada, Denmark, France, Germany, and the UK.²⁷⁵ The same is true for South Africa's commencement of the *Application of the Genocide Convention in Gaza* which was welcomed by members of the OIC, Arab League, and several states.²⁷⁶

Nonetheless, this observation must be tempered. First, it must be noted that the Court's rulings were limited to duties owed *erga omnes partes contractes*. Whether this may be extended to duties owed *erga omnes* remains to be seen. Of course, as discussed in *Chapter 2*, there is arguably no qualitative distinction between duties owed *erga omnes* and *erga omnes partes*. Norms that impose duties owed *erga omnes* bind every state while those that impose duties owed *erga omnes partes* apply only to some.²⁷⁷ Thus, the competence of 'states other than an injured state' may be extended to duties owed *erga omnes*. However, the Court has left this as a matter for future determination.²⁷⁸

Second, these cases were not without hesitation and opposition from states. In *Obligation to Prosecute or Extradite*, Belgium did not merely rely on the capacity of a 'state other than an

²⁷¹ *Application of the Genocide Convention in Gaza* [2024] (n 3), 12.

²⁷² 'Application Instituting Proceedings', *Proceedings between Nicaragua & Germany* (n 255), 10, 31, 36.

²⁷³ *Application of the Genocide Convention in Gaza* [2024] (n 3) (Xue, declaration), 1–2

²⁷⁴ Organisation of Islamic Cooperation, 'Final Communiqué: 14th Islamic Conference' (n 205), 11.

²⁷⁵ See 'Joint Declaration of Intervention', *Application of the Genocide Convention* (n 206), 2; 'Declaration of Intervention of Maldives', *Application of the Genocide Convention* (n 206), 4.

²⁷⁶ —, 'OIC Welcomes South Africa's International Court of Justice Suit against Israel Over Genocide' (n 250); —, 'League of Arab States endorses South Africa's legal action against Israel' (n 250); —, 'World Court to hear Genocide Case Against Israel' (n 249); Smith, 'South Africa's genocide case against Israel has "global support"' (n 249).

²⁷⁷ Ruys Tom, 'Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?' (2021) 20 *Chinese Journal of International Law* 457, 463; Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1, 14; Crawford James, *International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002), 277–8; Voefray Francois, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 225

²⁷⁸ Urs, 'Question of Standing before the ICJ' (n 277), 10.

injured state'. Rather, it stressed that it is an 'injured state' which was 'affected by the breach in a way which distinguishes it from [...] other states to which the [duty] is owed'.²⁷⁹ In the *Application of the Genocide Convention*, Myanmar opposed the Gambia's standing arguing that 'even if the Gambia has an interest in Myanmar's compliance with [duties owed] *erga omnes partes* [contractes] under [the Genocide] Convention', it does not follow 'that the Gambia also has standing to bring a case before the Court in respect of a claimed breach by Myanmar, without being specially affected'.²⁸⁰ In the *Application of the Torture Convention*, Syria simply chose to boycott the proceedings on provisional measures.²⁸¹ As for the *Application of the Genocide Convention in Gaza*, it remains to be seen if Israel, which 'did not raise the did not challenge' South Africa's competence,²⁸² will raise the issue as a preliminary objection. As for the *Proceedings between Nicaragua and Germany*, Germany is yet to respond to Nicaragua's claim of competence to invoke its responsibility.

Finally, the ICJ's rulings in these cases also attracted criticisms from the Court's members.²⁸³ In *Obligation to Prosecute and Extradite*, Judge Xue stressed that even if the Torture Convention's parties possessed a 'common interest in [the duties'] observance', the fact that a 'state is a party to the Convention does not [*per se*] give that state [competence] to bring [the] case'. For Judge Xue, 'it is one thing to say that each [...] party has an interest in the compliance with these [duties]'.²⁸⁴ Yet, 'it is another that every [...] party has [the prerogative] to bring a claim against another [...] for the breach of such [duties]'.²⁸⁵ Similarly, Judge *ad hoc* Sur criticised the Court's reliance on the 2001 Draft Articles stating that 'it is far from accepted that these express [...] customary law'.²⁸⁶ Judge Skotnikov shared this view noting that the 'entitlement of each [...] party to the [Torture Convention] to make a claim concerning [...] an alleged breach by another [...] party' does not 'seem to be founded in law, be it conventional or customary'.²⁸⁷ In the grant of provisional measures in the *Application of the Genocide*

²⁷⁹ 'Memorial of Belgium', *Obligation to Prosecute or Extradite* (n 20), 79; 'Verbatim Record 2012/3', *Obligation to Prosecute or Extradite* (n 25), 45; 'Verbatim Record 2012/6', *Obligation to Prosecute or Extradite* (n 25), 48.

²⁸⁰ 'Verbatim Record 2019/19', *Application of the Genocide Convention* (n 192), 53. See 'Preliminary Objections of Myanmar', *Application of the Genocide Convention* (n 209), 68, 71, 73.

²⁸¹ *Application of the Torture Convention* [2023] (n 144), 6.

²⁸² *Application of the Genocide Convention in Gaza* [2024] (n 3), 12.

²⁸³ See also *Nuclear Tests* (Australia v France) (Judgment) [1974] ICJ 253 (de Castro, dissenting), 387; *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Preliminary Objections) [1996] ICJ 595 (Oda, declaration), 626.

²⁸⁴ *Obligation to Prosecute or Extradite* [2012] (n 8) (Xue, dissenting), 575.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid* (Sur, dissenting), 614 ('And the adoption of a convention codifying the international responsibility of states has never been seriously envisaged, due to a lack of agreement on the subject').

²⁸⁷ *Ibid* (Skotnikov, dissenting), 484–5.

Convention, Judge Xue argued that ‘the *raison d’être* of the Genocide Convention [...] does not [*per se*] afford each [...] party [...] standing before the Court’.²⁸⁸ She repeated this view in her dissenting opinion in the preliminary objections decision stating that the basis of the Court’s grant of admissibility, based on the ‘common interest in the compliance’ with the duties under the Convention ‘does not seem consistent’ with state practice and *opinio juris*.²⁸⁹ In the decision on provisional measures in the *Application of the Torture Convention*, Judge Xue again argued that the competence of ‘states other than an injured state’ to invoke another’s responsibility ‘is determined by the intention of the parties at the time when the Convention was negotiated and concluded’.²⁹⁰

B. Enforcement through Unilateral Measures

As to countermeasures by ‘states other than an injured state’ the survey above suggests that contrary to the claim of some scholars,²⁹¹ this competence, as to norms safeguarding human rights, is yet to crystallise into a customary rule. Its status remains as it was when the ILC adopted the 2001 Draft Articles: limited and inconsistent practice and lacks evidence of *opinio juris*.

First, the practice remained neither widespread nor representative. Since 2001, only in two instances did non-Western states levy unilateral measures that are countermeasures to implement duties imposed by norms safeguarding human rights. These instances include: the torture and other human rights violations in Syria under Al-Assad (2011–) in which the Arab League and Turkey froze the Syrian government’s assets;²⁹² and the torture and other human rights violations in Venezuela under Maduro (2014–) in which the Lima Group imposed restrictions on financial transactions in Venezuela.²⁹³ Thus, even after 2001, only a minority have adopted the practice of imposing countermeasures to enforce duties imposed by some human rights norms. The practice is limited to a group of states that do not include states of ‘different political, economic, and legal systems’.²⁹⁴

²⁸⁸ *Application of the Genocide Convention* [2019] (n 208) (Xue, dissenting), ¶6.

²⁸⁹ *Application of the Genocide Convention* [2022] (n 210) (Xue, dissenting), 7. Note that Judge Xue further distinguishes The Gambia’s competence to invoke in the case with that of Belgium in *Obligation to Prosecute and Extradite* suggesting that Belgium was a ‘specially affected’ state. Thus, the ‘Court’s pronouncement on the obligations *erga omnes partes* cannot be taken as a legal basis for the Gambia’s competence in the case before the Court’. Compare *Application of the Genocide Convention in Gaza* [2024] (n 3) (Xue, declaration), 1–2.

²⁹⁰ *Application of the Torture Convention* [2023] (n 144), 1

²⁹¹ See Dawidowicz, *Third Party Countermeasures* (n 4), 252, 266; Tams, *Enforcing Obligations Erga Omnes* (n 4), 250, 390–1; Proukaki, *Problem of Enforcement* (n 4), 207.

²⁹² League of Arab States, ‘Res 7442’ (n 132); — —, ‘Turkey imposes Sanctions on Syria’ (n 135)

²⁹³ Ministerio de Relaciones Exteriores de Peru, ‘Declaración del Grupo de Lima’ (n 164).

²⁹⁴ *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (Judgment) [1969] ICJ 3 (Lachs, dissenting), 229.

Again, the point made in the previous chapters on the conduct of ‘major’ or ‘leading’ states is worth stressing. It is counterproductive to limit the analysis to economically powerful states, mostly Western ones, deemed to have the capacity to levy unilateral measures. Doing so risks a ‘hegemonical approach to international relations’ with ‘certain states proclaiming themselves to be the sole representatives of the ‘international community’”.²⁹⁵ Crucially, it neglects that in some instances, other states have supported the imposition of collective measures against wrongful states.²⁹⁶ Case in point, the UN sanctions against Libya for torture and other human rights violations (2011).

Second, state practice between 2001 and 2023 has been neither consistent nor uniform. There remains too much discrepancy and inconsistency suggesting that the competence of ‘states other than an injured state’ to enforce the wrongful state’s responsibility through countermeasures has not become customary.²⁹⁷ Comparable situations did not result in similar conduct. Several states levied unilateral measures in response to the torture in Belarus (2004–), Libya (2011), Syria, (2011–), and Venezuela (2014–). Yet, none did for the torture committed by the US and its allies in its ‘War on Terror’ (2001–). Similarly, some imposed measures against Myanmar for racial discrimination and genocide against the Rohingya (2016–). Yet, no measures were levied against Israel for the genocide against the Palestinians in Gaza (2023–). Again, the discernible pattern is that states, especially Western ones, tend not to assert the competence of a ‘state other than an injured state’ when the violators are their allies, or when the wrongful states serve their ‘strategic interests’.²⁹⁸

Finally, there is still a lack of a broad acknowledgement of the practice as law. Some

²⁹⁵ Corten Olivier, ‘Controversies Over the Customary Prohibition on the Use of Force: Methodological Debate’ (2006) 16(5) *European Journal of International Law* 803, 811, 819–20 citing Byers Michael & Chesterman Simon, ‘Changing the Rules about Rules? Unilateral Intervention & the Future of International Law’ in Holzgrefe J & Keohane R (eds), *Humanitarian Intervention: Ethical, Legal, & Political Dilemmas* (Cambridge University Press 2003), 194. See Corten Olivier, *Law Against War: Prohibition on the Use of Force in Contemporary International Law* (Hart 2010), 24; Dubuisson François, ‘La problématique de la légalité de l’opération “Force alliée” contre la Yougoslavie’ in Corten Olivier & Delcourt B (eds), *Droit, légitimation et politique extérieure: l’Europe et la guerre du Kosovo* (Bruylant 2001), 179; Lagerwall Anne, ‘Kosovo, Afghanistan, Irak: le retour des guerres d’agression’ in Corten Olivier & Delcourt B (eds), *Les guerres anti terroristes* (Contradictions 2004), 95–7; Subedi Surya, ‘Status of Unilateral Sanctions in International Law’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 39–40.

²⁹⁶ See Hofer Alexandra, ‘Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’ (2017) 16 *Chinese Journal of International Law* 1, 17, 39.

²⁹⁷ See *Asylum* (Colombia v Peru) (Judgment) [1950] ICJ 266, 277; *SS Lotus* (France v Turkey) (Judgment) [1927] PCIJ Ser A No 10, 21; *North Sea Continental Shelf* [1969] (n 294), 45.

²⁹⁸ Brownlie Ian, ‘UN Charter & the Use of Force, 1945–1985’ in Cassese Antonio (ed), *Current Legal Regulation of the Use of Force* (Nijhoff 1986), 500; Tomaševski, *Responding to HR Violations: 1946–99* (n 7), 369. See Hofer, ‘Adoption & Contestation of Sanctions’ (n 262), 447

Western states—the US, EU member states, UK, Australia, and Canada, along with their allies, have asserted the prerogative of ‘states other than an injured state’ to unilaterally impose unilateral measures against wrongful states. The US claimed that these allow states to ‘respond [...] to acts that [...] are offensive to international norms’,²⁹⁹ especially those that protect ‘human rights, democracy, and the rule of law’.³⁰⁰ Likewise, the EU stated that it will impose unilateral ‘measures to address human rights violations and abuses worldwide’.³⁰¹ It further claimed that these ‘measures [are] admissible in certain circumstances’,³⁰² and ‘may be used to seek to prevent [or respond] to ‘serious [human rights] violations’.³⁰³ The same is true for the UK which stressed the need for tools to allow it to impose unilateral measures ‘in coordination with [its] allies’;³⁰⁴ Australia which stated that it will ‘penalise those responsible for situations that give rise to international concern’ and ‘participate in concerted [...] action involving [...] like-minded countries’;³⁰⁵ and Canada which declared that it will adopt unilateral measures ‘alongside its [...] partners [...] to defend its values and [...] play a leadership role in response to international crises’.³⁰⁶ Some also asserted this competence in explaining their opposition to GA resolutions that broadly condemned unilateral measures,³⁰⁷ and in their responses to the Secretary-

²⁹⁹ UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (16 October 2002) UN Doc A/57/PV.31, 12; UNGA, ‘Verbatim Record, 60th Session, 68th Meeting’ (22 December 2005) UN Doc A/60/PV.68, 8.

³⁰⁰ UNGA, ‘Verbatim Record, 62nd Session, 78th Meeting’ (19 December 2007) UN Doc A/62/PV.78, 12; UNGA, Third Committee, ‘Summary Record of the 64th Session, 42nd Meeting’ (12 November 2009) UN Doc A/C.3/64/SR.42, 8; UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (2011) (n 149), 3–4.

³⁰¹ Council of the EU, ‘Council Decision (CFSP) 2020/1999’ (n 262).

³⁰² UNGA, Second Committee, ‘Summary Record of the 68th Session, 28th Meeting’ (16 November 2013) UN Doc A/C.2/68/SR.28, 3; UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (2015) (n 140), 4.

³⁰³ UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (9 August 2017) UN Doc A/72/307, 9; UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (31 July 2019) UN Doc A/74/264, 20; UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (30 August 2021) UN Doc A/76/310, 17, 18.

³⁰⁴ Cm 9403, *Consultation on the UK’s Legal Framework for Imposing & Implementing Sanctions* (2017) (UK), 7.

³⁰⁵ No 28, 2011, *Autonomous Sanctions Act* (2011) (AUS), Explanatory Memorandum.

³⁰⁶ Canada Ministry of Foreign Affairs, ‘Government Response to the Seventh Report of the Standing Committee on Foreign Affairs and International Developmental’ (17 July 2017), 2.

³⁰⁷ See UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 299), 12 (US), 13 (Australia); UNGA, ‘Verbatim Record, 60th Session, 68th Meeting’ (2002) (n 299), 8 (US); UNGA, Second Committee, ‘Summary Record of the 60th Session, 33rd Meeting’ (2 December 2005) UN Doc A/C.2/60/SR.33, (UK on behalf of the EU); UNGA, ‘Verbatim Record, 62nd Session, 78th Meeting’ (2007) (n 299), 11 (US); UNGA, Second Committee, ‘Summary Record of the 62nd Session, 28th Meeting’ (16 November 2007) UN Doc A/C.2/62/SR.28, 5 (Portugal on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 64th Session, 41st Meeting’ (9 December 2009) UN Doc A/C.2/64/SR.41, 4 (Sweden on behalf of the EU); UNGA, Third Committee, ‘Summary Record of the 64th Session, 42nd Meeting’ (2009) (n 300), 8 (US); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (2011) (n 140), 3 (US), 5 (Poland on behalf of

General's requests for comments on unilateral measures.³⁰⁸ Finally, some have also enacted specific laws for the imposition of these measures: Australia has its 2011 Autonomous Sanctions Act that allows it to impose measures in response to 'repression of human rights or democratic freedoms';³⁰⁹ the EU, under TEU Article 29 and Article 215 of the Treaty of the Functioning of the European Union ('TFEU') may also do so through its Common Foreign and Security Policy;³¹⁰ and the UK has its 2018 Sanctions and Money Laundering Act that permits it impose measures 'to promote compliance with [...] human rights'.³¹¹

Again, other states do not share this view. Indeed, some condemned the specific instances of imposition of unilateral measures to enforce duties imposed by some norms on human rights. Belarus, with the NAM's support, protested the measures imposed against it by the EU, the US, and Canada.³¹² Syria did the same and was supported by China, Iran, Niger, and South Africa.³¹³ Another example is Venezuela which, along with the CELAC and the G77, objected to the measures imposed by Western states and the Lima Group.³¹⁴ Crucially, while states did not

the EU); UNGA, Third Committee, 'Summary Record of the 66th Session, 44th Meeting' (15 November 2011) UN Doc A/C.3/66/SR.44, 9 (US); UNGA, Third Committee, 'Summary Record of the 67th Session, 44th Meeting' (26 November 2012) UN Doc A/C.3/67/SR.44, 2 (US); UNGA, Second Committee, 'Summary Record of the 68th Session, 28th Meeting' (2013) (n 302), 3 (Lithuania on behalf of the EU); UNGA, Third Committee, 'Summary Record of the 68th Session, 49th Meeting' (21 November 2013) UN Doc A/C.3/68/SR.49, 9 (US); UNGA, Third Committee, 'Summary Record of the 69th Session, 52nd Meeting' (24 November 2014) UN Doc A/C.3/69/SR.52, 6 (US); UNGA, Second Committee, 'Verbatim Record, 70th Session, 31st Meeting' (2015) (n 140), 4 (Luxembourg on behalf of the EU); UNGA, Second Committee, 'Verbatim Record, 70th Session, 52nd Meeting' (20 November 2015) UN Doc A/C.2/70/SR.52, 5 (US).

³⁰⁸ HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 August 2010) UN Doc A/HRC/15/43, 5 (Slovakia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (14 July 2011) UN Doc A/66/138, 10 (Malta); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 303), 9 (EU); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 303), 20 (EU).

³⁰⁹ *Autonomous Sanctions Act* (AUS), Explanatory Memorandum.

³¹⁰ *Treaty of the European Union (as amended)* (adopted 13 December 2007, entered into force 1 December 2009) C326/15, art 29; *Treaty on the Functioning of the European Union (as amended)* (adopted 1 December 2009, entered into force 1 October 2010) C326/141, art 215; Council of the EC, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' (7 June 2004) Doc 10198/1/04; Council of the EU, 'Guidelines on Implementation & Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU CFSP' (15 June 2012) Doc 15114/05.

³¹¹ 2018 c 13, *Sanctions and Anti-Money Laundering Act* (2018) (UK), §1(2).

³¹² UNSC, 'Letter from the Permanent Representative of Cuba (on behalf of NAM)' (2008) (n 83); UNSC, 'Letter from the Permanent Representative of Belarus' (2012) (n 82); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2011) (n 82); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (29 July 2012) UN Doc A/67/181, 3–4; UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2013) (n 59), 3.

³¹³ UNSC, 'Letter from the SC President' (2020) (n 141), 11, 17, 19, 27.

³¹⁴ Hofer, 'Adoption & Contestation of Sanctions' (n 262), 464, 467. See UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 312), 11; UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2013) (n 59), 13.

protest every imposition of unilateral measures including countermeasures,³¹⁵ many condemned these measures in GA resolutions, declarations of institutional arrangements, and individual statements. These have previously been noted but are nevertheless worth repeating. First, states continued to adopt resolutions that broadly condemned the coercive nature of unilateral measures,³¹⁶ called upon the states to adopt ‘measures to eliminate their use against developing countries’, and criticised these measures for not being ‘authorised by the [UN’s] relevant organs.’³¹⁷ They have also continued to adopt resolutions that rejected unilateral measures, such as those with ‘extra-territorial effects’,³¹⁸ due to their ‘negative effects on human rights’.³¹⁹

³¹⁵ Note Henry Etienne, ‘Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law’ (2017) 18 *Melbourne Journal of International Law* 1, 17, 19.

³¹⁶ See *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 56/179 UNGA (21 December 2001) UN Doc A/RES/56/179; Res 58/198 UNGA (23 December 2003) UN Doc A/RES/58/198; Res 60/185 UNGA (22 December 2005) UN Doc A/RES/60/185; Res 62/183 UNGA (19 December 2007) UN Doc A/RES/62/183; Res 64/189 UNGA (21 December 2009) UN Doc A/RES/64/189; Res 66/186 UNGA (22 December 2011) UN Doc A/RES/66/186; Res 68/200 UNGA (20 December 2013) UN Doc A/RES/68/200; Res 70/185 UNGA (22 December 2015) UN Doc A/RES/70/185; Res 72/201 UNGA (20 December 2017) UN Doc A/RES/72/201; Res 74/200 UNGA (19 December 2019) UN Doc A/RES/74/200; Res 76/191 UNGA (17 December 2021) UN Doc A/RES/76/191. See also *Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political & Economic Compulsion* Res 57/5 UNGA (16 September 2002) UN Doc A/RES/57/5. See also UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 299), 3 (Iran), 5 (Malaysia); UNGA, Second Committee, ‘Summary Record of the 60th Session, 17th Meeting’ (31 October 2005) UN Doc A/C.2/60/SR.17, 11 (Myanmar); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (2011) (n 140), 4 (Syria); UNGA, Third Committee, ‘Summary Record of the 71st Session, 23rd Meeting’ (31 October 2013) UN Doc A/C.3/71/SR.23, 6 (Iran); UNGA, ‘Verbatim Record, 70th Session, 81st Meeting’ (22 Dec 2015) UN Doc A/70/PV.81, 6 (Belarus); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (2015) (n 140), 5 (Russia).

³¹⁷ See also UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 299), 6 (Egypt); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (2011) (n 140), 3 (Mexico); UNSC, ‘Verbatim Record, 7323rd Meeting’ (25 November 2014) UN Doc S/PV.7323, 14.

³¹⁸ See *Human Rights & Unilateral Coercive Measures* Res 56/148 UNGA (19 December 2001) UN Doc A/RES/56/148; Res 57/222 UNGA (18 December 2002) UN Doc A/RES/57/222; Res 58/171 UNGA (22 December 2003) UN Doc A/RES/58/171; Res 59/188 UNGA (20 December 2004) UN Doc A/RES/59/188; Res 60/155 UNGA (16 December 2005) UN Doc A/RES/60/155; Res 61/170 UNGA (19 December 2006) UN Doc A/RES/61/170; Res 62/162 UNGA (18 December 2007) UN Doc A/RES/62/162; Res 63/179 UNGA (18 December 2008) UN Doc A/RES/63/179; Res 65/217 UNGA (21 December 2010) UN Doc A/RES/65/217; Res 66/165 UNGA (19 December 2011) UN Doc A/RES/66/165; Res 67/170 UNGA (20 December 2012) UN Doc A/RES/67/170; Res 68/162 UNGA (18 December 2013) UN Doc A/RES/68/162; Res 69/180 UNGA (18 December 2014) UN Doc A/RES/69/180; Res 70/151 UNGA (17 December 2015) UN Doc A/RES/70/151; Res 71/193 UNGA (18 December 2016) UN Doc A/RES/71/193; Res 72/168 UNGA (19 December 2017) UN Doc A/RES/72/168; Res 73/167 UNGA (18 December 2018) UN Doc A/RES/73/167; Res 74/154 UNGA (18 December 2019) UN Doc A/RES/74/154; Res 75/181 UNGA (16 December 2020) UN Doc A/RES/75/181; Res 76/161 UNGA (15 December 2021) UN Doc A/RES/76/161; Res 77/214 UNGA (15 December 2022) UN Doc A/RES/77/214. See also UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 299), 2 (Libya), 3 (Iran), 13 (Australia), 13 (Canada).

³¹⁹ See also UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 299), 2 (Libya), 3 (Iran), 9 (Syria), 10 (Iraq); UNGA, Second Committee, ‘Summary Record of the 60th Session, 17th Meeting’ (2005) (n 316), 5 (Jamaica); UNGA, Second Committee, ‘Summary Record of the 68th Session, 20th Meeting’ (24 October 2013) UN Doc A/C.2/68/SR.20, 9 (Syria), 12 (Brazil); UNGA, Third Committee, ‘Summary Record of the 68th

States have also rejected unilateral measures outside the UN. The NAM has condemned their coercive nature, extraterritorial effects, and negative impact on human rights.³²⁰ It also rejected ‘unilateralism’,³²¹ and stressed the need for ‘multilateral decision-making processes’.³²² It further declared that it would assist states that suffered harm due to these measures.³²³ Likewise, the G77 has claimed that these measures ‘undermine the [Charter’s] principles’.³²⁴ The Group of Arab States,³²⁵ AU,³²⁶ and BRICS,³²⁷ have also made similar statements.

States’ individual statements are also significant. As noted in *Chapter 5B*, Russia, in 2013,

Session, 35th Meeting’ (31 October 2013) UN Doc A/C.3/68/SR.35, 11 (Iran); UNGA, Third Committee, ‘Summary Record of the 71st Session, 23rd Meeting’ (2013) (n 316), 6 (Iran); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (2015) (n 140), 5 (Russia), 5 (Syria).

³²⁰ Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (16 July 2009) NAM2009/FD/Doc.1, 9, 91; Conference of Heads of the NAM, ‘Final Document of the 14th Summit’ (16 September 2006) UN Doc A/61/472-S/2006/780, 234.7; Conference of Heads of the NAM, ‘Final Document of the 16th Summit’ (31 August 2012) NAM2012/Doc.1/Rev.2, 133; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (18 September 2016) NAM/2016/CoB/DOC.1/Corr.1, 17, 145

³²¹ Conference of Heads of the NAM, ‘Final document of the 14th Summit’ (2006) (n 320), 19.5

³²² Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (n 320), 11; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (n 32-), 17, 145.

³²³ Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (n 320), 5; Conference of Heads of the NAM, ‘Final Document of the 16th Summit’ (n 320), 7; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (n 320), 14

³²⁴ G77 Foreign Ministers, ‘Declaration Adopted at the 26th Meeting’ (19 September 2002), ¶42; G77 & China Foreign Ministers, ‘Declaration adopted at the 27th Annual Meeting’ (25 September 2003), ¶36; G77 & China Foreign Ministers, ‘Declaration adopted at the 28th Annual Meeting’ (30 September 2004), ¶55; G77 & China Foreign Ministers, ‘Declaration adopted at the 30th Annual Meeting’ (22 September 2006), ¶33; G77 & China Foreign Ministers, ‘Declaration adopted at the 31st Annual Meeting’ (27 September 2007), ¶19; G77 & China Foreign Ministers, ‘Declaration adopted at the 32nd Annual Meeting’ (26 September 2008), ¶21; G77 & China Foreign Ministers, ‘Declaration adopted at the 33rd Annual Meeting’ (25 September 2009), ¶39; G77 & China Foreign Ministers, ‘Declaration adopted at the 34th Annual Meeting’ (28 September 2010), ¶69; G77 & China Foreign Ministers, ‘Declaration adopted at the 35th Annual Meeting’ (23 September 2011), ¶39; G77 & China Foreign Ministers, ‘Declaration adopted at the 36th Annual Meeting’ (28 September 2012), ¶36; G77 & China Foreign Ministers, ‘Declaration adopted at the 37th Annual Meeting’ (26 September 2013), ¶52; G77 & China Foreign Ministers, ‘Declaration adopted at the 38th Annual Meeting’ (26 September 2014), ¶47; G77 & China Foreign Ministers, ‘Declaration adopted at the 39th Annual Meeting’ (24 September 2015), ¶106; G77 & China Foreign Ministers, ‘Declaration adopted at the 40th Annual Meeting’ (23 September 2016), ¶¶47, 151; G77 & China Foreign Ministers, ‘Declaration adopted at the 41st Annual Meeting’ (22 September 2017), ¶¶178, 202; G77 & China Foreign Ministers, ‘Declaration adopted at the 42nd Annual Meeting’ (27 September 2018), ¶¶203–4; G77 & China Foreign Ministers, ‘Declaration adopted at the 43rd Annual Meeting’ (27 September 2019), ¶¶228–9.

³²⁵ See *Human Rights & Unilateral Coercive Measures* Res 24/14 HRC (24 Sept 2013) UN Doc A/HRC/24/L.5/Rev.1.

³²⁶ AU Assembly, ‘Sanctions & Unilateral Coercive Measures’ (Feb 2020) Assembly/AU/Res.1 (XXXIII).

³²⁷ See BRICS, ‘5th Summit: eThekweni Declaration’ (27 March 2013); BRICS, ‘6th Summit: Fortaleza Declaration’ (15 July 2014); BRICS, ‘7th Summit: Ufa Declaration’ (9 July 2015); BRICS, ‘8th Summit: Goa Declaration’ (16 October 2016); BRICS, ‘9th Summit: Xiamen Declaration’ (12 September 2017).

claimed that ‘measures outside the [SC’s framework]’ threaten ‘peace and stability’.³²⁸ In 2015, it also asserted that these measures ‘circumvent the [UN Charter’s] principles’.³²⁹ For its part, China urged states to ‘reject unilateralism’.³³⁰ In 2016, Russia and China criticised the ‘imposition by states of their will on others’ and deemed ‘unilateral measures’ unlawful.³³¹ Furthermore, Russia, India, and China also asserted that these measures ‘undermine the [SC’s] prerogatives’, ‘reduce the effectiveness of its sanctions regime’, and ‘[negatively] affect the [targeted] states’.³³² For similar reasons—coercion and intervention,³³³ unlawful exercise of

³²⁸ Ministry of Foreign Affairs of Russia, 'Concept of the Foreign Policy of the Russian Federation' (18 February 2013) <https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICk6BZ29>.

³²⁹ UNGA, 'Verbatim Record, 70th Session, 13th Meeting' (28 September 2015) UN Doc A/70/PV.13, 26.

³³⁰ Ibid, 19.

³³¹ Ministry of Foreign Affairs of Russia, 'Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law' (25 June 2016) <https://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYIKr/content/id/2331698>.

³³² Ministry of External Affairs of India, 'Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People's Republic of China' (18 April 2016) <https://mea.gov.in/bilateral-documents.htm?dtl/26628/Joint_Communique_of_the_14th_Meeting_of_the_Foreign_Ministers_of_the_Russian_Federation_the_Republic_of_India_and_the_Peoples_Republic_of_China>.

³³³ See e.g. UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (5 August 2002) UN Doc A/57/179/Add.1, 2 (Ecuador); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (15 October 2001) UN Doc A/56/473, 2 (Belarus), 6 (Malaysia), 8 (Yemen); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (11 September 2003) UN Doc A/58/301, 5 (Cuba), 6 (Iran), 13 (Thailand), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (12 August 2005) UN Doc A/60/226, 4 (Bulgaria), 7 (Guatemala), 7 (Honduras), 7 (Cuba), 8 (Jamaica), 12 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (6 August 2007) UN Doc A/62/210, 5 (Belarus), 5 (Benin), 6 (Cuba), 8 (Ukraine); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 308), 6 (Brunei), 6 (Colombia), 7 (Cuba), 7 (Egypt), 11 (Myanmar), 12 (Oman), 14 (Ukraine); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 140), 9 (Lao), 10 (Philippines), 10 (Nicaragua), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (16 July 2015) UN Doc A/70/152, 6 (Brunei), 6 (Cambodia), 7 (Central African Republic); 7 (Congo), 7 (Cuba), 10 (Ecuador), 11 (Madagascar), 12 (Sri Lanka), 15 (Tunisia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 303), 2 (Iran), 6 (Cuba), 10 (Guatemala), 11 (Russia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 303), 5 (Burundi), 5 (Cambodia), 6 (Cuba), 10 (Ghana), 11 (Nigeria), 12 (Russia), 13 (Sudan); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2021) (n 303), 7 (Iran), 13 (Russia), 15 (Syria). See also UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (20 July 2001) UN Doc A/56/207, 3 (Cuba); UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (7 December 2001) UN Doc E/CN.4/2002/51, 3 (Cuba); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (11 October 2005) UN Doc A/60/305, 4 (Iraq), 4 (Georgia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (17 August 2006) UN Doc A/61/287, 3 (Libya); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (13 August 2007) UN Doc A/HRC/6/2, 2 (Georgia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (3 August 2009) UN Doc A/64/219, 2 (Algeria), 3 (Angola), 4 (Jamaica); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 308), 4 (Jamaica); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 312), 6 (Cuba), 10 (Jamaica); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (27 June 2014) UN Doc A/69/97, 2 (Colombia).

extra-territorial jurisdiction,³³⁴ negative effects on human rights,³³⁵ and unilateralism,³³⁶ other

³³⁴ See e.g. UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 333), 3 (Cuba), 7 (Myanmar), 7 (Malaysia); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 333), 1 (Iran), 2 (Argentina), 2 (Ecuador); 2 (Japan: 'Unilateral economic measures that are taken as the result of extraterritorial application of domestic laws are contrary to international law'); 3 (Mali), 3 (Namibia), 3 (Qatar), 6 (Libya); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 333), 12 (Libya), 14 (Venezuela); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 333), 8 (Jamaica); 8 (Kazakhstan); 12 (Uruguay); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 333), 5 (Benin), 6 (Cuba), 7 (Myanmar), 7 (Qatar), 8 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 308), 10 (Malaysia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 140), 16 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 333), 15 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 303), 5 (Belarus); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 303), 20 (EU: 'condemns the application of unilateral restrictive measures that have extraterritorial effects contrary to international law'). See also HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 308), 2 (Algeria), 3 (Argentina); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2011) (n 82), 3 (Argentina), 8 (Cuba), 11 (Dominican Republic); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 312), 11 (Mexico).

³³⁵ See e.g. UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (2001) (n 333), 4 (Guatemala); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2001) (n 333), 2 (Cuba), 3 (Jamaica), 3 (North Korea), 5 (Libya); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 333), 2 (Iraq), 2 (Jamaica), 2 (Qatar); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 October 2004) UN Doc A/59/436, 2 (Cuba), 3 (Mexico); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2005) (n 333), 3 (Mexico), 3 (Cuba), 4 (Lebanon); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2006) (n 333), 2 (Cuba), 4 (Trinidad & Tobago); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2007) (n 333), 2 (Colombia), 4 (Syria); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2009) (n 333), 2 (Algeria), 3 (Angola), 4 (Jamaica), 5 (Paraguay); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 308), 2 (Algeria), 3 (Belarus), 4 (Jamaica), 5 (Qatar), 6 (Russia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2011) (n 82), 3 (Argentina), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 11 (Ecuador), 13 (Guyana), 14 (Iraq), 14 (Kuwait); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 312), 3 (Andorra), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 8 (Iran), 10 (Kuwait), 12 (Syria), 13 (Trinidad & Tobago); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2014) (n 333), 3 (Iran), 4 (Lebanon), 5 (Mauritius). See also UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 333), 4 (Iraq), 6 (Libya), 7 (Malaysia), 8 (Saudi Arabia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 333), 4 (Argentina), 4 (Cuba); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 333), 7 (Iraq), 8 (Kazakhstan), 9 (Sudan); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 333), 5 (Colombia), 9 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 308), 7 (Cuba), 7 (Egypt), 9 (Guatemala), 9 (Lebanon), 11 (Mexico), 12 (Oman), 13 (Sudan), 15 (Vietnam); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 140), 5 (Brazil: 'disputes the interpretation that sanctions act as "countermeasures" to induce a state to end the infringement of certain norms [...] Even if this were the case, there should be acceptance of clear parameters of legality, such as proportionality, to provide guarantees that human rights will not be put at risk'), 6 (Burundi), 8 (Cuba), 9 (Iran), 11 (Senegal), 12 (Sudan), 14 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 333), 13 (Syria), 15 (Turkey), 16 (Venezuela), 18 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 303), 5 (Armenia), 8 (Cuba), 20 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 303), 5 (Burundi), 10 (Jordan), 12 (Russia), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2021) (n 303), 4 (Cuba), 10 (Iran), 14 (Syria).

³³⁶ See e.g. UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report'

states have also condemned unilateral measures in their responses to the Secretary-General's requests for comments. Moreover, some states have also explicitly stated that the imposition of unilateral measures contravenes international law even when the measures are used to implement human rights.³³⁷

Again, as discussed in the previous chapters, these declarations must not be construed as an 'unqualified proposition' that unilateral measures are unlawful.³³⁸ They must be nuanced 'precisely to understand' the measures condemned.³³⁹ Recalling the analysis in *Chapter 5A*, the measures states consider to be 'not in accordance with international law' are arguably measures

(2001) (n 333), 3 (Gambia); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 333), 3 (Mali); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 333), 4 (Costa Rica: 'only support[s] [measures] [...] within the framework of the [UN]'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 333), 9 (Senegal), 9 (Panama: 'measures [that] may be applied against developing countries [are] only when those measures [...] duly authorized by the [UN]'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 333), 7 (Egypt); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 308), 7 (Egypt: '[These measures] are in total contradiction of the principles of multilateralism'), 8 (Gabon: 'encourages multilateralism rather than unilateralism'), 10 (Mauritius: 'The multilateral process must not be undermined by unilateral measures'); 11 (Mexico: 'Sanctions can only emanate from the decisions or recommendations of the [SC], or the [GA]'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 140), 5 (Brazil: 'Sanctions [must be] conditioned upon a decision of the SC'), 9 (Montenegro), 11 (Qatar), 16 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 333), 12 (Paraguay); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 303), 11 (Lesotho); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 303), 11 (Russia: '[Unilateral restrictive measures] undermine trust between countries and the role of the United Nations as the sole legitimate arbitrator in such matters'); 13 (South Africa), 19 (Turkey: '[Issues] need collective action and responses with the participation of the international community as a whole'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2021) (n 303), 7 (Iran), 14 (South Africa: 'Measures should be undertaken in the multilateral framework'). *See also* HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 308), 4 (Burkina Faso), 4 (Costa Rica); 6 (Russia: 'it would continue advocating for a multilateral approach in international affairs'); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2011) (n 82), 7 (Burkina Faso: 'Multilateral frameworks are appropriate for the resolution of challenges in inter-state relations'); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 312), 11 (Mexico); 12 (Trinidad & Tobago).

³³⁷ *See* UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 333), 4 (Argentina: 'Their application does not contribute to the [...] protection of human rights.');

UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 312), 10 (Kuwait: 'There should be no politicization of issues relating to human rights'); UNGA, 'Verbatim Record, 67th Session, 19th Meeting' (1 October 2012) UN Doc A/67/PV.19, 23 (Eritrea: 'The noble aims of protecting human rights [...] are being selectively and cynically employed to justify [...] [the] imposition of sanctions'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 140), 6 ('Brazil: 'Disputes the interpretation that unilateral sanctions act as "countermeasures" to induce a state to end the infringement of certain norms of international law'); UNGA, Second Committee, 'Verbatim Record, 70th Session, 31st Meeting' (2015) (n 140), 5 (Syria: 'Certain delegations had attempted to justify the use of such measures on the pretext of [...] protecting human rights'); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 333), 15 ('Turkey does not agree with the imposition of unilateral economic measure').

³³⁸ Barber Rebecca, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70 *International & Comparative Law Quarterly* 343, 359.

³³⁹ *Ibid.*, 359.

that are not retorsions and are not countermeasures taken by the ‘injured state’. These include measures that involve breaches but whose wrongfulness cannot be precluded such as measures not imposed as a response to wrongful acts;³⁴⁰ not levied against the wrongful state but against third states,³⁴¹ or against individuals or entities;³⁴² or measures that go beyond the limits of countermeasures such as those that are not proportional;³⁴³ or breach human rights duties.³⁴⁴

More importantly, as stressed in the previous chapters, it would appear, as scholars like Hofer observe, that most states continue to require collective decisions for the imposition of enforcement measures,³⁴⁵ and thus prefer collective measures.³⁴⁶ This explains the repeated condemnation of unilateralism and the measures taken by the ‘minority of the powerful states’ purporting to act on the international community’s behalf.³⁴⁷ Thus, it seems that they still have not accepted the competence of ‘states other than an injured state’ to impose countermeasures and, in the absence of a positive rule that provides such competence, states deem that the imposing state’s breach of duty will not be precluded.

³⁴⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 130 citing *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 55; *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa (Naulilaa)* (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1027; *Responsibility of Germany arising out of acts committed after 31 July 1914* (Portugal v Germany) (Award) (1930) 2 RIAA 1056, 1056–7.

³⁴¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 130; Ruys Tom & Ryngaert Cedric, ‘Secondary Sanctions: A Weapon out of Control? Legality of, & European Responses to, US Secondary Sanctions’ (2020) *British Yearbook of International Law* 1, 4

³⁴² ILC, ‘Summary Records of the 52nd Session’ (2000) I YbILC 1, 266, 271; Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 84; Ruys, ‘Immunity, Inviolability, & Countermeasures’ (n 60), 705; Hofer Alexandra, ‘The “Curiouser & Curiouser” Legal Nature of Non-UN Sanctions: US Sanctions against Russia’ (2018) 23 *Journal of Conflict & Security Law* 76, 89.

³⁴³ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 134; *Naulilaa* (n 340), 1028; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 448.

³⁴⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 131–3; Dawidowicz, *Third Party Countermeasures* (n 4), 337.

³⁴⁵ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 296), 17. See e.g. UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2003) (n 333), 4 (Costa Rica); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2005) (n 333), 9 (Panama); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2011) (n 308), 7 (Egypt), 8 (Gabon), 10 (Mauritius), 11 (Mexico); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2013) (n 140), 5 (Brazil); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 303), 11 (Russia); 13 (South Africa), 19 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2021) (n 303), 7 (Iran), 14 (South Africa). See also HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2010) (n 308), 6 (Russia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2011) (n 82), 7 (Burkina Faso).

³⁴⁶ Hofer, ‘Adoption & Contestation of Sanctions’ (n 262), 447. See Henry, ‘Revisionist Claims of Custom’ (n 315), 17.

³⁴⁷ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 296), 39; Hofer, ‘Adoption & Contestation of Sanctions’ (n 262), 446 citing Jouannet Emmanuelle, ‘Universalism & Imperialism: True-False Paradox of International Law?’ (2007) 18 *European Journal of International Law* 379, 391–2.

CHAPTER CONCLUSION

This chapter analysed the state practice and *opinio juris* on the implementation of duties imposed by certain human rights norms after the 2001 Draft Articles' adoption. It observed that when it comes to the duties imposed by certain human rights norms, the state practice and *opinio juris* relating to 2001 Draft Article 48 may be 'evolving'.³⁴⁸ Between 2001 and 2023, 'states other than an injured state', in five instances, asserted the competence to invoke another's responsibility through judicial proceedings. Some of these instances of invocation were also supported by states of different political, economic, and legal systems. In contrast, the question left by 2001 Draft Article 54 remains unanswered. The enforcement by 'states other than an injured state' of human rights duties claimed to be owed *erga omnes* remained a practice by predominantly Western states. In fact, most states continued to argue against the legality of these measures. ■

³⁴⁸ *Application of the Genocide Convention in Gaza* [2024] (n 3) (Xue, declaration), 1–2

CHAPTER 7: PEOPLE’S RIGHT TO SELF-DETERMINATION (1970–2023)

Like the norms discussed in the previous chapters, the rule safeguarding a people’s right to self-determination is also one of international law’s fundamental rules.¹ The norm has two dimensions—external and internal.² ‘External self-determination’, borne out of the context of decolonisation,³ grants ‘peoples’ of Non-Self-Governing Territories (‘NSGT’) the right to ‘determine their political status’,⁴ and is associated with the ‘sovereignty and title to territory’.⁵ In contrast, ‘internal self-determination’, based on several agreements that have enjoyed a wide degree of state acceptance,⁶ focuses on a people’s relationship with their governments,⁷ including their right ‘to choose their political status within a state’,⁸ and to ‘meaningful political participation’.⁹

¹ *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) [2019] ICJ 95, 131.

² Koskeniemi Martti, 'National Self-Determination Today: Problems of Legal Theory & Practice' (1994) 43 *International & Comparative Law Quarterly* 241, 249; McCorquodale Robert, 'Self-Determination: A Human Rights Approach' (1994) 43 *International & Comparative Law Quarterly* 857, 863; Cassese Antonio, 'Political Self-Determination' in Cassese Antonio (ed), *UN Law/Fundamental Rights* (Sijthoff 1979), 474. *But note* Senaratne Kalana, 'Beyond the Internal/External Dichotomy of the Principle of Self-Determination' (2013) 43 *Hong Kong Law Journal* 463, 464 ('This “internal”/“external” dichotomy fails to capture the complexity of the principle of self-determination, historical origins, inherent fluidity, and indeterminacy’); Senaratne Kalana, 'Internal Self-Determination in International Law: A Critical Third-World Perspective' (2013) 3 *Asian Journal of International Law* 305, 322 ('External self-determination [guarantees] internal [...] and internal self-determination [ensures] that external [...] is further strengthened’).

³ *Chagos* [2019] (n 1), 131–3 citing *UN Charter* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 1(2), Chapter XI; *Declaration on the Granting of Independence to Colonial Countries & Peoples* Res 1514 (XV) UNGA (14 December 1960) UN Doc A/RES/1515(XV); *Declaration on the Principles of International Law concerning Friendly Relations & Cooperation among States* Res 2625 (XXV) UNGA (24 October 1970) A/RES/2625. Thornberry Patrick, 'Self-Determination, Minorities, Human Rights' (1989) 38 *International & Comparative Law Quarterly* 867, 874; Quane Helen, 'UN & the Evolving Right to Self-Determination' (1998) 47 *International & Comparative Law Quarterly* 537, 547; Senaratne, 'Beyond Internal/External Dichotomy' (n 2), 475.

⁴ Res 1514 (XV) (n 3); Quane, 'Evolving Right to Self-Determination' (n 3), 538; Crawford James, *Creation of States in International Law* (Oxford University Press 2006), 113.

⁵ Saul Matthew, 'Normative Status of Self-Determination in International Law: Formula for Uncertainty in the Scope & Content of the Right?' (2011) 11 *Human Rights Law Review* 609, 628 citing Drew Catriona, 'East Timor Story: International Law on Trial' (2001) 12 *European Journal of International Law* 651, 663. *Chagos* [2019] (n 1), 134.

⁶ Joseph Sarah & Castan Melissa, *International Covenant on Civil & Political Rights: Cases, Materials, & Commentary* (3rd edn, Oxford University Press 2013), 160 citing *International Covenant on Civil & Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1; *International Covenant on Economic, Social & Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1. Castellino Joshua, 'International Law & Self-Determination: Peoples, Indigenous Peoples, & Minorities' in Walter Christian, *et al.* (eds), *Self-Determination & Secession in International Law* (Oxford University Press 2014), 42.

⁷ Thornberry Patrick, 'Democratic or Internal Aspect of Self-Determination' in Tomuschat Christian (ed), *Modern Law of Self-Determination* (Nijhoff 1992), 101.

⁸ Rosas Alan, 'Internal Self-Determination' in Tomuschat Christian (ed), *Modern Law of Self-Determination* (Nijhoff 1992), 230; Cassese Antonio, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1996), 101. *See* McCorquodale, 'Self-Determination: Human Rights Approach' (n 2), 883–4;

⁹ Joseph & Castan, *ICCPR* (n 6), 160; Senaratne Kalana, 'Internal Self-Determination in International Law:

It must be stressed that the right to self-determination, being a people's right, is distinct from human rights examined in *Chapters 6A* and *6B*. Hence, why a separate chapter is dedicated to this norm. While human rights are granted to individuals,¹⁰ a people's right to self-determination is held by a 'people'.¹¹ It is not a right granted to individuals nor jointly exercised by individuals within a group.¹² Instead, a 'people' hold the right due to their status as a type of group and exercise it as a collective.¹³ While individual rights protect personal liberties and persons from state action,¹⁴ the collective right to self-determination enables a people to attain a 'full measure of self-government',¹⁵ or 'participate fully in [a state's] political, economic, and social process'.¹⁶ A 'people', in this regard, 'has no existence or interest that [may] be explicated as that of its members'.¹⁷

An overwhelming majority, including the ICJ, claim that the norm on a people's right to external self-determination imposes a duty owed *erga omnes*.¹⁸ Others also assert that the rule on internal self-determination imposes a duty owed *erga omnes partes*.¹⁹ As such, many claim that every state would have the capacity to demand the duties' observance.²⁰ This chapter

A Critical Third-World Perspective' (2013) 3 *Asian Journal of International Law* 305, 306; McCorquodale, 'Self-Determination: Human Rights Approach' (n 2), 863; Vladysla Lanovoy, 'Self-determination in International Law: Democratic Phenomenon or Abuse of Right?' (2015) 4 *Cambridge Journal of International & Comparative Law* 388, 393.

¹⁰ Peter Jones, 'Human Rights, Group Rights, & Peoples' Rights' (1999) 21 *Human Rights Quarterly* 80, 88. See Raz Joseph, *Morality of Freedom* (Oxford University Press 1988), 208.

¹¹ Peter, 'Human Rights, Group Rights, & Peoples' Rights' (n 10), 88; Brownlie Ian, 'Rights of Peoples in Modern International Law' (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 104, 105.

¹² Peter, 'Human Rights, Group Rights, & Peoples' Rights' (n 10), 88.

¹³ Crawford James, 'Rights of Peoples: "Peoples" or "Governments"?' (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 136, 138–9. Compare Morss John, 'Legal Relations of Collectives: Belated Insights from Hohfeld' (2009) 22 *Leiden Journal of International Law* 289, 299. See Salmon Stefan, 'Self-determination in the Case Law of the African Commission' (2017) 50 *Verfassung und Recht in Übersee* 217, 224.

¹⁴ Brownlie, 'Rights of Peoples' (n 11), 104.

¹⁵ Res 1514 (XV) (n 3); *Legal Consequences of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1970] ICJ 16, 31.

¹⁶ McCorquodale, 'Self-Determination: Human Rights Approach' (n 2), 859; Joseph & Castan, *ICCPR* (n 6), 160. See Saul Ben, Kinley David, & Mowbray Jacqueline, *International Covenant on Economic, Social & Cultural Rights: Commentary, Cases, & Materials* (Oxford University Press 2014), 14.

¹⁷ Peter, 'Human Rights, Group Rights, & Peoples' Rights' (n 10), 85. See Brownlie, 'Rights of Peoples' (n 11), 105 ('It is not the case that the rights of groups are taken care of in all respects by the protection of the rights of individuals').

¹⁸ See *Chagos* [2019] (n 1), 139. See also *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90, 102; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136, 199; ILC, 'Report on the Work of the 53rd Session' (2001) II(2) YbILC 20, 127.

¹⁹ See HRCComm, 'General Comment 31: Nature of the General Legal Obligation Imposed on States Parties' (2004) UN Doc C/21/Rev1/Add13, ¶2 ('The contractual dimension of the treaty involves any [party] being [bound] to every other [party] to comply with its undertakings').

²⁰ See e.g. ILC, 'Report on the Work of the 53rd Session' (2001) (n 18), 127.

examines this claim. It determines if states have recognised the competence of ‘states other than an injured state’ to implement the *duty to respect a people’s right to self-determination*.

Like the previous chapters, this chapter first examines the content of the relevant rules and maps out the duties considered owed *erga omnes* and *erga omnes partes*. Next, it analyses the state practice and *opinio juris* before and after the 2001 Draft Articles’ adoption related to the implementation of these duties. Finally, it observes that during this period, the state practice and *opinio juris* on the competence of ‘states other than an injured state’ to implement the duty to respect the right to self-determination diverged. Thus, it submits that as this norm, the rules on implementation by ‘states other than an injured state’ under the 2001 Draft Articles remain as ‘progressive measures’.²¹

I. SCOPE OF THE DUTIES OWED *ERGA OMNES* OR *ERGA OMNES PARTES*

As prefaced above, the right to self-determination has two dimensions—external and internal—which differ in their content, application, and manner of exercise.²² External self-determination pertains to the norm borne out of the context of decolonisation.²³ The right, as the ICJ observes, emerged as a legal guarantee of political independence to peoples of NSGTs and those subject to alien subjugation, domination, and exploitation.²⁴ It entitles peoples of NSGTs to determine their international status.²⁵ In turn, this may lead to their emergence as an independent state, free association with a state, or integration with another state.²⁶ In this sense, the right in its external dimension, as Cassese and Saul point out, is associated with sovereignty and title to territory.²⁷

²¹ Ibid, 23, 127.

²² Koskeniemi, ‘National Self-Determination Today’ (n 2), 249; Klabbers Jan, ‘Right to Be Taken Seriously: Self-Determination in International Law’ (2006) 28 *Human Rights Quarterly* 186, 188. See Joseph & Castan, *ICCPR* (n 6), 161 (‘A complex right’); Crawford James, ‘Right of Self-Determination in International Law’ in Alston Philip (ed), *People’s Rights* (Oxford University Press 2001), 10, 38.

²³ *Chagos* [2019] (n 1), 131–3 citing *UN Charter* (n 3), art 1(2), Chapter XI; Res 1514 (XV) (n 3); Res 2625 (XXV) (n 3). Senaratne, ‘Beyond Internal/External Dichotomy’ (n 2), 475; Crawford, *Creation of States* (n 4), 122.

²⁴ *Namibia* [1970] (n 15), 34; *Western Sahara* (Advisory Opinion) [1975] ICJ 12, 31; *East Timor* [1995] (n 18), 102; *Wall* [2004] (n 18), 171–2; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ 404, 436; *Chagos* [2019] (n 1), 132.

²⁵ Quane, ‘Evolving Right to Self-Determination’ (n 3), 538, 555 citing Higgins Rosalyn, *Problems & Process: International Law & How We Use It* (Clarendon 1995), 113; Crawford, *Creation of States* (n 4), 92; Sureda Rigo, *Evolution of the Right to Self-Determination* (Sijthoff 1973), 105. Petersen Carole, ‘Hong Kong’s Right to Autonomy & Self-Determination under International Law’ (2019) 49 *Hong Kong Law Journal* 883, 891.

²⁶ Res 1514 (XV) (n 3); *Principles in determining whether an obligation exists to transmit the information called for under Article 73(e)* Res 1541 (XV) UNGA (15 December 1960) UN Doc A/RES/1541(XV); Res 2625 (XXV) (n 3).

²⁷ Cassese, *Self-Determination of Peoples* (n 8), 71–2; Saul, ‘Normative Status of Self-Determination’ (n 5),

Whether the right to external self-determination extends beyond decolonisation remains to be seen.²⁸ Some like Joseph and Castan submit that peoples ‘under [...] neo-colonial domination’, those whose ‘human rights [are] [...] systematically abused’, and those who are prevented from the ‘meaningful exercise of the [internal] self-determination’ are entitled to external self-determination by way of ‘remedial secession’.²⁹ Yet, others, such as Lanovoy, Borgen, and Heathcote, submit that the ‘evidence of the purported right to remedial secession is inconclusive’.³⁰ That is, there is ‘very little [...] state practice’ to support remedial secession outside of the colonial context’.³¹

In contrast, internal self-determination is based on human rights instruments, particularly the ICCPR and ICESCR, and guarantees the right of ‘all peoples’ to ‘freely determine their political status and [...] pursue their economic, social, and cultural development’.³² Internal self-determination, as Quane and Cassese claim, is not limited to peoples subject to alien subjugation, domination, and exploitation.³³ Indeed, ICCPR and ICESCR Common Article 1(1) broadly refers to ‘peoples’ rather than the peoples of NSGTs.³⁴ Likewise, as Crawford submits, Common Article 1(3) imposes the *duty to respect a people’s right to self-determination* upon all states not just those ‘responsible for the [NSGTs] administration’.³⁵

Internal self-determination does not concern a people’s title to territory.³⁶ The right is

628; *Chagos* [2019] (n 1), 134 (‘The right to territorial integrity [is] a corollary of the right to self-determination’). See Cassese Antonio, *International Law* (Oxford University Press 2005), 61 (‘[Self-determination is] firmly entrenched in the corpus of international law, as an anti-colonial standard [and a] ban on foreign military occupation’)

²⁸ See *In re: Secession of Quebec* (1998) 2 SCR 217 (CAN), ¶¶133–5 (‘The [other] case where a right to external self-determination accrues [...] outside a colonial context [...] [is] when a people is blocked from the meaningful exercise of [...] self-determination internally [...] [A people] is entitled, as a last resort, to exercise it by secession [...] [Yet] it remains unclear whether this [...] [has been] established [under] international law’).

²⁹ Joseph & Castan, *ICCPR* (n 6), 161; Quane, ‘Evolving Right to Self-Determination’ (n 3), 562; Salmon, ‘Self-determination & the African Commission’ (n 13), 233–5.

³⁰ Vladysla, ‘Self-determination in International Law’ (n 9), 400; Borgen Christopher, ‘Law, Rhetoric, Strategy: Russia & Self-Determination before & after Crimea’ (2015) 91 *International Law Studies* 216, 232; Heathcote Sarah, ‘Secession, Self-determination & Territorial Disagreements: Sovereignty claims in the contemporary South Pacific’ (2021) 34 *Leiden Journal of International Law* 653, 658.

³¹ Borgen, ‘Russia & Self-Determination before & after Crimea’ (n 31), 232.

³² *ICCPR* (n 6), art 1(1); *ICESCR* (n 6), art 1(1); *In re: Secession of Quebec* (n 28), ¶124 (‘The right to self-determination has developed largely as a human right’); Joseph & Castan, *ICCPR* (n 6), 159.

³³ Quane, ‘Evolving Right to Self-Determination’ (n 3), 560; Cassese, ‘Political Self-Determination’ (n 2), 137 cited in Senaratne, ‘Internal Self-Determination’ (n 2), 306; Saul, ‘Normative Status of Self-Determination’ (n 5), 628. See Velasco Zoilo, ‘Self-Determination & Secession: Human Rights-Based Conflict Resolution’ (2014) 16 *International Community Law Review* 75, 80.

³⁴ Loper Kelly, ‘Right to Self-Determination: Developments in International Law & their Relevance for the Tibetan People’ (2003) 33 *Hong Kong Law Journal* 167, 176.

³⁵ Crawford, ‘Right of Self-Determination’ (n 22), 27.

³⁶ Saul, ‘Normative Status of Self-Determination’ (n 5), 628 citing Drew, ‘East Timor Story’ (n 5), 663.

exercised in full respect of states' territorial integrity.³⁷ Indeed, the 1970 Friendly Relations Declaration provides that the right 'shall not be construed as authorising or encouraging any action [...] [against the] territorial integrity or political unity of [...] states [in complying] with the principle of equal rights and self-determination of peoples'.³⁸ Unlike its external dimension, internal self-determination is not concerned with a people's international status.³⁹ Rather, as Thornberry and Cassese note, it governs the 'relationship between a people' and its state or government.⁴⁰ It guarantees the 'right of peoples to choose their political status within a state' and their right to 'meaningful political participation'.⁴¹ In this sense, it may be construed as a 'collective' right,⁴² that is closely associated with human rights.⁴³

Like norms discussed in previous chapters, many submit that the norm on self-determination imposes duties owed *erga omnes* or *erga omnes partes*.⁴⁴ The ILC did so without

³⁷ *In re: Secession of Quebec* (n 28), ¶¶127 ('[Internal self-determination is fulfilled] within a framework of respect for the territorial integrity of existing states [...] [the] right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states'), 131. Note Thornberry Patrick, *International Law & the Rights of Minorities* (Clarendon 1991), 217 ('Internal self-determination is favoured by Western states, reflecting their notions of democracy').

³⁸ Res 2625 (XXV) (n 3) cited in Kohen Marcelo, 'Self-Determination' in Viñuales Jorge (ed), *UN Friendly Relations Declaration: Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020), 145.

³⁹ Brownlie, 'Rights of Peoples' (n 11), 108. Saul, 'Normative Status of Self-Determination' (n 5), 627 citing Wilde Ralph, *International Territorial Administration* (Oxford University Press 2008), 160; Anaya James, 'Self-Determination as a Collective Human Right' in Aikio Pekka & Scheinin Martin (eds), *Operationalising the Right of Indigenous Peoples to Self-Determination* (Abo Akademi University 2000), 12

⁴⁰ Thornberry, 'Democratic or Internal Aspect of Self-Determination' (n 7), 101; Cassese, 'Political Self-Determination' (n 2), 101; Salmon Jean, 'Internal Aspects of the Right to Self-Determination' in Tomuschat Christian (ed), *Modern Law of Self-Determination* (Nijhoff 1992), 265; Rosas Alan, 'Internal Self-Determination' in Cassese Antonio (ed), *UN Law/Fundamental Rights* (Sijthoff 1979), 230. See Senaratne, 'Internal Self-Determination' (n 2), 313 ('Internal self-determination refers to a "toolbox" from which various arrangements and solutions can be [...] applied according to the given circumstances and context').

⁴¹ Joseph & Castan, *ICCPR* (n 6), 160; McCorquodale, 'Self-Determination: Human Rights Approach' (n 2), 863; Cassese, 'Political Self-Determination' (n 2), 137.

⁴² McCorquodale, 'Self-Determination: Human Rights Approach' (n 2), 859, 883–4; Saul, 'Normative Status of Self-Determination' (n 5), 627.

⁴³ See Senaratne, 'Beyond Internal/External Dichotomy' (n 2), 470 ('Internal self-determination is a manifestation of all the rights embodied in the [ICCPR]. It is "a prerequisite for the enjoyment of (individual) rights") citing Nowak Manfred, *UN Covenant on Civil & Political Rights* (2nd edn, NP Engel 2005), 24. Joseph & Castan, *ICCPR* (n 6), 160 citing Cassese, *Self-Determination of Peoples* (n 8), 53 ('Manifestation of the totality of rights embodied in the Covenant').

⁴⁴ See for a discussion of peremptory status Tladi Dire, 'Fourth Report on Peremptory Norms' (31 January 2019) UN Doc A/CN.4/727, 52 citing Kadelbach Stefan, 'Genesis, Function, & Identification of Jus Cogens Norms' (2016) 46 *Netherlands International Law Review* 147, 152; Alexidze Levan, 'Legal Nature of Jus Cogens in Contemporary International law' (1981) 172 *Recueil des Cours de l'Académie de Droit International* 219, 229; Vargas Santalla, 'In Quest of the Practical Value of Jus Cogens Norms' (2016) 46 *Netherlands International Law Review* 211, 227. Park Ki-Gab, 'The Right to Self-Determination & Peremptory Norms' in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 700 ff; Espiell Hector Gros, 'Self-Determination & Jus Cogens' in Cassese Antonio (ed), *UN Law/Fundamental Rights* (Sijthoff 1979), 167–73.

distinction as to external and internal dimensions.⁴⁵ Some, like the ICJ, recognised that the *duty to respect a people's right to external self-determination* is owed *erga omnes* to which 'all states have a legal interest'.⁴⁶ Several states share this view.⁴⁷ Others, like the Human Rights Committee, proceeding from the view that fundamental norms safeguarding human and people's rights generally permit all states to ensure their performance, also claimed that the *duty to respect a people's right to internal self-determination* is owed *erga omnes* or *erga omnes partes*.⁴⁸

II. IMPLEMENTATION BY 'STATES OTHER THAN AN INJURED STATE' (1970–2023)

From the discussion above, there is evidence to suggest that the *duty to respect a people's right to self-determination* is owed *erga omnes* or *erga omnes partes*. As in the previous

⁴⁵ ILC, 'Report on the Work of the 53rd Session' (2001) (n 18), 127; Crawford James, 'Fourth Report on State Responsibility' (2000) II YbILC 3, 12.

⁴⁶ *Chagos* [2019] (n 1), 139; (Trindade, separate opinion), 196–202; (Sebutinde, separate opinion), 292. Note that the ICJ stated in *East Timor* that right to self-determination has 'an *erga omnes*' character (*East Timor* [1995] (n 18), 102) It also stated in the *Wall* opinion that as the right to self-determination is an obligation *erga omnes*, 'all states were 'to see to it that any impediment [...] to the exercise by the Palestinian people of its right [...] is brought to an end' (*Wall* [2004] (n 18), 197, 200). Yet, none of these passages appear to mean a 'duty owed *erga omnes*' in the sense that all states have the competence to demand its performance (See Klabbers Jan, 'Scope of International Law: Erga Omnes Obligations & the Turn to Morality' in Tupamäki Matti (ed), *Liber Amicorum Bengt Broms* (International Law Association 1999); Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 166).

⁴⁷ See 'Memoire du Portugaise', *East Timor* (Portugal v Australia) (Judgement) (ICJ, General List No 84, 18 November 1991), 4.71 ff; 'Written Statement of the African Union', *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 1 March 2018), 17; 'Written Statement of Argentina', *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 1 March 2018), 19; 'Written Statement of China', *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 1 March 2018), 7–8; 'Written Statement of Belize', *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 1 March 2018), 5; 'Written Statement of Brazil', *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 1 March 2018), 5; 'Written Statement of Djibouti', *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 1 March 2018), 5; 'Written Statement of Mauritius', *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, January 2018), 92; 'Verbatim Record 2018/22', *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 4 September 2018), 14–5 (South Africa); 'Verbatim Record 2018/23', *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 4 September 2018), 31–4 (Botswana), 49–50 (Cyprus); 'Verbatim Record 2018/24', *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 5 September 2018), 34–5 (Guatemala); 'Verbatim Record 2018/25', *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 5 September 2018), 25 (Kenya), 44 (Nicaragua), 53 (Nigeria); 'Verbatim Record 2018/26', *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 6 September 2018), 39–40 (Vanuatu); 'Verbatim Record 2018/27', *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 6 September 2018), 9–10 (Zambia).

⁴⁸ See HRCComm, 'General Comment No 12: Article 1 (The Right to Self-Determination of Peoples)' (13 March 1984) UN Doc HRI/GEN/1/Rev.1, ¶2. See also Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997), 142–4; Borelli Silvia & Olleson Simon, 'Obligations Relating to Human Rights & Humanitarian Law' in Crawford James, et al. (eds), *Law of International Responsibility* (Oxford University Press 2010), 1185. But see Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 273 ('There is certainly no indication in practice that all conventional human rights [duties] possess such status').

chapters, this leads to the next question that should be answered—whether states have accepted the competence of ‘states other than an injured state’ to implement these duties. The survey below examines breaches of this duty between 1970 and 2023. It shows that only in a few instances did ‘states other than an injured state’ invoke another’s responsibility through judicial dispute resolution. Similarly, only in a few cases did ‘states other than an injured state’ enforce the duty through countermeasures.

A. South Africa’s denial of Namibia’s right to external self-determination (1948–91)

Until 1966, South Africa administered Namibia, then Southwest Africa, as a Mandatory Power.⁴⁹ Yet, instead of promoting the Mandate’s development ‘as a sacred trust of civilisation’, it occupied Namibia,⁵⁰ applied its Apartheid policy in the territory,⁵¹ rejected UN supervision over the Mandate,⁵² and refused to place the territory ‘under the UN trusteeship system or offer [it] independence’.⁵³ In 1966, the GA deemed that South Africa breached its Mandate and terminated the Mandate.⁵⁴ Yet, despite several SC resolutions and the ICJ’s *Namibia* opinion that considered South Africa’s presence in Namibia unlawful,⁵⁵ South Africa occupied the territory until 1990.⁵⁶

By occupying Namibia, South Africa breached its *duty to respect Namibia’s people’s right to external self-determination*.⁵⁷ Clearly, Namibia’s people were entitled to self-determination. During the relevant period, Namibia was an NSGT.⁵⁸ Yet, South Africa instituted its repressive

⁴⁹ *Treaty of Versailles* (adopted 28 June 1919, entered into force 10 January 1930) XIII Foreign Relations 57, art 22. See *Southwest Africa* (Ethiopia & Liberia v South Africa) (Preliminary Objections) [1962] ICJ 319, 328.

⁵⁰ *Question of South West Africa* Res 2145(XXI) UNGA (27 October 1966) UN Doc A/RES/2145(XXI); *Namibia* [1970] (n 15), 43 (‘These claims of title [...] lead, by South Africa’s own admission, to a situation which vitiates the object and purpose of the Mandate’); (Khan, declaration), 63 (‘[South Africa claimed] that Namibia “may well find itself practically restricted to some kind of autonomy and local self-government within a larger arrangement of co-operation”’).

⁵¹ Dugard John & Reynolds John, ‘Apartheid, International Law, & the Occupied Palestinian Territory’ (2013) 24 *European Journal of International Law* 867, 875–6; Richardson Henry, ‘Self-Determination, International Law, & the South African Bantustan Policy’ (1978) 17 *Columbia Journal of Transnational Law* 185, 185; Umozurike UO, ‘Self-Determination in Namibia’ (1970) 8 *Journal of Modern African Studies* 585, 598.

⁵² *Namibia* [1970] (n 15), 41. See *International Status of Southwest Africa* (Advisory Opinion) [1950] ICJ 128, 131; *Southwest Africa* (Ethiopia & Liberia v South Africa) (Judgment) [1966] ICJ 6, 16.

⁵³ *Namibia* [1970] (n 15) 43–4.

⁵⁴ Res 2145(XXI) (n 50).

⁵⁵ *Namibia* [1970] (n 15), 58.

⁵⁶ See also Wren Christopher, ‘Namibia Achieves Independence’ (New York Times, 21 March 1990) <<https://www.proquest.com/historical-newspapers/namibia-achieves-independenceyears/docview/108579852>>.

⁵⁷ See Cassese, *International Law* (n 27), 61 Note that while South Africa was not a party to any instrument that imposed a *duty to respect a people’s right to self-determination*, the norm has arguably become customary by 1960 (See *Chagos* [2019] (n 1), 132)..

⁵⁸ See Res 2145(XXI) (n 50).

policies in Namibia, ‘entrenched itself in the territory’,⁵⁹ and even sought to annex Namibia.⁶⁰ By doing so, as several scholars argue, South Africa not only repressed the political and economic progress of Namibia’s people,⁶¹ but also deprived them of their ‘right to territorial integrity and political independence’.⁶²

States condemned South Africa’s actions in Namibia. In 1950, the GA requested an ICJ opinion on the Mandate’s status and South Africa’s duties.⁶³ After the ICJ ruled in *Southwest Africa* that the Mandate subsisted,⁶⁴ the GA urged South Africa to place Namibia under trusteeship.⁶⁵ Yet, as noted above, South Africa refused.⁶⁶ In 1966, the GA terminated South Africa’s Mandate and condemned its refusal to respect Namibia’s right to independence.⁶⁷ A year later, it also asked the SC to take appropriate action.⁶⁸ Later resolutions repeated these condemnations.⁶⁹ Furthermore, the GA, in 1981, called for states to ‘cease, individually and

⁵⁹ Umozurike, ‘Self-Determination in Namibia’ (n 51), 599.

⁶⁰ See *Namibia* [1970] (n 15) 43–4 (‘South Africa’s [view is] that no provision prevents its annexing [Namibia]’).

⁶¹ Umozurike, ‘Self-Determination in Namibia’ (n 51), 599; Richardson, ‘Bantustan Policy’ (n 51), 193.

⁶² Addo Michael, ‘Self-Determination within the African Charter on Human & Peoples’ Rights’ (1988) 32 *Journal of African Law* 182, 184; Gittleman R, ‘African Charter on Human & People’s Rights’ (1982) 22 *Virginia Journal of International Law* 667, 680. See Akhavan Payam, ‘Lessons from Iraqi Kurdistan: Self-Determination & Humanitarian Intervention against Genocide’ (1993) 11 *Netherlands Quarterly of Human Rights* 41, 55; Charney Jonathan, ‘Self-Determination: Chechnya, Kosovo, & East Timor’ (2001) 34 *Vanderbilt Journal of Transnational Law* 455, 465; Saul Matthew, ‘Right to Self-Determination & the Prolonged Occupation of Palestinian Territory’ in Zyberi Gentian (ed), *Protecting Community Interests through International Law* (Intersentia 2021), 5–7.

⁶³ See *Question of South West Africa* Res 338(IV) UNGA (16 December 1950) UN Doc A/RES/Res 338(IV).

⁶⁴ *Southwest Africa* [1950] (n 52), 143–4.

⁶⁵ See Res 570(VI) UNGA (19 January 1952) UN Doc A/RES/570(VI); Res 749 (VIII) UNGA (28 November 1953) UN Doc A/RES/749(VIII); Res 852 (IX) UNGA (23 November 1954) UN Doc A/RES/852(IX); Res 940 (X) UNGA (3 December 1955) UN Doc A/RES/940(X); Res 1055 (XI) UNGA (26 February 1957) UN Doc A/RES/1055(XI); Res 1059 (XI) UNGA (26 February 1957) UN Doc A/RES/1059(XI); Res 1141 (XII) UNGA (25 October 1957) UN Doc A/RES/1141(XII); Res 1142 (XII) UNGA (25 October 1957) UN Doc A/RES/1141(XII); Res 1564 (XV) UNGA (18 Dec 1960) UN Doc A/RES/1564(XV); Res 1246 (XIII) UNGA (30 October 1958) UN Doc A/RES/1246 (XIII); Res 1359 (XIV) UNGA (17 November 1959) UN Doc A/RES/1359(XIV); Res 1360 (XIV) UNGA (17 November 1959) UN Doc A/RES/1360(XIV); Res 1565(XV) UNGA (18 Dec 1960) UN Doc A/RES/RES/1565(XV); Res 1568 (XV) UNGA (18 December 1960) UN Doc A/RES/1568(XV); Res 1702 (XVI) UNGA (19 December 1961) UN Doc A/RES/1702(XVI); Res 1805 (XVII) UNGA (14 December 1962) UN Doc A/RES/1805(XVII); Res 2074 (XX) UNGA (17 December 1965) UN Doc A/RES/2074(XX).

⁶⁶ Umozurike, ‘Self-Determination in Namibia’ (n 51), 590.

⁶⁷ Res 2145(XXI) (n 50); Res 2248(S-V) UNGA (19 May 1967) UN Doc A/RES/2258(S-V).

⁶⁸ Res 2325(XXII) UNGA (16 December 1967) UN Doc A/RES/2325(XXII). See *Question of Namibia* Res 2403 (XXIII) UNGA (16 December 1968) UN Doc A/RES/2403(XXIII).

⁶⁹ See e.g. Res 2517 (XXIV) UNGA (1 December 1969) UN Doc A/RES/2517(XXIV); Res 2678 (XXV) UNGA (9 December 1970) UN Doc A/RES/2678(XXV); Res 2871 (XXVI) UNGA (20 December 1971) UN Doc A/RES/2871(XXVI); Res 3030 (XXVII) UNGA (18 December 1972) UN Doc A/RES/3030(XXVII); Res 3379(XXX) UNGA (10 November 1975) UN Doc A/RES/3379(XXX); Res 33/183 UNGA (24 January 1979) UN Doc A/RES/33/183; Res 35/227 UNGA (16 December 1980) UN Doc A/RES/35/227;

collectively, all dealings with South Africa [...] to isolate it politically, economically, militarily and culturally'.⁷⁰ It also asked the SC to impose mandatory sanctions on South Africa and for other states, in the absence of SC sanctions, to levy unilateral measures.⁷¹ For its part, the SC, in 1969, demanded South Africa's withdrawal from Namibia and deemed its actions an 'encroachment on the [UN's] authority', 'violation of [Namibia's] territorial integrity', and a 'denial of [its] political sovereignty'.⁷² In 1970, it also requested an ICJ opinion on the legal consequences of South Africa's presence in Namibia.⁷³ As mentioned above, the ICJ in the *Namibia* opinion ruled that South Africa's 'presence in [Namibia] was illegal, that it had the duty to 'withdraw its administration from Namibia', and that it must 'end its occupation'.⁷⁴

The situation in South Africa was one of the few instances where 'states other than an injured state' implemented duties arising from norms on self-determination. In 1960, Liberia and Ethiopia invoked South Africa's responsibility before the ICJ claiming that South Africa contravened the 1922 Mandate Agreement concluded between South Africa and the League of Nations. As previously discussed, the ICJ, in its 1962 *Southwest Africa* decision initially ruled that it had jurisdiction under the Treaty's compromissory clause. It stated that the provision's language was 'broad, clear, and precise enough' such that League members had the 'legal right or interest in the [Mandatory's] observance' of its duties 'towards the [Territory's] inhabitants' and the 'League [...] and its Members'.⁷⁵ Yet, it reversed this in 1966. It ruled that it was the UN's appropriate organs that possessed the competence to implement the duties and not individual states.⁷⁶

⁷⁰ Res ES-8/2 UNGA (14 September 1981) UN Doc A/RES/ES-8/2; Res 36/121 UNGA (10 December 1981) UN Doc A/RES/36/121.

⁷¹ See Res 37/233 UNGA (17 December 1982) UN Doc A/RES/39/50; Res 38/36 UNGA (25 November 1983) UN Doc A/RES/39/50; Res 39/50 UNGA (12 December 1984) UN Doc A/RES/39/50; Res 40/97 UNGA (13 December 1985) UN Doc A/RES/40/97; Res 41/39 UNGA (20 November 1986) UN Doc A/RES/41/39; Res 42/14 UNGA (6 November 1987) UN Doc A/RES/42/14; Res 43/26 UNGA (17 November 1988) UN Doc A/RES/43/26.

⁷² Res 264 UNSC (20 March 1969) UN Doc S/RES/264; Res 269 UNSC (12 August 1969) UN Doc S/RES/269; Res 276 UN SC (30 January 1970) UN Doc S/RES/276. *Note* the resolutions on South Africa or Namibia vetoed by US, the UK, or France: UNSC, 'Draft Resolution (Kenya, Mauritania, Cameroon)' (24 October 1974) UN Doc S/11543; UNSC, 'Draft Resolution (Guyana et al)' (6 June 1975) UN Doc S/11713; UNSC, 'Draft Resolution (Benin, Libya, & Mauritius)' (26 October 1977) UN Doc S/12312/Rev.1; UNSC, 'Draft Resolution (Mexico et al)' (27 April 1981) UN Doc S/14459; UNSC, 'Draft Resolution (Niger, Tunisia, Uganda)' (29 April 1981) UN Doc S/14460/Rev.1; UNSC, 'Draft Resolution (Congo et al)' (17 June 1986) UN Doc S/18163; UNSC, 'Draft Resolution (Argentina et al)' (19 February 1987) UN Doc S/18705.

⁷³ See Res 284 UNSC (20 July 1970) UN Doc S/RES/284.

⁷⁴ *Namibia* [1970] (n 15), 58.

⁷⁵ *Southwest Africa* [1962] (n 49), 343.

⁷⁶ *Southwest Africa* [1966] (n 52), 39, 41, 47. *But see* (Bustamante, separate opinion), 380; (Jessup, dissenting), 378.

Some states, in addition to the unilateral measures levied on South Africa for Apartheid discussed in *Chapter 6A*, also imposed countermeasures against South Africa for its actions in Namibia. In 1986, Commonwealth states, citing South Africa's 'refusal to dismantle Apartheid' and its 'illegal occupation of Namibia', restricted the importation of iron, steel, and coal, prohibited loans and the export of oil, and banned aviation links with South Africa.⁷⁷ These measures were levied without the SC's authority.⁷⁸ Thus, for states parties to the GATT or had bilateral treaties with South Africa, these measures amounted to *a priori* breaches of their respective duties not to impose qualitative and discriminatory trade restrictions.⁷⁹

B. The UK's denial of the Chagossians' right to external self-determination (1965–)

The UK, until 1965, administered the Chagos archipelago as Mauritius' dependency.⁸⁰ In 1964, after agreeing with the US on the use of the Diego Garcia island in Chagos for military purposes,⁸¹ the UK began discussions with the Mauritian Council of Ministers on Chagos' detachment from Mauritius.⁸² This led to the Lancaster House agreement under which the Council agreed to Chagos' detachment in exchange for the UK's accession to Mauritius' independence.⁸³ A year later, the UK formed the British Indian Ocean Territory ('BIOT') which included the Chagos archipelago.⁸⁴ After concluding an agreement on Diego Garcia with the US,⁸⁵ the UK forcibly removed Chagossians from Chagos to make way for the 'construction and operation of [a] US military facility'.⁸⁶ Since 1965, the UK has administered Chagos as

⁷⁷ Commonwealth of Nations, 'Commonwealth Accord on Southern Africa' (20 October 1985); Norman Peter, 'Thatcher's Failure to Agree on Sanctions Shows Shift From Commonwealth to EC' (Wall Street Journal, 6 August 1986) <<https://www.proquest.com/newspapers/thatchers-failure-agree-on-sanctions-shows-shift/docview/398064227>>

⁷⁸ Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 176–7.

⁷⁹ Dawidowicz, *Third Party Countermeasures* (n 48), 115–6; Proukaki, *Problem of Enforcement* (n 78), 167.

⁸⁰ *Chagos* [2019] (n 1), 107.

⁸¹ *Ibid*, 108, 119–20

⁸² *Ibid*, 108, 120–4

⁸³ Allen Stephen, 'Self-Determination, Chagos Advisory Opinion, & the Chagossians' (2020) 69 *International & Comparative Law Quarterly* 203, 204 ('The historical record shows that the UK government applied considerable pressure to procure such "consent" and that this transaction was intimately connected with the decision to grant Mauritius its independence') citing *Chagos* [2019] (n 1), 121–2. Kattan Victor, 'Chagos Advisory Opinion & the Law of Self-Determination' (2020) 10 *Asian Journal of International Law* 12, 14 ('The Council of Ministers were given no choice but to accept the separation of the Chagos Archipelago "in principle" as the price for independence'); Guilfoyle Douglas, 'Chagos Archipelago before International Tribunals' (2021) 21 *Melbourne Journal of International Law* 1, 14–5.

⁸⁴ *Chagos* [2019] (n 1), 108.

⁸⁵ *Exchange of Notes between the UK & US concerning the Availability for Defence Purposes of the British Indian Ocean Territory* (adopted 30 December 1966) 603 UNTS 372.

⁸⁶ *Chagos* [2019] (n 1), 110; *Chagos Islanders v Attorney-General* (2003) EWHC 2222 (UK), ¶¶3–49, 54.

part of the BIOT. It did so notwithstanding demands from Mauritius, which gained its independence in 1968,⁸⁷ for the ‘return’ of the Chagos archipelago,⁸⁸ and notwithstanding calls from states not to ‘disrupt [...] the national unity and the territorial integrity of [an] [NSGT]’.⁸⁹

By detaching Chagos from Mauritius, incorporating it in the BIOT, and continuing to administer the territory, the UK arguably breached the Chagossian’s right to external self-determination. Indeed, this is the opinion of the UN Special Committee on Decolonisation (‘Special Committee’) and the ICJ.⁹⁰ As the Court ruled in the *Chagos* advisory opinion, peoples of NSGTs are ‘entitled to exercise their right to [external] self-determination in relation to their territory as a whole’ and the territory’s integrity must be ‘respected by the administering Power’.⁹¹ This means that the detachment by the ‘administering [state] of a part of the [NSGT]’, unless ‘based on the freely expressed and genuine will of the [territory’s] people’, infringes their right to external self-determination.⁹² The fact that the Council of Ministers agreed to Chagos’ detachment does not make it lawful. As the Special Committee observed, the Council did not ‘exercise [any] real [...] powers’.⁹³ Furthermore, it would seem that the UK applied ‘considerable pressure’ upon the Council and conditioned Mauritius’ independence to Chagos’ separation.⁹⁴ Thus, the agreement was ‘not based on the free and genuine expression of the [Chagossians] will’.⁹⁵ As Mauritius’ decolonisation was ‘not conducted in a manner consistent with the right of peoples to [external] self-determination’, the UK’s ‘continued administration of the Chagos archipelago [...] constitutes a wrongful act’.⁹⁶

⁸⁷ *Chagos* [2019] (n 1), 109.

⁸⁸ Allen, ‘Self-Determination & Chagos’ (n 83); *Chagos* [2019] (n 1), 109–10, 124–8.

⁸⁹ Res 2232 (XXI) UNGA (20 December 1966) UN Doc A/RES/2232(XVI); Res 2357 (XXII) UNGA (19 December 1967) UN Doc A/RES/2257(XXII). See Res 2066 (XX) UNGA (6 December 1965) UN Doc A/RES/2066 (XX); Res 71/292 UNGA (22 June 2017) UN Doc A/RES/71/292.

⁹⁰ *Chagos* [2019] (n 1), 109 (‘On 10 May 1967, Sub-Committee I of the Committee of Twenty-Four reported that: “By creating [...] the British Indian Ocean Territory, composed of islands detached from Mauritius and Seychelles, the administering Power continues to violate the territorial integrity of these Non-Self-Governing Territories”) 137, 138.

⁹¹ *Ibid.*, 134 citing Res 1514 (XV) (n 3).

⁹² *Chagos* [2019] (n 1), 134.

⁹³ UNGA, Fourth Committee, ‘Report of the Special Committee on the Situation regarding the Implementation of the Declaration on the Granting of Independence to Colonial Countries & Peoples’ (1966) UN Doc A/5800/Rev.1, 352.

⁹⁴ Allen, ‘Self-Determination & Chagos’ (n 83), 204; Kattan, ‘Chagos Opinion & Self-Determination’ (n 83), 14; Guilfoyle, ‘Chagos Archipelago before International Tribunals’ (n 83), 14–5; *Chagos Marine Protected Area* (Mauritius v UK) (Final Award) (2015) (PCA, 18 March 2015), (Kateka & Wolfrum, dissenting & concurring), 19 (‘A look at the discussion between Prime Minister Harold Wilson and Premier Sir Seewoosagur Ramgoolam suggests [...] Wilson’s threat that Ramgoolam could return home without independence amounts to duress’). See *Chagos* [2019] (n 1), 121–2.

⁹⁵ *Chagos* [2019] (n 1), 137.

⁹⁶ *Ibid.*, 139.

Some states criticised the UK for its actions in the Chagos archipelago. In 1967, states within the Special Committee ‘deplore[d] the [UK’s] dismemberment of Mauritius’ and ‘call[ed] upon the [UK] to return [...] the islands detached [to Mauritius]’.⁹⁷ Furthermore, the GA called on the UK to ‘implement without delay’ its resolutions on self-determination.⁹⁸ On several occasions, the OAU also demanded Chagos’ return to Mauritius.⁹⁹ Yet, it would appear that no ‘state other than an injured state’ unilaterally invoked the UK’s responsibility through judicial dispute resolution or levied unilateral measures against the UK.¹⁰⁰ Nonetheless, in 2017, the GA adopted Resolution 71/292 which requested the ICJ advisory opinion discussed above on the legality of the Chagos’ detachment from Mauritius and the UK’s continued administration of the archipelago.¹⁰¹

C. Israel’s denial of Palestinians’ right to external self-determination (1967–)

In 1947, the GA adopted a partition plan concerning Palestine after the UK announced its intent to terminate its Mandate.¹⁰² Yet, as is well-known, this plan was never implemented. In 1948, hostilities erupted between Israel, which recently proclaimed its independence, and several Arab states.¹⁰³ By 1949, Israel occupied twenty-two per cent of the territory allocated to Palestine under the partition plan.¹⁰⁴ Later conflicts—the 1967 Six-Day War and the 1973 Yom Kippur War—resulted in Israel’s occupation of more territories including East Jerusalem, West Bank, and the Gaza Strip (‘Occupied Palestinian Territories’).

Since 1967, Israel has occupied the Palestinian Territories.¹⁰⁵ In 1980, it also incorporated

⁹⁷ Ibid, 109.

⁹⁸ Res 2232 (XXI) (n 89); Res 2357 (XXII) (n 89).

⁹⁹ OAU, ‘Resolution 99 (XVII)’ (4 July 1980) AHG/Res.99 (XVII); OAU, ‘Decision 159 (XXXVI)’ (12 July 2000) AHG/Dec.159 (XXXVI); African Union, ‘Decision 331’ (AHG/Dec.331 (2010); African Union, ‘Res 1 (XXVIII)’ (30 January 2017) AU/Res.1 (XXVIII).

¹⁰⁰ Note that Mauritius, arguably the ‘injured state’, commenced proceedings against the UK for establishing the Chagos Marine Protected Area in 2009 which it asserted to be a breach of the UK’s duties under the UNCLOS. *See Chagos Marine Protected Area* (Mauritius v UK) (Final Award) (2015) (PCA, 18 March 2015), 90 (‘The parties’ dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention’); 213 (‘The [UK] breached its [duties] under Articles 2(3), 56(2), and 194(4) of the Convention’).

¹⁰¹ Res 71/292 (n 89).

¹⁰² *Wall* [2004] (n 18), 165.

¹⁰³ Ibid, 165; Quigley John, ‘Apartheid Outside Africa: Case of Israel’ (1991) 2 *Indiana International & Comparative Law Review* 221, 224.

¹⁰⁴ Imseis Ardi, ‘Zionism, Racism, & the Palestinian People:’ (1999) 8 *Dalhousie Journal of Legal Studies* 1, 14.

¹⁰⁵ *Wall* [2004] (n 18), 181; Falk Richard, ‘Human Rights in the Occupied Palestinian Territories’ (30 August 2010) UN Doc. A/65/331, 3; Dugard John, ‘Human Rights in the Palestinian Territories Occupied since 1967’ (29 January 2007) UN Doc A/HRC/4/17, 3. Note that under the 1994 Oslo I Accord, Israel agreed to withdraw from

East Jerusalem into its territory and claimed Jerusalem's entirety as its capital.¹⁰⁶ As for the West Bank, while the Oslo Accords granted the Palestinian Authority administrative control over certain areas of the territory,¹⁰⁷ Israel has retained control over large parts of the West Bank.¹⁰⁸ It has also constructed 'settlements' for Israelis displacing Palestinians.¹⁰⁹ Furthermore, under Israel's occupation, Palestinians in East Jerusalem and the West Bank have endured harsh conditions. Based on reports, Palestinians have been subjected to 'significant restrictions on their movement', deprived of access to natural resources which are 'disproportionately allocated to Israeli [...] settlers',¹¹⁰ and subjected to 'punitive demolitions and expulsions'.¹¹¹ Palestinians have also experienced 'routine violence by Israeli soldiers and armed settlers', 'arbitrary arrests', and 'indefinite [...] detentions'.¹¹²

As for Gaza, while Israel, in 2005, disengaged from Gaza and dismantled the territory's Israeli settlements,¹¹³ it continues to exercise control over Gaza's airspace, territorial waters, land crossings, water, electricity, and civilian infrastructure.¹¹⁴ It also controls Gaza's key governmental functions including 'its monetary market and population registry'.¹¹⁵ Thus, for many including the HRC, Gaza remains under Israel's effective occupation.¹¹⁶ Under Israel, the

parts of Gaza and the West Bank and agreed to the creation of the Palestinian Interim Self-Government Authority (*Declaration of Principles on Interim Self-Government Arrangements* (adopted 13 September 1993) UN Doc A/48/486). Under the 1995 Oslo II Accord, Israel further agreed to Palestinian self-government in the Palestinian Territories (*Interim Agreement on the West Bank & the Gaza Strip* (adopted 28 September 1995) UN Doc A/51/889).

¹⁰⁶ See Res 478 UNSC (20 August 1980) UN Doc S/RES/478.

¹⁰⁷ See *Declaration of Principles on Interim Self-Government Arrangements* (adopted 13 September 1993) UN Doc A/48/486; *Interim Agreement on the West Bank & the Gaza Strip* (adopted 28 September 1995) UN Doc A/51/889. Note that the Oslo Peace Process never led to the envisioned final peace treaty and led to another uprising in the Palestinian Territories ('Second Intifada') between 2000 and 2005 (HRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict' (15 September 2009) UN Doc A/HRC/12/48, 49)

¹⁰⁸ Ibid, 52; Maguire Amy & Thompson Katie, 'Palestine, Self-determination, & Justice' (2017) 26 *Griffith Law Review* 532, 537. See Wall [2004] (n 18), 166–7.

¹⁰⁹ Falk, 'Human Rights in the Occupied Palestinian Territories' (2010) (n 105), 5.

¹¹⁰ Lynk Michael, 'Human Rights in the Palestinian Territories Occupied since 1967' (23 October 2017) UN Doc A/72/556, 18–22.

¹¹¹ Falk, 'Human Rights in the Occupied Palestinian Territories' (2010) (n 105), 6.

¹¹² 'Application', *Application of the Genocide Convention in Gaza* (South Africa v Israel) (ICJ, General List No 192, 28 December 2023), 26 citing Lynk Michael, 'Human Rights in the Palestinian Territories Occupied since 1967' (12 August 2022) UN Doc A/HRC/49/87, 11–2, 17.

¹¹³ HRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict' (2009) (n 107), 49; Devi Sharmila & Morris Harvey, 'Israel's 30-year settlement of Gaza ends' (Financial Times, 15 August 2005) <<https://www.proquest.com/newspapers/israel-s-30-year-settlement-gaza-ends/docview/249561914>>.

¹¹⁴ HRC, 'Report of the Independent Commission of Inquiry on the Occupied Palestinian Territory' (9 May 2022) UN Doc A/HRC/50/21, 4

¹¹⁵ HRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict' (2009) (n 107), 17 ff.

¹¹⁶ Ibid, 74; HRC, 'Report of the Independent Commission of Inquiry established pursuant to HRC Res S-21/1' (24 June 2015) UN Doc A/HRC/29/52, 4–5; Maurer Peter, 'Challenges to International Humanitarian Law:

Palestinians' entry into and exit from Gaza have been tightly restricted.¹¹⁷ The same is true for the Palestinians' access to natural resources as Israel also limited their access to Gaza's waters and agricultural lands.¹¹⁸ Moreover, as in the case of the West Bank, Palestinians in Gaza have also been subjected to routine violence.¹¹⁹ Israel has repeatedly launched attacks against non-state armed groups in Gaza causing civilian casualties and damaging infrastructure.¹²⁰ By 2020, it has been observed that Israel's actions in Gaza transformed it 'from a low-income society with modest but growing export ties to [...] an impoverished [enclave] with a decimated economy and a collapsing social service system'.¹²¹

Israel's conduct, as several scholars submit, constitutes a breach of its *duty to respect the Palestinians' right to external self-determination*.¹²² The right requires that an 'occupation be brought to an end' and the 'withdrawal of the occupier'.¹²³ Occupation inhibits a people's right to territorial integrity and political independence. Israel's prolonged occupation and 'control over [Palestinians'] land', 'undermines the possibility' of their 'creation of a viable state' and denies them access to and control over their natural resources.¹²⁴ Israel's conduct also hinders the Palestinians' exercise of the right to self-determination.¹²⁵ Its forcible removal of Palestinians and establishment of Israeli settlements, apart from being a breach of the laws on occupation,¹²⁶ 'fragments' Palestinian communities, 'change the [Occupied Palestinian

Israel's Occupation Policy' (2012) 94 *International Review of the Red Cross* 1503, 1506; Henderson Christian, 'Israeli Military Operations against Gaza: Operation Cast Lead (2008–09), Operation Pillar of Defence (2012), & Operation Protective Edge (2014)' in Ruys Tom, *et al.* (eds), *Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018), 743; Dugard & Reynolds, 'Apartheid & the OPT' (n 51), 904.

¹¹⁷ Lynk, 'Human Rights in the Palestinian Territories Occupied since 1967' (2022) (n 112), 13.

¹¹⁸ Dugard, 'Human Rights in the Palestinian Territories Occupied since 1967' (2007) (n 105), 23.

¹¹⁹ HRC, 'Report of the Detailed Findings of the Commission of Inquiry on Protests in the Occupied Palestinian Territories' (18 March 2019) UN Doc A/HRC/40/CRP.2, 146 ff.

¹²⁰ Res 49/87 UNGA (16 December 1994) UN Doc A/RES/49/87, 15 ('Highly asymmetrical wars')

¹²¹ Lynk Michael, 'Human Rights in the Palestinian Territories Occupied with a Focus on Collective Punishment' (22 December 2020) UN Doc A/HRC/44/60, 13.

¹²² Dugard, 'Human Rights in the Palestinian Territories Occupied since 1967' (2007) (n 105), 3 ('Prolonged occupation with features of colonialism and apartheid for the occupied people'); Falk, 'Human Rights in the Occupied Palestinian Territories' (2010) (n 105), 3, 4 ('[Israel's] occupation [is] a severe and unprecedented denial of [...] self-determination'); HRC, 'Report of the UN Fact Finding-Mission on the Gaza Conflict' (2009) (n 107), 71–2; 335, 404; Saul, 'Self-Determination & Occupation of Palestinian Territory' (n 62), 226, 228–40. *See Wall* [2004] (n 18), 197, 200.

¹²³ Saul, 'Self-Determination & Occupation of Palestinian Territory' (n 62), 230.

¹²⁴ UNSG, 'Israeli Settlements in the Occupied Palestinian Territory' (18 September 2012) UN Doc A/67/375, 6–7; HRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict' (2009) (n 107), 258 ff; HRC, 'Report of the Independent Fact-Finding Mission on the Implications of the Israeli Settlements in the Occupied Palestinian Territory' (7 Feb 2013) UN Doc A/HRC/22/63, 8–9.

¹²⁵ *See* Pellet Alain, 'Destruction of Troy will not take Place' in Playfair Emma (ed), *International Law & the Administration of Occupied Territories* (Clarendon Press 1992), 186.

¹²⁶ *Wall* [2004] (n 18), 183 *citing Convention Relative to the Protection of Civilian Persons in the Time of*

Territories’] demographic composition’, and reduce the territory ‘over which Palestinians are entitled to exercise [...] self-determination’.¹²⁷ In addition, Israel’s repeated employment of violence against civilians contravenes its ‘duty to refrain from forcible actions [that] deprive peoples [...] of their right to self-determination, freedom, and independence’.¹²⁸ Finally, Israel’s curtailment of Palestinians’ rights also impedes their political and socio-economic progress.¹²⁹

States within the UN condemned Israel’s conduct. The SC, after the 1967 Six-Day War, called for Israel’s withdrawal from the ‘territories occupied in the recent conflict’ and the ‘termination of all claims or states of belligerency’.¹³⁰ Between 1979 and 1990, it also urged Israel to withdraw from the Occupied Territories and to desist from actions that ‘materially [affects] the demographic composition of the [...] territories occupied since 1967’.¹³¹ Due to US vetoes, resolutions affirming Palestinian’s right to self-determination, calling for states not to assist Israel, or demanding that Israel observe its duties as the ‘occupying power’ have not been adopted.¹³² However, the SC, in at least two resolutions, recognised the Gaza Strip as an integral

War (adopted 12 August 1949) 75 UNTS 287, art 49(6). Res 446 UNSC (22 March 1979) UN Doc S/RES/446; Maurer, ‘Israel’s Occupation Policy’ (n 116), 1507.

¹²⁷ *Wall* [2004] (n 18), 181–2, 184.

¹²⁸ Henderson Christian, ‘Contested States & Rights & Obligations of the Jus ad Bellum’ (2013) 21 *Cardozo Journal of International & Comparative Law* 367, 384 citing Res 2625 (XXV) (n 3).

¹²⁹ See Dugard, ‘Human Rights in the Palestinian Territories Occupied since 1967’ (2007) (n 105), 3; Falk, ‘Human Rights in the Occupied Palestinian Territories’ (2010) (n 105), 3; HRC, ‘Report of the UN Fact-Finding Mission on the Gaza Conflict’ (2009) (n 107), 71–2, 335.

¹³⁰ Res 242 UNSC (22 Nov 1967) UN Doc S/RES/242. See also Res 252 UNSC (21 May 1968) UN Doc S/RES/252; Res 267 UNSC (3 July 1969) UN Doc S/RES/267; Res 298 UNSC (25 September 1971) UN Doc S/RES/298.

¹³¹ Res 446 (n 126). See Res 425 UNSC (19 March 1978) UN Doc S/RES/425; Res 452 UNSC (20 July 1979) UN Doc S/RES/452; Res 465 UNSC (1 March 1980) UN Doc S/RES/465; Res 476 UNSC (30 June 1980) UN Doc S/RES/476; Res 478 (n 106); Res 497 UNSC (17 December 1981) UN Doc S/RES/497; Res 508 UNSC (5 June 1982) UN Doc S/RES/508; Res 509 UNSC (6 June 1982) UN Doc S/RES/509; Res 569 UNSC (31 July 1990) UN Doc S/RES/659.

¹³² See e.g. UNSC, ‘Draft Resolution (Guinea et al)’ (24 July 1973) UN Doc S/10974; UNSC, ‘Draft Resolution (Guyana et al)’ (1975) (n 72); UNSC, ‘Draft Resolution (Benin et al)’ (24 March 1976) UN Doc S/12022; UNSC, ‘Draft Resolution (Guyana et al)’ (29 June 1976) UN Doc S/12119; UNSC, ‘Draft Resolution (Tunisia)’ (28 April 1980) UN Doc S/13911; UNSC, ‘Draft Resolution (Jordan)’ (1 April 1982) UN Doc S/14943; UNSC, ‘Draft Resolution (Iran et al)’ (20 April 1982) UN Doc S/14985; UNSC, ‘Draft Resolution (Algeria et al)’ (1 August 1983) UN Doc S/15895; UNSC, ‘Draft Resolution (Burkina Faso et al)’ (12 September 1985) UN Doc S/17459; UNSC, ‘Draft Resolution (Algeria et al)’ (29 January 1988) UN Doc S/19466; UNSC, ‘Draft Resolution (Algeria et al)’ (17 February 1989) UN Doc S/20463; UNSC, ‘Draft Resolution (Colombia et al)’ (31 May 1990) UN Doc S/21326; UNSC, ‘Draft Resolution (Botswana et al)’ (17 May 1995) UN Doc S/1995/394; UNSC, ‘Draft Resolution (France et al)’ (7 March 1997) UN S/1997/189; UNSC, ‘Draft Resolution (Egypt & Qatar)’ (21 March 1997) UN Doc S/1997/241; UNSC, ‘Draft Resolution (Bangladesh et al)’ (26 March 2001) UN Doc S/2001/270; UNSC, ‘Draft Resolution (Egypt & Tunisia)’ (14 December 2001) UN Doc S/2001/1199; UNSC, ‘Draft Resolution (Pakistan et al)’ (16 September 2003) UN Doc S/2003/891; UNSC, ‘Draft Resolution (Guinea et al)’ (14 October 2003) UN Doc S/2003/980; UNSC, ‘Draft Resolution (Algeria, Pakistan & Tunisia)’ (5 October 2004) UN Doc S/2004/783; UNSC, ‘Draft Resolution (Qatar)’ (12 July 2006) UN Doc S/2006/508; *ibid*; UNSC, ‘Draft Resolution (Afghanistan et al)’ (18 February 2011) UN Doc S/2011/24.

part of Palestine and condemned Israeli settlement activities in the West Bank.¹³³

The GA also deplored Israel's occupation,¹³⁴ affirmed Palestinians' right to self-determination,¹³⁵ criticised Israel's settlement activities,¹³⁶ and condemned the violations of

¹³³ See Res 1860 UNSC (8 Jan 2009) UN Doc S/RES/1860; Res 2334 UNSC (23 Dec 2016) UN Doc S/RES/2334.

¹³⁴ See *Situation in the Middle East* Res 32/20 UNGA (25 November 1977) UN Doc A/RES/32/20; Res 33/29 UNGA (7 December 1978) UN Doc A/RES/33/29; Res 34/70 UNGA (6 December 1979) UN Doc A/RES/34/70; Res 35/207 UNGA (16 December 1980) UN Doc A/RES/35/207; Res 36/226 UNGA (17 December 1981) UN Doc A/RES/36/226; Res 37/123 UNGA (16 December 1982) UN Doc A/RES/37/123; Res 38/180 UNGA (14 December 1983) UN Doc A/RES/38/180; Res 39/146 UNGA (13 December 1984) UN Doc A/RES/39/146; Res 40/168 UNGA (16 December 1985) UN Doc A/RES/40/168; Res 41/162 UNGA (4 December 1986) UN Doc A/RES/41/162; Res 42/209 UNGA (11 December 1987) UN Doc A/RES/42/209; Res 43/54 UNGA (6 December 1988) UN Doc A/RES/43/54; Res 44/40 UNGA (4 December 1989) UN Doc A/RES/44/40; Res 45/83 UNGA (13 December 1990) UN Doc A/RES/45/83; Res 46/82 UNGA (16 December 1991) UN Doc A/RES/46/82; *Situation in the Middle East* Res 47/63 UNGA (11 December 1992) UN Doc A/RES/47/63; Res 48/49 UNGA (13 December 1993) UN Doc A/RES/48/59; Res 49/87 (n 120); Res 50/22 UNGA (4 December 1995) UN Doc A/RES/50/22.

¹³⁵ See *Question of Palestine* Res 3236(XXIX) UNGA (22 Nov 1974) UN Doc A/RES/3236(XXIX); Res 3376(XXX) UNGA (10 November 1975) UN Doc A/RES/3376(XXX); Res 32/40 UNGA (2 December 1977) UN Doc A/RES/32/40; Res 33/28 UNGA (7 December 1978) UN Doc A/RES/33/28; Res 34/65 UNGA (5 December 1979) UN Doc A/RES/34/65; Res 35/169 UNGA (15 December 1980) UN Doc A/RES/35/169; Res 36/120 UNGA (10 December 1981) UN Doc A/RES/36/120; Res 37/86 UNGA (10 December 1982) UN Doc A/RES/37/86; Res 38/58 UNGA (13 December 1983) UN Doc A/RES/38/58; Res 39/49 UNGA (11 December 1984) UN Doc A/RES/39/49; Res 40/96 UNGA (12 December 1985) UN Doc A/RES/40/96; Res 41/43 UNGA (2 December 1986) UN Doc A/RES/41/43; Res 42/66 UNGA (2 December 1987) UN Doc A/RES/42/66; Res 43/233 UNGA (20 April 1989) UN Doc A/RES/43/233; Res 44/42 UNGA (7 December 1989) UN Doc A/RES/44/42; Res 45/67 UNGA (6 December 1990) UN Doc A/RES/45/67; Res 46/74 UNGA (11 December 1991) UN Doc A/RES/46/74; Res 47/64 UNGA (11 December 1992) UN Doc A/RES/47/64; Res 48/158 UNGA (20 December 1993) UN Doc A/RES/48/158; Res 49/62 UNGA (14 December 1994) UN Doc A/RES/49/62; Res 50/84 UNGA (15 December 1995) UN Doc A/RES/50/84; Res 50/140 UNGA (21 December 1995) UN Doc A/RES/50/140; Res 51/26 UNGA (4 December 1996) UN Doc A/RES/51/26; Res 52/52 UNGA (9 December 1997) UN Doc A/RES/52/52; Res 53/136 UNGA (9 December 1998) UN Doc A/RES/53/136; Res 54/152 UNGA (17 December 1999) UN Doc A/RES/54/152; Res 55/87 UNGA (4 December 2000) UN Doc A/RES/55/87. See also *Right of the Palestinian people to Self-Determination* Res 56/142 UNGA (19 December 2001) UN Doc A/RES/56/142; Res 57/199 UNGA (18 December 2002) UN Doc A/RES/57/199; Res 59/179 UNGA (20 December 2004) UN Doc A/RES/59/179; Res 60/146 UNGA (16 December 2005) UN Doc A/RES/60/146; Res 61/152 UNGA (19 December 2006) UN Doc A/RES/61/152; Res 62/146 UNGA (18 December 2007) UN Doc A/RES/62/146; Res 63/165 UNGA (18 December 2008) UN Doc A/RES/63/165; Res 64/150 UNGA (18 December 2009) UN Doc A/RES/64/150; Res 65/202 UNGA (21 December 2010) UN Doc A/RES/65/202; Res 66/146 UNGA (19 December 2011) UN Doc A/RES/66/146; Res 67/158 UNGA (20 December 2012) UN Doc A/RES/67/158; Res 68/154 UNGA (18 December 2013) UN Doc A/RES/68/154; Res 69/165 UNGA (18 December 2014) UN Doc A/RES/69/165; Res 70/141 UNGA (17 December 2015) UN Doc A/RES/70/141; Res 71/184 UNGA (19 December 2016) UN Doc A/RES/71/184; Res 72/160 UNGA (19 December 2017) UN Doc A/RES/72/160; Res 73/158 UNGA (17 December 2018) UN Doc A/RES/73/158; Res 74/139 UNGA (18 December 2019) UN Doc A/RES/74/139.

¹³⁶ See *Economic & Social Repercussions of the Israeli Settlements on the Palestinian people* Res 50/129 UNGA (20 December 1995) UN Doc A/RES/50/129; Res 51/134 UNGA (13 December 1996) UN Doc A/RES/51/134; Res 51/223 UNGA (13 March 1997) UN Doc A/RES/51/223; Res 53/55 UNGA (3 December 1998) UN Doc A/RES/53/55; Res 54/78 UNGA (6 December 1999) UN Doc A/RES/54/78. See also *Israeli Settlements in the Occupied Palestinian Territory* Res 57/126 UNGA (11 December 2002) UN Doc A/RES/57/126; Res 58/98 UNGA (9 December 2003) UN Doc A/RES/58/98; Res 60/106 UNGA (8 December 2005) UN Doc A/RES/60/106; Res 61/118 UNGA (14 December 2006) UN Doc A/RES/61/118; Res 62/108 UNGA (17 December 2007) UN Doc A/RES/62/108; Res 63/97 UNGA (5 December 2008) UN Doc A/RES/63/97; Res 64/93 UNGA (10 December 2009) UN Doc A/RES/64/93; Res 65/104 UNGA (10 December 2010) UN Doc A/RES/65/104; Res 66/78 UNGA (9 December 2011) UN Doc A/RES/66/78; Res 67/120 UNGA (18 December 2012) UN Doc A/RES/67/120; Res 68/82 UNGA (11 December 2013) UN Doc A/RES/68/82; Res 69/92 UNGA

Palestinians' rights.¹³⁷ Furthermore, like the NAM,¹³⁸ the GA in at least two instances, called upon states to 'desist in supplying Israel with any military and economic aid',¹³⁹ and requested

(5 December 2014) UN Doc A/RES/69/92; Res 70/89 UNGA (9 December 2015) UN Doc A/RES/70/89; Res 71/97 UNGA (6 December 2016) UN Doc A/RES/71/97; Res 72/86 UNGA (7 December 2017) UN Doc A/RES/72/86; Res 73/98 UNGA (7 December 2018) UN Doc A/RES/73/98; Res 74/88 UNGA (13 December 2019) UN Doc A/RES/74/88.

¹³⁷ See *Respect for the Implementation of Human Rights in Occupied Territories* Res 2443(XXIII) UNGA (19 December 1968) UN Doc A/RES/2443(XXIII); Res 2727(XXV) UNGA (15 December 1970) UN Doc A/RES/2727(XXV); Res 2851(XXVI) UNGA (20 December 1971) UN Doc A/RES/2851(XXVI); Res 3005(XXVII) UNGA (15 December 1972) UN Doc A/RES/3005(XXVII); Res 3091(XXVIII) UNGA (7 December 1973) UN Doc A/RES/3091(XXVIII); Res 3240(XXIX) UNGA (29 November 1974) UN Doc A/RES/3240(XXIX); Res 3525(XXX) UNGA (15 December 1975) UN Doc A/RES/3525(XXX); Res 32/19 UNGA (13 December 1977) UN Doc A/RES/32/19; Res 33/113 UNGA (18 December 1978) UN Doc A/RES/33/113; Res 34/90 UNGA (12 December 1979) UN Doc A/RES/34/90; Res 35/122 UNGA (11 December 1980) UN Doc A/RES/35/122; Res 36/147 UNGA (16 December 1981) UN Doc A/RES/36/147; Res 37/88 UNGA (10 December 1982) UN Doc A/RES/37/88; Res 38/79 UNGA (15 December 1983) UN Doc A/RES/38/79; Res 39/95 UNGA (14 December 1984) UN Doc A/RES/39/95; Res 40/161 UNGA (16 December 1985) UN Doc A/RES/40/161; Res 41/63 UNGA (3 December 1986) UN Doc A/RES/41/63; Res 42/160 UNGA (8 December 1987) UN Doc A/RES/42/160; Res 43/58 UNGA (6 December 1988) UN Doc A/RES/43/58; Res 44/48 UNGA (8 December 1989) UN Doc A/RES/44/48; Res 45/74 UNGA (11 December 1990) UN Doc A/RES/45/74; Res 46/47 UNGA (9 December 1991) UN Doc A/RES/46/47. See also *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People* Res 47/70 UNGA (14 December 1992) UN Doc A/RES/47/70; Res 48/41 UNGA (10 December 1993) UN Doc A/RES/48/41; Res 49/36 UNGA (9 December 1994) UN Doc A/RES/49/36; Res 50/29 UNGA (6 December 1995) UN Doc A/RES/50/29; Res 51/131 UNGA (13 December 1996) UN Doc A/RES/51/131; Res 52/67 UNGA (10 December 1997) UN Doc A/RES/52/67; Res 53/53 UNGA (3 December 1998) UN Doc A/RES/53/53; Res 53/56 UNGA (3 December 1998) UN Doc A/RES/53/56; Res 54/79 UNGA (6 December 1999) UN Doc A/RES/54/79; Res 55/133 UNGA (8 December 2000) UN Doc A/RES/55/133.

Res 56/62 UNGA (10 December 2001) UN Doc A/RES/56/62; Res 57/127 UNGA (11 December 2002) UN Doc A/RES/57/127; *Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People & Other Arabs of the Occupied Territories* Res 56/59 UNGA (10 December 2001) UN Doc A/RES/56/59; Res 57/124 UNGA (11 December 2002) UN Doc A/RES/57/124; Res 58/96 UNGA (9 December 2003) UN Doc A/RES/58/96; Res 58/99 UNGA (9 December 2003) UN Doc A/RES/58/99; Res 59/121 UNGA (10 December 2004) UN Doc A/RES/59/121; Res 59/124 UNGA (10 December 2004) UN Doc A/RES/59/124; Res 60/104 UNGA (8 December 2005) UN Doc A/RES/60/104; Res 60/107 UNGA (8 December 2005) UN Doc A/RES/60/107; Res 61/116 UNGA (14 December 2006) UN Doc A/RES/61/116; Res 61/119 UNGA (14 December 2006) UN Doc A/RES/61/119; Res 62/106 UNGA (17 December 2007) UN Doc A/RES/62/106; Res 62/109 UNGA (17 December 2007) UN Doc A/RES/62/109; Res 63/95 UNGA (5 December 2008) UN Doc A/RES/63/95; Res 63/98 UNGA (5 December 2008) UN Doc A/RES/63/98; Res 64/91 UNGA (10 December 2009) UN Doc A/RES/64/91; Res 64/94 UNGA (10 December 2009) UN Doc A/RES/64/94; Res 65/102 UNGA (10 December 2010) UN Doc A/RES/65/102; Res 65/105 UNGA (10 December 2010) UN Doc A/RES/65/105; Res 66/76 UNGA (9 December 2011) UN Doc A/RES/66/76; Res 66/79 UNGA (9 December 2011) UN Doc A/RES/66/79; Res 67/118 UNGA (18 December 2012) UN Doc A/RES/67/118; Res 67/121 UNGA (18 December 2012) UN Doc A/RES/67/121; Res 68/80 UNGA (11 December 2013) UN Doc A/RES/68/80; Res 68/83 UNGA (11 December 2013) UN Doc A/RES/68/83; Res 69/80 UNGA (5 December 2014) UN Doc A/RES/69/80; Res 69/93 UNGA (5 December 2014) UN Doc A/RES/69/93; Res 70/87 UNGA (9 December 2015) UN Doc A/RES/70/87; Res 70/90 UNGA (9 December 2015) UN Doc A/RES/70/90; Res 71/95 UNGA (6 December 2016) UN Doc A/RES/71/95; Res 71/98 UNGA (6 December 2016) UN Doc A/RES/71/98; Res 72/84 UNGA (7 December 2017) UN Doc A/RES/72/84; Res 72/87 UNGA (7 December 2017) UN Doc A/RES/72/87; Res 73/96 UNGA (7 December 2018) UN Doc A/RES/73/96; Res 73/99 UNGA (7 December 2018) UN Doc A/RES/73/99; Res 74/87 UNGA (13 December 2019) UN Doc A/RES/74/87; Res 74/89 UNGA (13 Dec 2019) UN Doc A/RES/74/89.

¹³⁸ UNGA, 'Letter from the Representative of Peru (on behalf of the NAM)' (5 Sept 1975) UN Doc A/10217, 15.

¹³⁹ *Situation in the Middle East* Res 3414(XXX) UNGA (5 December 1975) UN Doc A/RES/3414(XXX).

the SC ‘to take effective measures’ for the ‘implementation of [the SC and GA’s] relevant resolutions’.¹⁴⁰

In 2003, following Israel’s decision to construct a security barrier that ‘deviated significantly from the “Green Line” [and] ‘ran virtually wholly within’ Occupied Palestinian Territories in the West Bank, the GA requested an ICJ opinion on the legal consequences of Israel’s conduct.¹⁴¹ In the *Wall* opinion, the Court found that Israel breached its duty to respect Palestinian’s right to self-determination,¹⁴² and certain duties under humanitarian law.¹⁴³ Likewise, it found that states have the duty not to recognise the illegal situation created by Israel’s actions, not to aid Israel in maintaining the situation, and to cooperate to end the alleged violations.¹⁴⁴ Due to the continued Israeli practices in the Occupied Palestinian Territories, the GA again sought another advisory opinion in 2022 as to the ‘legal consequences arising from the [Israel’s] ongoing violation of the Palestinian people’s [right] to self-determination’.¹⁴⁵

No state has invoked Israel’s duty to respect Palestinian’s right to self-determination via judicial dispute resolution.¹⁴⁶ Yet, some levied measures against Israel to enforce this duty. Recall that in 1945, Arab League members banned trade with Israel.¹⁴⁷ While most have since abandoned this boycott,¹⁴⁸ Saudi Arabia retained this measure after acceding to the GATT in 2005.¹⁴⁹ This arguably amounts to a discriminatory practice prohibited by GATT Article I and is thus a countermeasure.¹⁵⁰ For its part, the EEC/EU, in a measure of retorsion, suspended aid

¹⁴⁰ *Situation in the Middle East* Res 31/61 UNGA (9 December 1976) UN Doc A/RES/31/61.

¹⁴¹ *Illegal Israeli actions in Occupied East Jerusalem & the Rest of the Occupied Palestinian Territory* Res ES-10/14 UNGA (8 December 2003) UN Doc A/RES/ES-10/14.

¹⁴² *Wall* [2004] (n 18), 171, 200.

¹⁴³ *Ibid*, 177, 182–94, 191–2, 200.

¹⁴⁴ *Ibid*, 200. *But see* on non-recognition: (Higgins, Separate Opinion), 216 (‘It follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter’). On non-assistance: (Higgins, Separate Opinion), 217 (‘The duty [of] and non-assistance does not rest on the notion of *erga omnes*’); Aust Helmut, ‘Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the ILC’ in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 239 (‘States also incur responsibility for aiding and assisting [the commission of wrongful acts] on the basis of [2001 Draft] Articles’). On cooperation: Tladi Dire, ‘Fifth Report on Peremptory Norms’ (24 January 2022) UN Doc A/CN.4/747, 85 (‘Remains almost entirely aspirational’); *Wall* [2004] (n 18), (Koojimans, separate opinion), 233–4.

¹⁴⁵ *Israeli Practices affecting the Human Rights of the Palestinian people in the Occupied Palestinian Territory* Res 77/247 UNGA (30 December 2022) UN Doc A/RES/77/247.

¹⁴⁶ *See* on the genocide in Gaza: ‘Application’, *Application of the Genocide Convention in Gaza* (n 112).

¹⁴⁷ Truck Nancy, ‘Arab Boycott of Israel’ (1977) 55 *Foreign Affairs* 472, 474; Kontrorovich Eugene, ‘Arab League Boycott & WTO Accession’ (2003) 4 *Chicago Journal of International Law* 283, 286.

¹⁴⁸ Kontrorovich, ‘Arab League Boycott & WTO Accession’ (n 147), 284.

¹⁴⁹ Freund Michael, ‘Congress to Saudis: End Israel boycott’ (Jerusalem Post, 6 April 2006) <<http://www.jpost.com/International/Congress-to-Saudis-End-Israel-boycott>>.

¹⁵⁰ *See* Proukaki, *Problem of Enforcement* (n 78), 154–5. *Note* that the EC expressed support for these

to Israel on several occasions.¹⁵¹ In contrast, except between 1992 and 1996, the US remained Israel's largest donor.¹⁵²

D. Indonesia's denial of Timor Leste's right to external self-determination (1975–99)

After the *coup d'état* in 1974, Portugal announced its withdrawal from its colonies.¹⁵³ Meanwhile, in Timor Leste, a conflict erupted between its two largest parties—the Frente Revolucionaria de Timor Leste Independente ('FREITLIN') which sought independence from Portugal and the União Democrática Timorense ('UDT') which favoured autonomy.¹⁵⁴ FREITLIN eventually gained control over the Timor Leste and declared independence in August 1975.¹⁵⁵ Undeterred, the UDT formed a coalition Movimento Anti-Comunista ('MAC')—a party that sought integration with Indonesia—and continued attacking FREITLIN.¹⁵⁶ Portugal, dealing with its domestic problems, was powerless to intervene. In December 1975, it informed the SC of its inability to 'restore peace in Timor' and to ensure peaceful decolonisation.¹⁵⁷

The same month, Indonesia landed troops in Timor Leste allegedly to de-escalate the conflict, provide humanitarian assistance, and prevent the spillover of violence.¹⁵⁸ Yet, before sending troops into Timor Leste, it already evinced its intent to annex the territory.¹⁵⁹ In May

measures stating that states have the 'liberty to take measures restricting trade [to] protect its national security interests' (Council of the EC, 'Arab Economic Boycott of Israel (A3-0239/93)' (16 November 1993) C 329/47, 48).

¹⁵¹ Tomaševski Katarina, *Responding to Human Rights Violations: 1946–1999* (Kluwer 2000), 69.

¹⁵² Ibid, 71. See Dugard, 'Human Rights in the Palestinian Territories Occupied since 1967' (2007) (n 105), 3.

¹⁵³ Lawless Robert, 'Indonesian Takeover of East Timor' (1976) 16(1) *Asian Survey* 948, 948.

¹⁵⁴ Olsson Louise, *Gender Equality & UN Peace Operations* (Nijhoff 2009), 60–1; Cheah Ling, 'Forgiveness & Punishment in Post-Conflict Timor' (2005) 10 *UCLA Journal of International Law & Foreign Affairs* 297, 302. See —, 'Portuguese Timor Reports Fighting After Coup Attempt' (New York Times, 14 August 1975); Sweeney Christopher, 'Timor Rivals Prepare to Fight' (The Guardian, 16 August 1975) <<https://www.proquest.com/historical-newspapers/timor-rivals-prepare-fight/docview/185862344/>>.

¹⁵⁵ Jolliffe Jill, *East Timor: Nationalism & Colonialism* (University of Queensland Press 1978), 212; —, 'Fretilin Declares Timor's Freedom' (The Guardian, 29 November 1975) <<https://www.proquest.com/historical-newspapers/fretilin-declares-timors-freedom/docview/185835473>>. See —, 'Portugal Says It Rules Timor' (New York Times, 30 Nov 1975) <<https://www.proquest.com/historical-newspapers/portugal-says-rules-timor/docview/120208330>>.

¹⁵⁶ Lawless, 'Indonesian Takeover of East Timor' (n 153), 953.

¹⁵⁷ UNSC, 'Letter from the Permanent Representative of Portugal' (8 December 1975) UN Doc S/11899.

¹⁵⁸ *East Timor* [1995] (n 18), 96. Howard Jessica, 'Invoking State Responsibility for Aiding the Commission of International Crimes—Australia, the US, & East Timor' (2001) 2 *Melbourne Journal of International Law* 1, 27–8. See UNSC, 'Verbatim Record, 1864th Meeting' (15 December 1975) UN Doc S/PV.1864, 11–8; UNSC, 'Verbatim Record, 1869th Meeting' (18 December 1975) UN Doc S/PV.1869, 2–3.

¹⁵⁹ See Lawless, 'Indonesian Takeover of East Timor' (n 153), 950–1. —, 'Indonesia to Press Interests in Timor' (New York Times, 2 December 1975) <<https://www.proquest.com/historical-newspapers/indonesia-press->

1976, it convened a 'People's Assembly' in Timor Leste, composed of hand-picked members, which endorsed Timor Leste's integration with Indonesia.¹⁶⁰ Two months after sending troops, Indonesia declared Timor Leste as its twenty-seventh province.¹⁶¹ This began Indonesia's occupation of Timor Leste.¹⁶² According to estimates, this resulted in the detention of 200,000 Timorese in camps and the deaths of 100,000.¹⁶³ Only in August 1999 did Indonesia hold a referendum in Timor Leste resulting in independence in May 2002.¹⁶⁴

Indonesia's actions in Timor Leste amounted to a breach of its *duty to respect its people's right to external self-determination*.¹⁶⁵ Clearly, Timor Leste's people are entitled to such a right. Its decolonisation was incomplete.¹⁶⁶ Indeed, until 2002, the UN considered Timor Leste an NSGT.¹⁶⁷ By occupying and annexing Timor Leste, Indonesia breached its duty to 'refrain from any forcible action which deprives peoples of their right to self-determination',¹⁶⁸ and denied Timor Leste's people's 'right to territorial integrity and political independence'.¹⁶⁹ The 1976 People's Assembly's endorsement of integration does not militate against this conclusion. Due to issues concerning the Assembly's legitimacy,¹⁷⁰ it is doubtful if it represented the 'free and genuine expression of the will of [Timor Leste's] people'.¹⁷¹ Finally, Indonesia, by subjecting Timor Leste's people to widespread and systematic human rights violations,¹⁷² and denying

interests-timor/docview/120550287>; — —, 'Jakarta Threat to Timor' (The Guardian, 5 December 1975) <<https://www.proquest.com/historical-newspapers/jakarta-threat-timor/docview/185756450>>.

¹⁶⁰ Lawless, 'Indonesian Takeover of East Timor' (n 153), 948; Andelman David, 'Indonesia Completes Takeover of Timor' (New York Times, 1 June 1976) <<https://www.proquest.com/historical-newspapers/indonesia-completes-takeover-portuguese/docview/122850937>>.

¹⁶¹ Retboll Torben, 'East Timor & Western Response' (1987) 19(1) *Bulletin of Concerned Asian Scholars* 24, 24.

¹⁶² *East Timor* [1995] (n 18), 96.

¹⁶³ Clark Roger, 'Criminal Genocide in the Context of Indonesia's Invasion of East Timor' (1981) 8 *Ohio Northern University Law Review* 321, 323; Retboll, 'East Timor & Western Response' (n 161), 27; Saul Ben, 'Was the Conflict in East Timor "Genocide" & Why Does it Matter?' (2001) 2 *Melbourne Journal of International Law* 470, 510.

¹⁶⁴ Charney, 'Chechnya, Kosovo, & East Timor' (n 62), 466; Weller Marc, 'Settling Self-determination Conflicts: Recent Developments' (2009) 20 *European Journal of International Law* 111, 146.

¹⁶⁵ *Question of East Timor* Res 32/34 UNGA (28 November 1977) UN Doc A/RES/32/34 ('[Due to Indonesia's actions] the people of the Territory have not been able to exercise freely their right to self determination and independence')

¹⁶⁶ UNSC, 'Letter from the Permanent Representative of Portugal' (1975) (n 157).

¹⁶⁷ *East Timor* [1995] (n 18), 95–6. See Chinkin Christine, 'East Timor Case (Portugal v Australia)' (1996) 45 *International & Comparative Law Quarterly* 712, 715.

¹⁶⁸ See *Wall* [2004] (n 18), 172 citing Res 2625 (XXV) (n 3).

¹⁶⁹ 'Memoire du Portugaise', *East Timor* (n 47), 17–20. See Howard, 'Aiding the Commission of International Crimes' (n 158), 36, 44–5; Charney, 'Chechnya, Kosovo, & East Timor' (n 62), 465.

¹⁷⁰ Howard, 'Aiding the Commission of International Crimes' (n 158), 36.

¹⁷¹ See *Chagos* [2019] (n 1), 137.

¹⁷² Note that while the people of Timor Leste constitute a national group for the purposes of genocide, the

them access to and control over their natural resources,¹⁷³ arguably curtailed their political and socio-economic progress.

States condemned Indonesia's actions in Timor Leste.¹⁷⁴ Between 1975 and 1981, the GA called for Indonesia's withdrawal.¹⁷⁵ Yet, no state levied countermeasures against Indonesia. Due to its strategic importance,¹⁷⁶ several Western countries continued to provide material aid to Indonesia.¹⁷⁷ Australia afforded economic and diplomatic support to Indonesia.¹⁷⁸ Other Western states such as the US, UK, West Germany, and Belgium also provided economic or military assistance.¹⁷⁹ Only after the 1991 Dili massacre did the Netherlands and Canada levy retorsions against Indonesia by suspending aid.¹⁸⁰

In 1989, Portugal instituted a related case before the ICJ following Indonesia and Australia's conclusion of the Timor Gap Treaty.¹⁸¹ As Indonesia had not accepted the ICJ's jurisdiction, only Australia was impleaded.¹⁸² Portugal alleged that the treaty's conclusion violated its rights as Timor Leste's administering power. It also claimed that Australia infringed on Timor Leste's people's right to self-determination by denying them their right to self-government and sovereignty over natural resources.¹⁸³ Portugal, under its first claim, sought to

requisite 'intent' appears to be absent (See Saul, 'Was the Conflict in East Timor "Genocide"?' (n 163), 515; Clark, 'Criminal Genocide & Indonesia's Invasion of East Timor' (n 163), 326).

¹⁷³ 'Memoire du Portugaise', *East Timor* (n 47), 17–20; Howard, 'Aiding the Commission of International Crimes' (n 158), 38, fn 181. See *East Timor* [1995] (n 18) (Weeramantry, dissenting) 151; (Skubizecki, dissenting), 242.

¹⁷⁴ Res 384 UNSC (22 Dec 1975) UN Doc S/RES/384; *Question of Timor* Res 3485 (XXX) UNGA (12 Dec 1975) UN Doc A/RES/3485. See UNSC, 'Verbatim Record, 1867th Meeting' (18 Dec 1975) UN Doc S/PV.1867.

¹⁷⁵ See *Question of Timor* Res 31/53 UNGA (1 December 1976) UN Doc A/RES/31/53; Res 32/34 (n 165); *Question of East Timor* Res 33/39 UNGA (13 December 1978) UN Doc A/RES/33/39; *Question of East Timor* Res 34/40 UNGA (21 November 1979) UN Doc A/RES/34/40; *Question of East Timor* Res 35/27 UNGA (11 November 1980) UN Doc A/RES/35/27; *Question of East Timor* Res 36/50 UNGA (24 November 1981) UN Doc A/RES/36/50.

¹⁷⁶ Cheah, 'Post-Conflict Timor' (n 154), 303; Howard, 'Aiding the Commission of International Crimes' (n 158), 24.

¹⁷⁷ Retboll, 'East Timor & Western Response' (n 161), 30; Howard, 'Aiding the Commission of International Crimes' (n 158), 24. See Richardson Henry, 'Critical Thought on Self-Determination for East Timor and Kosovo' (2000) 14 *Temple International & Comparative Law Journal* 101, 103.

¹⁷⁸ Howard, 'Aiding the Commission of International Crimes' (n 158), 33.

¹⁷⁹ Retboll, 'East Timor & Western Response' (n 161), 31, 35; Fernandes Clinton, 'Accomplice to Mass Atrocities: International Community & Indonesia's Invasion of East Timor' (2015) 3(4) *Politics and Governance* 1, 5.

¹⁸⁰ Tomaševski, *Responding to HR Violations: 1946–99* (n 151), 226–7 ('The Netherlands [and] Canada suspended [their] aid [...] [Yet] Japanese and German aid to Indonesia was not interrupted [...] France and the [UK] counterbalanced the loss of Dutch and Canadian aid. [The UK] increased aid to Indonesia [...] Australia offset cuts in US military aid').

¹⁸¹ *Timor Gap Treaty* (adopted 11 December 1989, entered into force 9 February 1991) 29 ILM 469.

¹⁸² Chinkin, 'East Timor Case' (n 167), 715.

¹⁸³ 'Memoire du Portugaise', *East Timor* (n 47), 17–20. See Lefeber René & Raič David, 'Chechen People,

vindicate its rights as the ‘injured state’.¹⁸⁴ Yet, it asserted that its second claim was an ‘international public service’ on ‘behalf of and in the interest of [Timor Leste’s] people’.¹⁸⁵ Arguably, this translated to an assertion of the competence of a ‘state other than an injured state’. In response, Australia argued that Portugal failed to demonstrate the ‘*erga omnes* character of the [duty] [...] it asserted’.¹⁸⁶ Furthermore, while Australia acknowledged the ICJ’s *dictum* in *Barcelona Traction*, it argued that the ‘Court did not say that every [duty owed] *erga omnes* would support [...] *actio popularis* [proceedings]’.¹⁸⁷ Finally, it claimed that the ‘right to self-determination gives rise to consequential [duties] for third states only where there has been a collective decision by the international community to that effect’.¹⁸⁸

The ICJ concluded that the ‘effects of the judgment requested by Portugal’ required the determination of the lawfulness of Indonesia’s conduct in Timor Leste and its ‘treaty-making power [over Timor Leste’s] continental shelf resources’.¹⁸⁹ Thus, it ruled that it could not decide on the matter as ‘the Court can only exercise jurisdiction over [Indonesia] with its consent’.¹⁹⁰ Having deemed the case inadmissible, the Court did not examine Australia’s objections concerning Portugal’s competence to implement duties owed *erga omnes*.¹⁹¹

Continued: Postscript’ (1997) 10 *Leiden Journal of International Law* 16, 20 (‘By concluding an agreement with Australia [...] Indonesia exercised a right of [Timor Leste’s] people. [...] Indonesia cannot [...] exercise such a right and Australia cannot lawfully conclude an agreement with Indonesia involving that right [...] Its conclusion [is] a violation of the right to self-determination of the [Timor Leste’s] people’).

¹⁸⁴ ‘Memoire du Portugaise’, *East Timor* (n 47), 9.

¹⁸⁵ *Ibid.*, 9–11. *But see* ‘Rejoinder of Australia’, *East Timor* (Portugal v Australia) (Judgment) (ICJ, General List No 84, 1 July 1993), 67 (‘Whatever claims Portugal might have against Indonesia as the state that has displaced its administration of [Timor Leste], it is unsound as a matter of legal principle and good judicial administration to accord standing to a state on behalf of a separate and distinct people where [it is] in no position to represent those people’).

¹⁸⁶ ‘Counter-Memorial of Australia’, *East Timor* (Portugal v Australia) (Judgment) (ICJ, General List No 84, 1 June 1992), 118 (‘Portugal cannot bring these proceedings [...] unless it can show that an entitlement to do so arises from the *erga omnes* character of the [duty] which it asserts. Portugal points to no other basis on which it could rely’).

¹⁸⁷ *Ibid.*, 119 (‘Even if it be assumed that the right of self-determination gives rise to [duties owed] *erga omnes*’)

¹⁸⁸ *Ibid.* (‘To allow states to proceed [...] in the absence of a collective decision would lead to action of a highly subjective character’). *See* 118 (‘Portugal [cannot] act on [Timor Leste’s] behalf much less the international community’)

¹⁸⁹ *East Timor* [1995] (n 18), 104–5.

¹⁹⁰ *Ibid.* citing *Monetary Gold Removed from Rome in 1943* (Italy v France, UK, & US) (Judgment) [1954] ICJ 2, 32. *See* (Vereshchetin, separate opinion), 125. *But see* Chinkin, ‘East Timor Case’ (n 167), 717–9 citing (Weeramantry, dissenting), 162 (‘The mere allegation of a third party’s wrongdoing as a prerequisite to the proof of one’s own cannot [...] steer it away from the [...] state’s individual responsibility for its [...] actions’); (Skubiszewski, dissenting), 245 (‘This fact is not a bar to the court’s jurisdiction, nor does it make the various claims inadmissible’).

¹⁹¹ *East Timor* [1995] (n 18), 105–6; (Weeramantry, dissenting), 215; Frowein Jochen, ‘Reactions by Not Directly Affected States to Breaches of Public International Law’ (1994) 248 *Recueil des Cours de l’Académie de Droit International* 345, 406.

E. Yugoslavia's denial of Kosovars' right to internal self-determination (1990–2000)

Before 1988, Kosovo enjoyed substantial autonomy within Yugoslavia.¹⁹² However, under Milosević, Yugoslavia (later Serbia and Montenegro), restricted Kosovo's autonomy. Among other things, it removed the province's control over its police, courts, civil defence, and economic and educational policies.¹⁹³

In response, the Kosovo Parliament in 1990 issued a declaration demanding to be an 'equal and independent entity within [Yugoslavia]'.¹⁹⁴ A year later, it held a referendum in which its population voted for an independent state of Kosovo.¹⁹⁵ Milosević's regime did not view these developments favourably. In 1990, it dissolved Kosovo's Parliament.¹⁹⁶ In 1991, it also made the Serbian language compulsory in schools, fired thousands of Albanians from their jobs, and transferred a sizeable police force to Kosovo.¹⁹⁷ Thus, began its repressive rule in which hundreds of thousands of Albanian Kosovars were arbitrarily arrested, executed, tortured, and discriminated against.¹⁹⁸ At first, Albanian Kosovars resorted to protests. Yet, by 1996, a 'growing number of Albanians [realised that] peaceful resistance [did not] improve their situation'.¹⁹⁹ As discussed in *Chapter 5B*, this led to the KLA's armed resistance and conflict with Serbian forces by 1998.²⁰⁰ The hostilities lasted until June 1998 after NATO's intervention forced Milosević to withdraw from Kosovo.²⁰¹

¹⁹² Charney, 'Chechnya, Kosovo, & East Timor' (n 62), 460; Kuci Hajredin, 'Legal & Political Grounds for, & the Influence of Situation on, the Demand of Kosovo for Independence' (2005) 80 *Chicago-Kent Law Review* 331, 341.

¹⁹³ Zimmermann Andreas & Stahn Carsten, 'Reflections on the Current & Future Legal Status of Kosovo' (2001) 70 *Nordic Journal of International law* 423, 425; Abrams Jason, 'Atrocities in Cambodia & Kosovo: Observations on the Codification of Genocide' (2001) 35 *New England Law Review* 303, 307; Gabor Francis, 'Reflections on Ethnic Self-Determination in Central-Eastern Europe' (2000) 41 *Acta Juridica Hungarica* 3, 8.

¹⁹⁴ Zimmermann & Stahn, 'Status of Kosovo' (n 193), 426; —, 'Kosovo Rule Dissolved' (Washington Post, 6 July 1990) <<https://www.proquest.com/newspapers/kosovo-rule-dissolved/docview/307341081>>.

¹⁹⁵ Kuci, 'Demand of Kosovo for Independence' (n 192), 342; Home AD, 'Ethnic Albanians in Yugoslavia Reportedly Vote for Sovereignty' (Washington Post, 26 October 1999) <<https://www.proquest.com/newspapers/ethnic-albanians-yugoslavia-reportedly-vote/docview/307434039>>.

¹⁹⁶ Dietrich Frank, 'Status of Kosovo— Legitimacy of Secession' (2010) 33 *Ethics & Global Politics* 123, 124.

¹⁹⁷ Ibid; Zimmermann & Stahn, 'Status of Kosovo' (n 193), 426.

¹⁹⁸ Dawidowicz, *Third Party Countermeasures* (n 48), 182; Pellet Alain, 'Questions Not Asked: Self-Determination, Secession, & Recognition' in Milanović Marko & Wood Michael (eds), *Law & Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015), 273.

¹⁹⁹ Charney, 'Chechnya, Kosovo, & East Timor' (n 62), 461; Dietrich, 'Status of Kosovo' (n 196), 125.

²⁰⁰ Cvijic Srdjan, 'Self-Determination as a Challenge to Humanitarian Interventions: Kosovo' (2007) 8 *German Law Journal* 57, 62; Abrams, 'Atrocities in Cambodia & Kosovo' (n 193), 307; Dietrich, 'Status of Kosovo' (n 196), 125.

²⁰¹ Charney, 'Chechnya, Kosovo, & East Timor' (n 62), 462; Cvijic, 'Kosovo' (n 200), 63.

Yugoslavia/Serbia and Montenegro, as Pellet, Zimmermann, and Stahn submit, breached its *duty to respect the Kosovars' right to internal self-determination* by denying Kosovars autonomy and subjecting them to 'gross human rights violations'.²⁰² Kosovars are arguably entitled to the right to internal self-determination.²⁰³ Kosovo's 'majority population' is a distinct 'ethnic and linguistic' group that 'inhabited a compact territory'.²⁰⁴ Thus, they are entitled to 'meaningful political participation' and may 'choose their political status' within Yugoslavia/Serbia and Montenegro.²⁰⁵ The Kosovars' demand to be an 'equal and independent entity within Yugoslavia' falls under this category.²⁰⁶ Yet, Milosević's regime repressed the Kosovars' rights through brutal measures.²⁰⁷

States responded to the situation in Kosovo even before the civil conflict began. In 1993, the GA condemned the abuses against Albanian Kosovars and the 'large-scale repression committed by the Serbian authorities' that included arbitrary arrests and detention, torture, discriminatory removal of ethnic Albanian officials, and repression by the police and military.²⁰⁸ In 1996, the CHR also called on Yugoslavia to allow Albanian Kosovars 'to participate fully in the life of Kosovo', 'enjoy political and educational rights', and establish 'democratic institutions'.²⁰⁹ Responding to the hostilities between KLA and Serbian forces, the SC, in March 1998 adopted Resolution 1160 which condemned the violence and 'expressed its support' for Kosovo's 'enhanced status' including a 'greater degree of autonomy and [...] self-administration', condemned the human rights violations committed by government forces, and imposed an arms embargo, under Chapter VII, against Yugoslavia.²¹⁰

²⁰² Pellet, 'Self-Determination, Secession, & Recognition' (n 198), 273; Zimmermann & Stahn, 'Status of Kosovo' (n 193), 456. *Note* that Yugoslavia ratified the ICCPR on 23 March 1976.

²⁰³ *Note* that whether the Kosovars are entitled to external self-determination through 'remedial secession' remains to be seen (Gabor, 'Ethnic Self-Determination in Central-Eastern Europe' (n 193), 13; Zimmermann & Stahn, 'Status of Kosovo' (n 193), 455). Indeed, the ICJ did not address the issue in the *Kosovo* opinion (*Kosovo* [2010] (n 24), 438).

²⁰⁴ Kuci, 'Demand of Kosovo for Independence' (n 192), 343. Zimmermann & Stahn, 'Status of Kosovo' (n 193), 454. *See* Abrams, 'Atrocities in Cambodia & Kosovo' (n 193), 308.

²⁰⁵ Joseph & Castan, *ICCPR* (n 6), 160; McCorquodale, 'Self-Determination: Human Rights Approach' (n 2), 863.

²⁰⁶ *See* Gabor, 'Ethnic Self-Determination in Central-Eastern Europe' (n 193), 13.

²⁰⁷ *See* Senaratne, 'Internal Self-Determination' (n 2), 306 ('Internal self-determination [also means] [...] that ethnic, racial, or religious minority groups within a state have "a right not to be oppressed by the central government"') *citing* Cassese, 'Political Self-Determination' (n 2), 137.

²⁰⁸ *Situation of Human Rights in Yugoslavia* Res 48/153 UNGA (20 Dec 1993) UN Doc A/RES/48/153. *See* Res 49/204 UNGA (23 Dec 1994) UN Doc A/RES/49/204; Res 50/190 UNGA (22 Dec 1995) UN Doc A/RES/50/190; Res 52/139 UNGA (12 Dec 1997) UN Doc A/RES/52/139; Res 53/164 UNGA (9 December 1998) UN Doc A/RES/53/164.

²⁰⁹ *Situation of Human Rights in Yugoslavia* Res 1996/71 UN CHR (23 April 1996) UN Doc E/CN.4/RES/1996/71. *See* Res 1992/2 UN CHR (13 April 1999) UN Doc E/CN.4/RES/1992/2.

²¹⁰ Res 1160 UNSC (31 Mar 1998) UN Doc S/RES/1160. *See also* Res 1199 UNSC (23 Sept 1998) UN Doc

As the ILC noted,²¹¹ states levied unilateral measures against Yugoslavia/Serbia and Montenegro. In March 1998, before SC Resolution 1160, the EU levied a retorsion through an arms embargo.²¹² It also levied targeted measures in the form of travel restrictions against some officials.²¹³ In response, Serbia and Montenegro claimed that these measures were ‘tantamount to [...] gunboat diplomacy’.²¹⁴ In May, the EU further levied countermeasures by banning investments in Serbia and Montenegro.²¹⁵ In June, it also banned flights by Yugoslav carriers to the EU.²¹⁶ Canada, Japan, and the US followed suit by restricting investments in Serbia and Montenegro and banning flights by Yugoslav carriers.²¹⁷

III. ANALYSIS OF STATE PRACTICE & *OPINIO JURIS*

Like the previous chapters, the survey above is not meant to be comprehensive. In the interest of space, it did not examine other breaches of the duty to respect a people’s right to self-determination such as Morocco’s denial of the Western Sahara’s people’s right to external self-determination (1973–),²¹⁸ and Russia’s denial of the Chechens’ internal self-determination (1991–6).²¹⁹ Yet, it must be noted that in none of these cases did ‘states other than an injured state’ implement the duties to respect a people’s right to self-determination.²²⁰ These appear to suggest, as will be shown below, that as to this norm, states have not accepted as the law the competence of ‘states other than an injured state’ to invoke another’s responsibility via judicial dispute resolution or enforce it through unilateral measures. Thus, as to the norm on self-

S/RES/1998; UNSC, ‘Statement of the SC President’ (19 January 1999) UN Doc S/PRST/1999/2.

²¹¹ Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 103.

²¹² Council of the EU, ‘Common Position 98/240/CFSP’ (19 March 1998) L 95/1

²¹³ Ibid. See Bothe Michael, ‘Compatibility & Legitimacy of Sanctions Regimes’ in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 33; Lugato M, ‘Sanctions & Individual Rights’ in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 183.

²¹⁴ UNSC, ‘Verbatim Record, 3868th Meeting’ (31 March 1998) UN Doc S/PV.3868, 16.

²¹⁵ Council of the EU, ‘Common Position 98/326/CFSP’ (7 May 1998) L 143/1; Dawidowicz, *Third Party Countermeasures* (n 48), 1985 (‘For Austria, Bulgaria, France, Germany, Greece, the Netherlands, Poland, Romania, Slovakia and Sweden, the investment ban seemingly violated their respective bilateral investment treaties with the FRY’).

²¹⁶ Council of the EU, ‘Common Position 98/426/CFSP’ (29 June 1998) L 190; Dawidowicz, *Third Party Countermeasures* (n 48), 1985 (‘[For] Austria, Belgium, France, Germany, Greece, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom, the flight ban violated their air services agreements with the FRY’).

²¹⁷ Dawidowicz, *Third Party Countermeasures* (n 48), 186.

²¹⁸ See *Western Sahara* [1975] (n 24), 45–8, 64.

²¹⁹ See Lefeber & Raič, ‘Chechen People’ (n 183), 14; Charney, ‘Chechnya, Kosovo, & East Timor’ (n 62), 456.

²²⁰ See on Morocco: Tomaševski, *Responding to HR Violations: 1946–99* (n 151), 385 (‘[The] government that [was] condemned for human rights violations but economic sanctions did not follow’). On Russia: *ibid.*, 364–5 (‘The EC appears to have levied retorsions on Russia’); Charney, ‘Chechnya, Kosovo, & East Timor’ (n 62), 456.

determination, it may be said that 2001 Draft Article 48 remains a progressive measure while the status of 2001 Draft Article 54 remains unsettled.

A. Invocation of Responsibility through Judicial Dispute Resolution

As to invocation via judicial dispute resolution, there were only two instances in which ‘states other than an injured state’ invoked another’s responsibility since 1970.²²¹ None were successful. The first was in 1961 when Liberia and Ethiopia invoked South Africa’s responsibility for its conduct in Namibia.²²² The second was in 1991 when Portugal invoked Australia’s responsibility for its actions, in conjunction with Indonesia, in Timor Leste.²²³ In both cases, the respondents opposed the applicants’ competence to invoke their responsibility. In *Southwest Africa*, South Africa asserted that there was no dispute between it and Ethiopia, Liberia, or any other ‘member of the League of Nations’.²²⁴ It also stressed that the alleged breach ‘does not affect any material interests’ of Ethiopia and Liberia.²²⁵ Similarly, in *East Timor*, Australia argued that the *dictum* in *Barcelona Traction* ‘did not say that every [duty owed] *erga omnes* would support *actio popularis* [proceedings]’.²²⁶ It also asserted that states may only invoke another’s responsibility for breaches of duties owed *erga omnes* if ‘there has been a collective decision by the international community to that effect’.²²⁷

As observed in *Chapter 5A*, the relative absence of practice may be due, in part, to the difficulty in establishing jurisdiction before tribunals.²²⁸ While the ICCPR has a compromissory clause that allows states to seize courts’ jurisdiction and invoke another’s

²²¹ See *Southwest Africa* [1966] (n 52), 39, 41–2, 47; *East Timor* [1995] (n 18), 104–5.

²²² See *Southwest Africa* [1962] (n 49), 343; *Southwest Africa* [1966] (n 52) 39, 41–2, 47.

²²³ ‘Memoire du Portugaise’, *East Timor* (n 47), 9–11.

²²⁴ ‘Preliminary Objections’, *Southwest Africa* (Preliminary Objections) (ICJ, General List Nos 46 & 47, 30 November 1961), 213.

²²⁵ Ibid, 213. Compare ‘Application’, *Application of the Genocide Convention in Gaza* (n 112), 3, 6, 9, 78; ‘Verbatim Record 2024/1’, *Application of the Genocide Convention in Gaza* (South Africa v Israel) (ICJ, General List No 192, 11 January 2024), 42, 53–4.

²²⁶ ‘Counter-Memorial of Australia’, *East Timor* (n 186), 119. Compare ‘Verbatim Record 2013/18’, *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Merits) (ICJ, General List No 148, 9 July 2013), 28, 33–4.

²²⁷ ‘Counter-Memorial of Australia’, *East Timor* (n 186), 119. See 118 (‘The [UN] has not granted Portugal any authority to act on behalf of [Timor Leste] much less the international community’)

²²⁸ Gaja Giorgio, ‘Protection of General Interests in the International Community’ (2011) 364 *Recueil des Cours de l’Académie de Droit International* 9, 110; Tams Christian & Tzanakopoulos Antonios, ‘Barcelona Traction: ICJ as an Agent of Legal Development’ (2010) 23 *Leiden Journal of International Law* 781, 793. See Nollkaemper André, ‘International Adjudication of Global Public Goods: Substance & Procedure’ (2012) 23 *European Journal of International Law* 769, 786; Tams Christian, ‘Individual States as Guardians of Community Interests’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 385, 399.

responsibility for breach of the *duty to respect the right to internal self-determination*,²²⁹ the same is not true for *external self-determination*. This norm, like the norm against force, is not usually subject of compromissory clauses. Furthermore, many of the states that have breached the duty relating to self-determination have not made optional clause declarations as to disputes involving the norm,²³⁰ or have withdrawn these declarations.²³¹ This prevents ‘states other than an injured state’ from implementing another’s responsibility through judicial dispute resolution. Case in point, *East Timor* where Portugal was not able to establish a jurisdictional link with Indonesia.²³² Nonetheless, it must also be stressed that in the instances in which the ICJ would have had jurisdiction over claims against the wrongful state,²³³ no ‘state other than an injured state’ invoked the wrongful state’s responsibility.

It may also be due to the lack of clarity in the case law. Recall the ICJ’s changing stance in the two *Southwest Africa* cases. The Court in 1962 ruled that the Mandate Agreement’s clause gave ‘[League] members [...] a legal right or interest in the [Mandatory’s] observance [...] of its [duties]’.²³⁴ Yet, it reversed its position in 1966 stating that the clause did not vest states this capacity.²³⁵ While *Barcelona Traction* is commonly seen as an effort from the Court to ‘right [the] wrong’,²³⁶ it did not explain how these duties may be implemented,²³⁷ or the nature of the

²²⁹ ICCPR (n 6), art 41.

²³⁰ Note that states like Indonesia and Russia have not lodged optional clause declarations recognising the jurisdiction of the ICJ (See —, ‘Declarations recognising the ICJ’s Jurisdiction as Compulsory’ (UNTS, 2024) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1>).

²³¹ See South Africa, ‘Termination of Optional Clause Declaration’ (12 April 1867) 595 UNTS 363; Israel, ‘Termination of Optional Clause Declaration’ (19 November 1985) 1349 UNTS 346; UK, ‘Termination of its Optional Clause Declaration’ (1 January 1969) 482 UNTS 187.

²³² *East Timor* [1995] (n 18), 102.

²³³ Note South Africa had an optional clause declaration before 1967 (See South Africa, ‘Optional Clause Declaration’ (12 September 1955)) 216 UNTS 115). The same is true for Israel before 1985 (See Israel, ‘Optional Clause Declaration’ (3 October 1956) 252 UNTS 301; Israel, ‘Optional Clause Declaration’ (8 February 1984) 1349 UNTS 346). UK also had an optional declaration until 1969 and after 2004. (See UK, ‘Optional Clause Declaration’ (27 November 1963) 211 UNTS 109; UK, ‘Optional Clause Declaration’ (5 July 2004) 654 UNTS 335). Finally, Yugoslavia lodged an optional clause declaration in 1999 (Yugoslavia, ‘Optional Clause Declaration’ (28 May 1999) 2121 UNTS 193).

²³⁴ *Southwest Africa* [1962] (n 49), 343.

²³⁵ *Southwest Africa* [1966] (n 52), 39, 41–2, 47. But see (Bustamante, separate opinion), 380; (Forster, dissenting), 479; (Jessup, dissenting), 378.

²³⁶ *Chagos* [2019] (n 1) (Robinson, separate opinion), 310 citing Crawford James, ‘Multilateral Rights & Obligations in International Law’ (2006) 319 *Recueil des Cours de l’Académie de Droit International* 325, 410, 423. *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022) (Xue, dissenting), 9, 10 (‘Rectification of its position’).

²³⁷ Frowein, ‘Reactions by Not Directly Affected States’ (n 191), 406; Nollkaemper, ‘Adjudication of Global Public Goods’ (n 228), 784; Tams, *Enforcing Obligations Erga Omnes* (n 46), 162; Annacker Claudia, ‘Legal Regime of Erga Omnes Obligations in International Law’ (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 133; Villalpando Santiago, ‘Legal Dimension of the International Community: How

legal relations these norms create.²³⁸ Portugal raised the issue in *East Timor*. Yet, the Court, as it deemed the case inadmissible due to Indonesia's absence, did not deal with the competence of 'states other than an injured state to implement duties owed *erga omnes*.'²³⁹

Curiously, this lack of instances of invocation of responsibility via judicial dispute resolution remains despite the ICJ's pronouncements in *Obligation to Prosecute or Extradite*, *Application of the Genocide Convention*, *Application of the Torture Convention*, and *Application of the Genocide Convention in Gaza*.²⁴⁰ States appear to prefer to respond to breaches of the duty to respect a people's right to self-determination through multilateral means such as requesting advisory opinions. This was the case for South Africa in which states through the GA and SC sought ICJ opinions on South Africa's Mandate,²⁴¹ and the legal consequences of South Africa's presence in Namibia.²⁴² States did the same to clarify Western Sahara's status and the duties of the states that claim the territory.²⁴³ The same is true for Israel as to its occupation of and practices in the Occupied Palestinian Territories.²⁴⁴ Finally, states also used the Court's advisory function to determine the consequences of the UK's separation of Chagos from Mauritius.²⁴⁵ As will be further examined in *Chapter 9*, this may be because this method of addressing breaches provides greater 'legitimacy' over proceedings involving duties owed *erga omnes*.²⁴⁶ It avoids the issue of whether states can act on behalf of others in a decentralised legal system.²⁴⁷ Indeed, by design,²⁴⁸ no state can unilaterally request an opinion from the

Community Interests are Protected in International Law' (2010) 21 *European Journal of International Law* 387, 410.

²³⁸ See Tams, 'Guardians of Community Interests' (n 228), 385–6. See also ILC, 'Fragmentation of International Law' (13 April 2006) UN Doc A/CN.4/L.682, 206 ('The importance of [duties owed] *erga omnes* may lie less in the way the concepts are "applied" than as signals of argumentative possibilities and boundaries for institutional decision-making').

²³⁹ Frowein, 'Reactions by Not Directly Affected States' (n 191), 406.

²⁴⁰ See *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422, 460; *Application of the Genocide Convention* [2022] (n 236), 35, 37; *Application of the Torture Convention* (Canada & The Netherlands v Syria) (Provisional Measures) [2023] General List No 188, 16; *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192, 12.

²⁴¹ See *Southwest Africa* [1950] (n 52).

²⁴² *Namibia* [1970] (n 15).

²⁴³ *Western Sahara* [1975] (n 24).

²⁴⁴ *Wall* [2004] (n 18); Res 77/247 (n 145).

²⁴⁵ *Chagos* [2019] (n 1).

²⁴⁶ See Broude Tomer, 'The Legitimacy of the ICJ's Advisory Competence in the Shadow of the Wall' (2005) 39 *Israel Law Review* 189, 192–3.

²⁴⁷ See Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014), 206 ('The question of who is entitled to represent that community remains nebulous'); Crawford James, 'Responsibility to the International Community as a Whole' (2001) 8 *Indiana Journal of Global Legal Studies* 303, 344

²⁴⁸ Ruys Tom & Soete Anemoon, "'Creeping" Advisory Jurisdiction of International Courts & Tribunals?

ICJ.²⁴⁹ A request will only be made if the majority of states support the request.²⁵⁰

B. Enforcement through Unilateral Measures

As to countermeasures by ‘states other than an injured state’, the survey above again suggests that contrary to the claim of some scholars,²⁵¹ this competence, as to the norm on self-determination, is yet to crystallise into a customary rule. Its status remains as it was when the ILC adopted the 2001 Draft Articles: limited and inconsistent practice and lacks evidence of *opinio juris*.

First, the practice is not widespread nor representative. The three instances in which ‘states other than an injured state’ imposed unilateral measures that are countermeasures involved mostly Western states and their allies.²⁵² Only in one instance did non-Western states levy countermeasures as opposed to retorsions—Arab League members in response to Israel’s denial of the Palestinians’ right to external self-determination (1967–). Thus, the practice is arguably not extensive. Only a small minority imposed countermeasures as ‘states other than an injured state’ to enforce the duty to respect the right to self-determination. Moreover, the practice is limited to certain groups of states that do not include states of ‘different political, economic, and legal systems’.²⁵³

Second, state practice is not consistent nor uniform. There remains too much inconsistency suggesting that the competence of ‘states other than an injured state’ to enforce the wrongful state’s responsibility through countermeasures has not become customary.²⁵⁴ In comparable situations, the repetition of the conduct, even from Western states, has not been apparent. Some Western states imposed measures against South Africa for denying Namibian people’s right to

Case of the International Tribunal for the Law of the Sea' (2016) 29 *Leiden Journal of International Law* 155, 1612.

²⁴⁹ Ibid, 161, 174; Kolb Robert, *The International Court of Justice* (Hart 2013), 1053–2.

²⁵⁰ Broude, ‘ICJ’s Advisory Competence’ (n 246), 197. See Hofbauer Jane, ‘Not Just a Participation Trophy? Advancing Public Interests through Advisory Opinions at the International Court of Justice’ (2023) 22 *Law & Practice of International Courts & Tribunals* 234, 255–6.

²⁵¹ See Dawidowicz, *Third Party Countermeasures* (n 48), 252, 266; Tams, *Enforcing Obligations Erga Omnes* (n 46), 250, 390–1; Proukaki, *Problem of Enforcement* (n 78), 207; Sicilianos Linos-Alexander, ‘Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13(5) *European Journal of International Law* 1127, 1143.

²⁵² See Subedi Surya, ‘Status of Unilateral Sanctions in International Law’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 34.

²⁵³ *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (Judgment) [1969] ICJ 3 (Lachs, dissenting), 229; *Mondev International Ltd v US* (Award) (2002) (ICSID Additional Facility, 11 October 2002), ¶117.

²⁵⁴ *Asylum* (Colombia v Peru) (Judgment) [1950] ICJ 266, 277; *SS Lotus* (France v Turkey) (Judgment) [1927] PCIJ Ser A No 10, 21; *North Sea Continental Shelf* [1969] (n 253), 45.

external self-determination (1948–91) and Yugoslavia/Serbia and Montenegro for failing to respect the Kosovar’s right to internal self-determination (1989–2000). However, none levied measures against the UK for its conduct in Chagos (1965–), Israel for its actions in the Occupied Palestinian Territories (1967–), and Indonesia for its occupation of Timor Leste (1976–99). Again, the discernible pattern of behaviour, as previously observed, is that states tend not to act when the violators are ‘friendly states’, the wrongful states serve their ‘strategic interests’, or the situation does not affect their interests.²⁵⁵

Finally, there is still a lack of a broad acknowledgement of the practice as law from states. As discussed in previous chapters, some Western states have asserted the prerogative of ‘states other than an injured state’ to enforce responsibility through unilateral measures in their individual statements,²⁵⁶ in explaining their votes against GA resolutions that condemn unilateral measures,²⁵⁷ in responding to the Secretary-General’s requests for comments,²⁵⁸ and in enacting specific laws that allow for the imposition of unilateral measures.²⁵⁹ However, other states do not appear to share this view. Some states protested the imposition of measures against them—Yugoslavia/Serbia and Montenegro did so in response to measures levied against it for its actions in Kosovo.²⁶⁰ Furthermore, while most states did not protest every imposition of unilateral measures including countermeasures,²⁶¹ many, including those that have imposed measures against Israel for its denial of the Palestinians’ right to external self-determination,

²⁵⁵ Brownlie Ian, ‘UN Charter & the Use of Force, 1945–1985’ in Cassese Antonio (ed), *Current Legal Regulation of the Use of Force* (Nijhoff 1986), 500; Tomaševski, *Responding to HR Violations: 1946–99* (n 151), 369. See Hofer Alexandra, ‘Negotiating International Public Policy through Adoption & Contestation of Sanctions’ (2017) 50 *Revue Belge de Droit International* 440, 447

²⁵⁶ See e.g. Council of the EC, ‘Arab Economic Boycott of Israel’ (n 150), 48; Council of the EU, ‘Council Decision (CFSP) 2020/1999’ (7 December 2020) LI 410/13.

²⁵⁷ See e.g. UNGA, ‘Verbatim Record, 53rd Session, 43rd Meeting’ (26 October 1998) UN Doc A/53/PV.43, 17 (US); UNGA, ‘Verbatim Record, 55th Session, 41st Meeting’ (26 October 2000) UN Doc A/55/PV.41, 23 (France on behalf of the EU); UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (16 October 2002) UN Doc A/57/PV.31, 12 (US); *ibid.*, 12 (US), 13 (Australia); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (28 September 2015) UN Doc A/C.2/70/SR.31, 4 (Luxembourg on behalf of the EU); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 52nd Meeting’ (20 November 2015) UN Doc A/C.2/70/SR.52, 5 (US).

²⁵⁸ See e.g. UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (9 August 2017) UN Doc A/72/307, 9 (EU); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (31 July 2019) UN Doc A/74/264, 20 (EU).

²⁵⁹ See e.g. PL 95–223, *International Emergency Economic Powers Act* (1977) (US); *Treaty Establishing the European Community* (adopted 25 March 1957, entered into force 1 January 1958) 294 UNTS 3, art 108; SC 1992 c 17, *Special Economic Measures Act* (1992) (CAN), §1; Council of the EU, ‘Guidelines on Implementation & Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU CFSP’ (15 June 2012) Doc 15114/05; 2018 c 13, *Sanctions and Anti-Money Laundering Act* (2018) (UK), §1(2).

²⁶⁰ UNSC, ‘Verbatim Record, 3868th Meeting’ (1998) (n 214), 16.

²⁶¹ Note Henry Etienne, ‘Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law’ (2017) 18 *Melbourne Journal of International Law* 1, 17, 19.

continue to condemn these measures in GA resolutions,²⁶² declarations of institutional arrangements,²⁶³ and individual statements.²⁶⁴ For these states, unilateral measures, including countermeasures, are unlawful as they amount to coercion and intervention,²⁶⁵ constitute an

²⁶² See e.g. *Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political & Economic Compulsion* Res 57/5 UNGA (16 September 2002) UN Doc A/RES/57/5; *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 56/179 UNGA (21 December 2001) UN Doc A/RES/56/179; Res 76/191 UNGA (17 December 2021) UN Doc A/RES/76/191; *Human Rights & Unilateral Coercive Measures* Res 56/148 UNGA (19 December 2001) UN Doc A/RES/56/148; Res 57/222 UNGA (18 December 2002) UN Doc A/RES/57/222; Res 77/214 UNGA (15 December 2022) UN Doc A/RES/77/214.

²⁶³ See e.g. Conference of Heads of the NAM, 'Final Document of the 17th Summit' (18 September 2016) NAM/2016/CoB/DOC.1/Corr.1, 17, 145; G77 & China Foreign Ministers, 'Declaration adopted at the 43rd Annual Meeting' (27 September 2019), ¶¶228–9; AU Assembly, 'Sanctions & Unilateral Coercive Measures' (Feb 2020) Assembly/AU/Res.1 (XXXIII); BRICS, '9th Summit: Xiamen Declaration' (12 September 2017).

²⁶⁴ See e.g. Ministry of Foreign Affairs of Russia, 'Concept of the Foreign Policy of the Russian Federation' (18 February 2013) <https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6BZ29>; UNGA, 'Verbatim Record, 70th Session, 13th Meeting' (28 September 2015) UN Doc A/70/PV.13, 19 (China); Ministry of External Affairs of India, 'Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People's Republic of China' (18 April 2016) <https://mea.gov.in/bilateral-documents.htm?dtl/26628/Joint_Communicu_of_the_14th_Meeting_of_the_Foreign_Ministers_of_the_Russian_Federation_the_Republic_of_India_and_the_Peoples_Republic_of_China>.

²⁶⁵ See e.g. Res 76/191 (n 262); Conference of Heads of the NAM, 'Final Document of the 17th Summit' (n 263), 17, 145; G77 & China Foreign Ministers, 'Declaration adopted at the 43rd Annual Meeting' (n 263), ¶¶228–9; UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2 July 2002) UN Doc A/57/179, 2 (Ecuador); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (15 October 2001) UN Doc A/56/473, 2 (Belarus), 6 (Malaysia), 8 (Yemen); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (11 September 2003) UN Doc A/58/301, 5 (Cuba), 6 (Iran), 13 (Thailand), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (12 August 2005) UN Doc A/60/226, 4 (Bulgaria), 7 (Guatemala), 7 (Honduras), 7 (Cuba), 8 (Jamaica), 12 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (6 August 2007) UN Doc A/62/210, 5 (Belarus), 5 (Benin), 6 (Cuba), 8 (Ukraine); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (14 July 2011) UN Doc A/66/138, 6 (Brunei), 6 (Colombia), 7 (Cuba), 7 (Egypt), 11 (Myanmar), 12 (Oman), 14 (Ukraine); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (29 July 2013) UN Doc A/68/218, 9 (Lao), 10 (Philippines), 10 (Nicaragua), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (16 July 2015) UN Doc A/70/152, 6 (Brunei), 6 (Cambodia), 7 (Central African Republic); 7 (Congo), 7 (Cuba), 10 (Ecuador), 11 (Madagascar), 12 (Sri Lanka), 15 (Tunisia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 258), 2 (Iran), 6 (Cuba), 10 (Guatemala), 11 (Russia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 258), 5 (Burundi), 5 (Cambodia), 6 (Cuba), 10 (Ghana), 11 (Nigeria), 12 (Russia), 13 (Sudan); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (30 August 2021) UN Doc A/76/310, 7 (Iran), 13 (Russia), 15 (Syria). See also UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (20 July 2001) UN Doc A/56/207, 3 (Cuba); UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (7 December 2001) UN Doc E/CN.4/2002/51, 3 (Cuba); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (11 October 2005) UN Doc A/60/305, 4 (Iraq), 4 (Georgia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (17 August 2006) UN Doc A/61/287, 3 (Libya); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (13 August 2007) UN Doc A/HRC/6/2, 2 (Georgia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (3 August 2009) UN Doc A/64/219, 2 (Algeria), 3 (Angola), 4 (Jamaica); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 August 2010) UN Doc A/HRC/15/43, 4 (Jamaica); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (29 July 2012) UN Doc A/67/181, 6 (Cuba), 10 (Jamaica); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (27 June 2014) UN Doc A/69/97, 2 (Colombia).

unlawful exercise of extra-territorial jurisdiction,²⁶⁶ have negative effects on human rights,²⁶⁷ and are not the result of multilateral decision-making processes.²⁶⁸

²⁶⁶ See e.g. Res 77/214 (n 262); Conference of Heads of the NAM, 'Final Document of the 17th Summit' (n 263), 17, 145; UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 265), 3 (Cuba), 7 (Myanmar), 7 (Malaysia); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 265), 1 (Iran), 2 (Argentina), 2 (Ecuador); 2 (Japan); 3 (Mali), 3 (Namibia), 3 (Qatar), 6 (Libya); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 265), 12 (Libya), 14 (Venezuela); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 265), 8 (Jamaica); 8 (Kazakhstan); 12 (Uruguay); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 265), 5 (Benin), 6 (Cuba), 7 (Myanmar), 7 (Qatar), 8 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 265), 10 (Malaysia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 265), 16 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 265), 15 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 258), 5 (Belarus); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 258), 20 (EU). See also HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 265), 2 (Algeria), 3 (Argentina); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (5 August 2011) UN Doc A/66/272, 3 (Argentina), 8 (Cuba), 11 (Dominican Republic); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 265), 11 (Mexico).

²⁶⁷ See e.g. Res 77/214 (n 262); Conference of Heads of the NAM, 'Final Document of the 17th Summit' (n 263), 17, 145; UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (2001) (n 265), 4 (Guatemala); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2001) (n 265), 2 (Cuba), 3 (Jamaica), 3 (North Korea), 5 (Libya); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 265), 2 (Iraq), 2 (Jamaica), 2 (Qatar); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 October 2004) UN Doc A/59/436, 2 (Cuba), 3 (Mexico); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2005) (n 265), 3 (Mexico), 3 (Cuba), 4 (Lebanon); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2006) (n 265), 2 (Cuba), 4 (Trinidad & Tobago); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2007) (n 265), 2 (Colombia), 4 (Syria); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2009) (n 265), 2 (Algeria), 3 (Angola), 4 (Jamaica), 5 (Paraguay); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 265), 2 (Algeria), 3 (Belarus), 4 (Jamaica), 5 (Qatar), 6 (Russia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2011) (n 266), 3 (Argentina), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 11 (Ecuador), 13 (Guyana), 14 (Iraq), 14 (Kuwait); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 265), 3 (Andorra), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 8 (Iran), 10 (Kuwait), 12 (Syria), 13 (Trinidad & Tobago); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2014) (n 265), 3 (Iran), 4 (Lebanon), 5 (Mauritius). See also UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 265), 4 (Iraq), 6 (Libya), 7 (Malaysia), 8 (Saudi Arabia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 265), 4 (Argentina), 4 (Cuba); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 265), 7 (Iraq), 8 (Kazakhstan), 9 (Sudan); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 265), 5 (Colombia), 9 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 265), 7 (Cuba), 7 (Egypt), 9 (Guatemala), 9 (Lebanon), 11 (Mexico), 12 (Oman), 13 (Sudan), 15 (Vietnam); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 265), 5 (Brazil), 6 (Burundi), 8 (Cuba), 9 (Iran), 11 (Senegal), 12 (Sudan), 14 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 265), 13 (Syria), 15 (Turkey), 16 (Venezuela), 18 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 258), 5 (Armenia), 8 (Cuba), 20 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 258), 5 (Burundi), 10 (Jordan), 12 (Russia), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2021) (n 265), 4 (Cuba), 10 (Iran), 14 (Syria).

²⁶⁸ See e.g. Res 76/191 (n 262); Conference of Heads of the NAM, 'Final Document of the 17th Summit' (n 263), 17, 145; UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report'

Yet, as stressed in the previous chapters, these statements and declarations must not be construed as an ‘unqualified proposition’ that unilateral measures are unlawful.²⁶⁹ They must be nuanced ‘precisely to understand’ the measures condemned.²⁷⁰ Recalling the analysis in *Chapter 5A*, the measures states consider to be ‘not in accordance with international law’ are arguably measures that are not retorsions and are not countermeasures taken by the ‘injured state’. These include measures that involve breaches but whose wrongfulness cannot be precluded such as measures not imposed as a response to wrongful acts;²⁷¹ not levied against the wrongful state but against third states,²⁷² or against individuals or entities;²⁷³ or measures that go beyond the limits of countermeasures such as those that are not proportional;²⁷⁴ or breach human rights duties.²⁷⁵

Crucially, it would appear, as scholars like Hofer observe, that most states continue to

(2001) (n 265), 3 (Gambia); UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report’ (2002) (n 265), 3 (Mali); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2003) (n 265), 4 (Costa Rica); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2005) (n 265), 9 (Senegal), 9 (Panama); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2007) (n 265), 7 (Egypt); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2011) (n 265), 7 (Egypt); 11 (Mexico); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2013) (n 265), 5 (Brazil), 9 (Montenegro), 11 (Qatar), 16 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2015) (n 265), 12 (Paraguay); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2017) (n 258), 11 (Lesotho); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 258), 11 (Russia); 13 (South Africa), 19 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2021) (n 265), 7 (Iran), 14 (South Africa). *See also* HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2010) (n 265), 4 (Costa Rica); 6 (Russia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2011) (n 266), 7 (Burkina Faso); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2012) (n 265), 11 (Mexico); 12 (Trinidad & Tobago).

²⁶⁹ Barber Rebecca, ‘An Exploration of the General Assembly’s Troubled Relationship with Unilateral Sanctions’ (2021) 70 *International & Comparative Law Quarterly* 343, 359.

²⁷⁰ *Ibid.*, 359.

²⁷¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 18), 130 *citing Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 55; *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa* (Naulilaa) (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1027.

²⁷² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 18), 130; Ruys Tom & Ryngaert Cedric, ‘Secondary Sanctions: A Weapon out of Control? Legality of, & European Responses to, US Secondary Sanctions’ (2020) *British Yearbook of International Law* 1, 4.

²⁷³ ILC, ‘Summary Records of the 52nd Session’ (2000) I YbILC 1, 266, 271; Crawford, ‘Third Report on State Responsibility’ (2000) (n 211), 84; Ruys Tom, ‘Immunity, Inviolability, & Countermeasures’ in Angelet Nicolas & Ferro Luca (eds), *Cambridge Handbook of Immunities & International Law* (Cambridge University Press 2019), 705; Hofer Alexandra, ‘The “Curiouser & Curiouser” Legal Nature of Non-UN Sanctions: US Sanctions against Russia’ (2018) 23 *Journal of Conflict & Security Law* 76, 89.

²⁷⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 18), 134; Naulilaa (n 271), 1028; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 448.

²⁷⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 18), 131–3; Dawidowicz, *Third Party Countermeasures* (n 48), 337.

require collective decisions for the imposition of enforcement measures,²⁷⁶ and thus prefer collective measures.²⁷⁷ This explains the repeated condemnation of unilateralism and the measures taken by the ‘minority of the powerful states’ purporting to act on the international community’s behalf.²⁷⁸ Thus, it seems that they still have not accepted the competence of ‘states other than an injured state’ to impose countermeasures and, in the absence of a positive rule that provides such competence, states deem that the imposing state’s breach of duty will not be precluded.

CHAPTER CONCLUSION

This chapter examined if states have accepted the competence of ‘states other than an injured state’ to implement duties to respect a people’s right to self-determination. First, it clarified the scope of the duties deemed owed *erga omnes*. It examined the two dimensions of the norm—external and internal. The *duty to respect a people’s right to external self-determination* emerged out of the context of decolonisation. It grants ‘peoples’ the right to determine their political status and is associated with the notion of sovereignty and title to territory. In contrast, *internal self-determination* is based on several agreements that have enjoyed a wide degree of state acceptance. It focuses on the peoples’ relationship with their governments and includes their right to choose their political status within a state and to meaningful political participation. It is closely associated with human rights.

This chapter then analysed the state practice and *opinio juris* in implementing the duty to respect the right to self-determination. A survey of breaches of the duty suggests that states have not accepted as law the competence of ‘states other than an injured state’ to implement duties owed *erga omnes* and *erga omnes partes*. Only in a few instances did ‘states other than

²⁷⁶ Hofer Alexandra, ‘Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’ (2017) 16 *Chinese Journal of International Law* 1, 17. See e.g. UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2003) (n 265), 4 (Costa Rica); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2005) (n 265), 9 (Panama); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2011) (n 265), 7 (Egypt), 8 (Gabon), 10 (Mauritius), 11 (Mexico); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2013) (n 265), 5 (Brazil); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 258), 11 (Russia); 13 (South Africa), 19 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2021) (n 265), 7 (Iran), 14 (South Africa). See also HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2010) (n 265), 6 (Russia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2011) (n 266), 7 (Burkina Faso).

²⁷⁷ Hofer, ‘Adoption & Contestation of Sanctions’ (n 255), 447.

²⁷⁸ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 276), 39; Hofer, ‘Adoption & Contestation of Sanctions’ (n 255), 446 citing Jouannet Emmanuelle, ‘Universalism & Imperialism: True-False Paradox of International Law?’ (2007) 18 *European Journal of International Law* 379, 391–2.

an injured state' invoke another's responsibility through judicial dispute resolution. Similarly, only in a few instances did 'states other than an injured state' enforce the duty through countermeasures. In these few cases, the states that imposed these unilateral measures were predominantly Western states. Others consider such measures unlawful. This suggests that the state practice is limited, inconsistent, and lacks evidence of *opinio juris*. Thus, the chapter submits that as to the norm on self-determination, 2001 Draft Article 48 remains a progressive measure and the question left by 2001 Draft Article 54 is still unanswered.■

CHAPTER 8: CERTAIN NORMS FOR THE PRESERVATION & PROTECTION OF THE ENVIRONMENT (1970–2023)

The rules protecting the environment also have a collective dimension. Like *jus ad bellum* and violations of human and peoples' rights which cause economic, social, and political problems affecting each member of the international community,¹ environmental harm also endangers every state.² This realisation, brought about by the advancement of 'scientific knowledge, application of new technologies, and understanding of [environmental harm's] impacts',³ led states to develop norms, albeit in a piecemeal fashion,⁴ to conserve species and natural resources,⁵ restrict activities that cause pollution and other harmful effects,⁶ and mitigate climate change.⁷

Environmental norms are found in customary and conventional law.⁸ As to custom,

¹ Simma Bruno, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 236; Buergenthal Thomas, 'Evolving International Human Rights System' (2006) 100 *American Journal of International Law* 783, 786; Benedek Wolfgang, 'Humanisation of International Law, Human Rights, & Common Interest' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 190.

² Fitzmaurice Malgosia, 'Liability for Environmental Damage Caused to the Global Commons' (1996) 5 *Review of European, Comparative & International Environmental Law* 305, 305; *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3 (Weeramantry, separate opinion), 118.

³ Sands Philippe, *et al.*, *Principles of International Environmental Law* (Cambridge University Press 2012), 22.

⁴ *Ibid.*, 3; Bodansky Daniel, *Art & Craft of International Environmental Law* (Harvard University Press 2010), 22.

⁵ Murase Shinya, 'Perspectives from International Economic Law on Transnational Environmental Issues' (1995) 253 *Recueil des Cours de l'Académie de Droit International* 283, 310; Kiss Alexander, 'Protection of Environmental Interests of the World Community Through International Environmental Law' in Wolfrum Rüdger (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means* (Routledge 1996), 9.

⁶ Arsanjani Mahnouch & Reismann Michael, 'Quest for an International Liability Regime for the Protection of the Global Commons' in Wellens Karel (ed), *International Law: Theory & Practice: Essays in Honour of Eric Suy* (Nijhoff 1998), 469, 471; Murase, 'Transnational Environmental Issues' (n 5), 311.

⁷ Delbruck Jost, 'A More Effective International Law or a New World Law—Some Aspects of the Development of International Law in a Changing International System' (1993) 68 *Indiana Law Journal* 705, 717; Mayer Benoit, 'ILC's Guidelines on the Protection of the Atmosphere' (2019) 20 *Melbourne Journal of International Law* 453, 461.

⁸ Fitzmaurice, 'Liability for Environmental Damage Caused to the Global Commons' (n 2), 1012. *Note* that this chapter deals with what the ILC refers to as 'responsibility' and not 'liability' (See Horbach N, 'Confusion between State Responsibility & International Liability' (1991) 4 *Leiden Journal of International Law* 47, 50 citing Jimenez de Arechaga E, 'International Responsibility' in Sørensen Max (ed), *Manual of Public International Law* (St Martin's 1986), 569, 579). Recall from *Chapter 2* that 'responsibility' refers to acts or omissions attributable to states (ILC, 'Report on the Work of the 53rd Session' (2001) II(2) YbILC 20, 34–5 citing *German Settlers in Poland* (Advisory Opinion) [1923] PCIJ Ser B No 6, 22; *Corfu Channel* (UK v Albania) (Merits) [1949] ICJ 4, 22–3; *US Diplomatic & Consular Staff in Tehran* (US v Iran) (Judgment) [1980] ICJ 3, 31–2), that breach international duties (ILC, 'Report on the Work of the 53rd Session' (2001) (n 8), 32 citing *Phosphates of Morocco* (Italy v France) (Preliminary Objections) [1938] PCIJ Ser A/B No 74, 28; *SS Wimbledon* (UK et al v Germany) (Judgment) [1923] PCIJ Ser A No 1, 30; *Chorzów Factory* (Germany v Poland) (Merits) [1928] PCIJ Ser A No 17, 29), without circumstances precluding wrongfulness (ILC, 'Report on the Work of the 53rd Session' (2001) (n 8), 71). This entails, among others, the duty to make reparations for the injury caused by the wrongful act (*ibid.*, (n 8), 71).

scholars like Sands and Duvic-Paoli submit that there are two interrelated customary norms.⁹ There is the *no-harm* rule that imposes a *duty not to cause transboundary harm* or a ‘negative’ duty not to use or permit one’s territory to be used in a manner that causes ‘significant’ harm

91 citing *Chorzów Factory* [1928] (n 8), 29). In contrast, ‘liability’, in the ILC’s terminology (See ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 8), 148 ff; ILC, ‘Report on the Work of the 58th Session’ (2006) II(2) YbILC 59, 59 ff. Compare Hohfeld Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning & Other Legal Essays*, Cook Walter (ed) (Yale University Press 1919), 50–1; Horbach, ‘Responsibility & Liability’ (n 8), 48; Schmalenbach Kirsten, ‘State Responsibility & Liability for Transboundary Environmental Harm’ in Gailhofer Peter, *et al.* (eds), *Corporate Liability for Transboundary Harm* (Springer 2023), 45 citing Quentin-Baxter Robert, ‘Preliminary Report on International Liability for Injurious Consequences arising out of Acts not prohibited by International Law’ (1980) II(1) YbILC 247, 250–2), involves activities within states’ ‘jurisdiction or control’ that are ‘not prohibited by law’ but cause ‘significant transboundary harm’ (ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 8), 149; ILC, ‘Report on the Work of the 58th Session’ (2006) (n 8), 62–3). Liability requires neither intention nor negligence but only the occurrence of harm (Schmalenbach, ‘Responsibility & Liability for Transboundary Harm’ (n 8), 59; Horbach, ‘Responsibility & Liability’ (n 8), 50). Should there be harm, the ‘state of origin’ has a duty to ensure compensation for the harm caused (ILC, ‘Report on the Work of the 58th Session’ (2006) (n 8), 59 ff). This is based on the recognition that ‘certain activities’ carry ‘risks of significant transboundary harm’ even when there is no fault or if due diligence is exercised (ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 8), 150 noting Akehurst Michael, ‘International liability for injurious consequences arising out of acts not prohibited by international law’ (1985) 16 *Netherlands Yearbook of International Law* 3; Boyle Alan, ‘State Responsibility & International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?’ (1990) 39 *International & Comparative Law Quarterly* 1; Zemanek Karl, ‘State Responsibility & Liability’ in Lang Winfried, *et al.* (eds), *Environmental Protection & International Law* (Nijhoff 1991), 197. ILC, ‘Report on the Work of the 58th Session’ (2006) (n 8), 60). Yet, while hazardous, these activities are ‘justified from a cost-benefit standpoint and should not be prohibited’ (Fitzmaurice Malgosia, ‘International Responsibility & Liability’ in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 1021. See ILC, ‘Report on the Work of the 58th Session’ (2006) (n 8), 79). Thus, for balance, a framework for prompt and adequate compensation must be established in case of harm (Fitzmaurice, ‘Responsibility & Liability’ (n 8), 1021; ILC, ‘Report on the Work of the 58th Session’ (2006) (n 8), 59. Note Horbach, ‘Responsibility & Liability’ (n 8), 60 citing Barboza Julio, ‘Fifth Report on the International Liability for Injurious Consequences arising out of Acts not prohibited by International Law’ (25 April 1989) UN Doc A/CN.4/423, 23). That said, it must be noted that the ‘liability [...] remain [...] exceptional’ (Voigt Christina, ‘International Environmental Responsibility & Liability’ in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2021), 1004), and is so far limited to ‘specific treaty regimes’ (Brunnée Jutta, ‘Of Sense & Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection’ (2004) 53 *International & Comparative Law Quarterly* 351, 354, 356 citing Rao Pemmaraju Sreenivasa, ‘First Report on the Legal Regime for Allocation of Loss in case of Transboundary Harm arising from Hazardous Activities’ (21 March 2003) UN Doc A/CN.4/531, ¶3. Schmalenbach, ‘Responsibility & Liability for Transboundary Harm’ (n 8), 80. See e.g. *Convention on Third Party Liability in the Field of Nuclear Energy* (adopted 29 July 1960, entered into force 1 April 1968) 956 UNTS 251; *Vienna Convention on Civil Liability for Nuclear Damage* (adopted 21 May 1963, entered into force 12 November 1977) 1063 UNTS 265; *Convention on the International Liability for Damage caused by Space Objects* (adopted 29 March 1972, entered into force 1 September 1972) 961 UNTS 187; *Convention on Long-Range Transboundary Air Pollution* (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217. See also *Civil Liability for Damage Resulting from Activities Dangerous to the Environment* (adopted 21 June 1993) 32 ILM 1228; *Basel Protocol on Liability & Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal* (adopted 10 December 1999)).

⁹ Brunnée Jutta, ‘Harm Prevention’ in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2021) citing Sands, *et al.*, *International Environmental Law* (n 3), 195–200; Duvic-Paoli Leslie-Anne, *Prevention Principle in International Environmental Law* (Cambridge University Press 2018), 21–4; Duvic-Paoli Leslie-Anne & Viñuales Jorge, ‘Principle 2: Prevention’ in Viñuales Jorge (ed), *Rio Declaration on Environment & Development: Commentary* (Oxford University Press 2015), 108. Beyerlin Ulrich & Marauhn Thilo, *International Environmental Law* (Hart 2011), 41; Xue Hanqin, *Transboundary Damage in International Law* (Cambridge University Press 2003), 322.

to another.¹⁰ There is also the *harm-prevention* rule that imposes a *duty to prevent transboundary harm* or a ‘positive’ duty to adopt measures to protect the environment.¹¹ In contrast, authors like Brunnée argue that there is a ‘single *harm-prevention* rule’ which has its ‘antecedents in the [customary] due diligence [duties]’.¹² Indeed, Brunnée submits that the *no-harm* rule has ‘evolved into the *harm-prevention* rule’ and that ‘there now exists a single rule’.¹³ For completeness, this chapter discusses both the *no-harm* and *harm-prevention* rules.¹⁴

Conventional law also plays an important role.¹⁵ While the customary norms impose ‘broad-meshed duties’,¹⁶ treaties ‘due to their canonical form’, provide ‘greater certainty about

¹⁰ Sands, *et al.*, *International Environmental Law* (n 3), 195–200 (‘Responsibility not to cause [transboundary harm]’) citing *Trail Smelter* (USA v Canada) (1941) 3 RIAA 1907, 1965; *Lac Lanoux* (France v Spain) (1957) 62 RGDIP 179; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ 2, 241–2; Brent Kerryn, ‘Certain Activities case: What Implications for the No-Harm Rule?’ (2017) 20 *Asia Pacific Journal of Environmental Law* 28, 31, 34 citing *Corfu Channel* [1949] (n 8), 22; 51 citing *Pulp Mills* (Argentina v Uruguay) (Judgment) [2010] ICJ 14, 56; 55 citing *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (Merits) [2015] ICJ 665, 706. Voigt, ‘Responsibility & Liability’ (n 8), 1011.

¹¹ Sands, *et al.*, *International Environmental Law* (n 3), 200–3 (‘Principle of preventive action’); Handl Günther, ‘Transboundary Impact’ in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 539; Dupuy Pierre-Marie, Le Moli Ginevra, & Viñuales Jorge, ‘Customary International Law & the Environment’ in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021), 394.

¹² Brunnée Jutta, ‘Procedure & Substance in International Environmental Law’ (2020) 405 *Recueil des Cours de l’Académie de Droit International* 75, 147 citing Proelß Alexander, ‘Prinzipien des Internationalen Umweltrechts’ in Proelß Alexander (ed), *Internationales Umweltrecht* (De Gruyter, 2017), 77–9; Birnie Patricia, Boyle Alan, & Redgewell Catherine, *International Law & the Environment* (3rd edn, Oxford University Press 2007), 134–50; Mayer Benoît, *International Law of Climate Change* (Cambridge University Press 2018).

¹³ Brunnée, ‘Procedure & Substance’ (n 12), 147–8

¹⁴ Note that there are other norms claimed to have become customary such as those on ‘precaution’, ‘sustainable development’, and ‘common but differentiated responsibilities’ (Beyerline Ulrich, ‘Normative Development’ in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 425; Fitzmaurice, ‘Responsibility & Liability’ (n 8), 1013; Brunnée, ‘Reflections on Liability Regimes’ (n 8), 354). Yet, there remains ‘controversy and considerable confusion concerning the status of these norms’ as well as the ‘roles they play and the effects they have’ (Beyerline, ‘Normative Development’ (n 14), 425; Sands, *et al.*, *International Environmental Law* (n 3), 188. See Nègre Céline, ‘Content of International Responsibility’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 806). It is yet to be seen if these norms have become established rules in the sense that they impose concrete duties that may be breached (Duvic-Paoli, *Prevention Principle* (n 9), 311 citing Fitzmaurice Gerald, ‘General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 *Recueil des Cours de l’Académie de Droit International* 5, 7; Dworkin Ronald, *Taking Rights Seriously* (Harvard University Press 1977), 24), or are mere soft-law ‘principles’ that ‘do not specify particular actions’ (Sands, *et al.*, *International Environmental Law* (n 3), 188–9 citing *Iron Rhine* (Belgium/Netherlands) (Award) (2005), ¶58; *Gentini* (Italy v Venezuela) (Award) (1903) 10 RIAA 561), but nevertheless ‘influence international environmental policy and shape environmental agreements’ (Brunnée, ‘Reflections on Liability Regimes’ (n 8), 354; Fitzmaurice Malgosia, ‘Responsibility & Climate Change’ (2010) 53 *German Yearbook of International Law* 89, 101, 123).

¹⁵ Brunnée, ‘Procedure & Substance’ (n 12), 184; Massimiliano Montini, ‘Improving Compliance with Multilateral Environmental Agreements through Positive Measures: Kyoto Protocol’ in Kiss Alexander, *et al.* (eds), *Economic Globalisation & Compliance with International Environmental Agreements* (Kluwer 2005), 157.

¹⁶ Brunnée Jutta, ‘International Environmental Law & Climate Change: Reflections on Structural Challenges in a “Kaleidoscopic” World’ (2020) 33 *Georgetown Environmental Law Review* 113, 125.

the applicable norms'.¹⁷ They also allow states to focus on particular issues, agree on specific rules, and adopt mechanisms to address environmental concerns.¹⁸ Indeed, the past decades have seen an 'explosion' in the number of environmental treaties which by one count have reached more than a thousand.¹⁹ Some of these have enjoyed a wide degree of state accession.²⁰

Many, like the ILC, suggest that some environmental norms impose duties owed *erga omnes* or *erga omnes partes* and allow 'states other than an injured state' to implement responsibility.²¹ Several submit that the *no-harm* and *harm-prevention* rules impose duties owed *erga omnes*.²² Others assert that some conventional norms impose duties owed *erga omnes partes*.²³ This chapter examines this claim. It determines whether states have recognised

¹⁷ Bodansky Daniel, 'Multilateral Environmental Treaty Making' in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of International Environmental Law* (2021), 402. See Duvic-Paoli, *Prevention Principle* (n 9), 89.

¹⁸ Schmalenbach, 'Responsibility & Liability for Transboundary Harm' (n 8), 48.

¹⁹ Omura Robert, 'Chasing Hamlet's Ghost: State Responsibility & the Use of Countermeasures to Compel Compliance with Multilateral Environmental Agreements' (2010) 15 *Appeal* 86, 86; Brunnée, 'Procedure & Substance' (n 12), 184. See Massimiliano, 'Improving Compliance with MEAs' (n 15), 157.

²⁰ Rose Gregory, 'Interlinkages between Multilateral Environmental Agreements' in Paddock Leroy, *et al.* (eds), *Compliance & Enforcement in Environmental Law* (Elgar 2011), 3. See *Convention on International Trade in Endangered Species of Wild Fauna & Flora* (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 ('CITES'); *UN Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 ('UNCLOS'); *Convention on Biological Diversity* (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 69 ('CBD'); *UN Framework Convention on Climate Change* (adopted 14 June 1992, entered into force 21 March 1994) 1771 UNTS 107 ('UNFCCC')

²¹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 8), 126.

²² See generally: Birnie, Boyle, & Redgewell, *International Law & the Environment* (n 12), 130, 232; Sands, *et al.*, *International Environmental Law* (n 3), 150; Institut de Droit International, 'Resolution: Obligations Erga Omnes in International Law' (2005), Preamble. On the *no-harm rule*: Scovazzi Tullio, 'Some Remarks on International Responsibility in the Field of Environmental Protection' in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 219; Maljean-Dubois Sandrine, 'No-Harm Principle as the Foundation of International Climate Law' in Mayer Benoit & Zahar Alexander (eds), *Debating Climate Law* (Cambridge University Press 2021), 21. On the *harm-prevention rule*: Duvic-Paoli, *Prevention Principle* (n 9), 321–3; Dupuy, Le Moli, & Viñuales, 'Custom & the Environment' (n 11), 393; Charney Jonathan, 'Third State Remedies for Environmental Damage to the World's Common Spaces' in Fancioni Francesco & Scovazzi Tullio (eds), *International Responsibility for Environmental Harm* (Graham & Trotman 1991), 175–6. But see arguing that the *erga omnes* character of environmental norms is far from clear: Brunnée, 'Harm Prevention' (n 9), 280; Fitzmaurice, 'Responsibility & Liability' (n 8), 1012; Ni Kuei-Jung, 'Third-State Countermeasures for Enforcing International Common Environmental Interests: The Implication and Inspiration of the ILC's Articles on State Responsibility' (2004) 22 *Chinese (Taiwan) Yearbook of International Law and Affairs* 1, 23; Peel Jacqueline, 'New State Responsibility Rules & Compliance with Multilateral Environmental Obligations' (2020) 10 *Review of European, Comparative & International Environmental Law* 82, 94; Strain Nicola, 'Regulating Collective Resources under Multilateral Treaties: The Decision in Whaling in the Antarctic (Australia v Japan)' (2019) 20 *Melbourne Journal of International Law* 572, 583.

²³ See Arsanjani & Reismann, 'Liability & Protection of the Global Commons' (n 6), 485; Rest Alfred, 'Erga Omnes Obligations & Judicial Control' (2010) 40 *Environmental Policy & Law* 298, 301; Kiss, 'Protection of Environmental Interests' (n 5), 7; Murase, 'Transnational Environmental Issues' (n 5), 311. Note that examples of such treaties include the 1946 Whaling Convention ('ICRW') (*International Convention on the Regulation of Whaling* (adopted 2 December 1946) 161 UNTS 72. See Tanaka Yoshifumi, 'Reflections on Locus Standi in Response to a Breach of Obligations Erga Omnes Partes: A Comparative Analysis of the Whaling in the Antarctic

the competence of ‘states other than an injured state’ to implement the duties imposed by certain environmental norms.

Like the previous chapters, this chapter first examines the content of the relevant rules and maps out the duties considered owed *erga omnes* and *erga omnes partes*. Next, it examines the state practice and *opinio juris* before and after the 2001 Draft Articles’ adoption related to the implementation of these duties. Finally, it observes that during this period, the state practice and *opinio juris* on the competence of ‘states other than an injured state’ to implement some environmental duties diverged. Thus, this chapter submits that as these norms, the rules on implementation by ‘states other than an injured state’ under the 2001 Draft Articles remain as ‘progressive measures’.²⁴

I. SCOPE OF THE DUTIES OWED *ERGA OMNES* OR *ERGA OMNES PARTES*

A. Duties under Customary & Conventional Norms

1. Under Customary Law

As noted above, one of the customary environmental norms, for scholars like Sands, is the *no-harm* rule.²⁵ This imposes a ‘negative’ *duty not to cause ‘significant transboundary harm’* that is established by ‘clear and convincing evidence’.²⁶ It must be noted that this is not a duty

& South China Sea Cases' (2018) 17 *Law & Practice of International Courts & Tribunals* 527, 535), 1968 Non-Proliferation Treaty ('NPT') (*Treaty on the Non-Proliferation of Nuclear Weapons* (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161. Tanaka, 'Locus Standi & Obligations Erga Omnes Partes' (n 23), 540), CITES (See Theobald Elodie, 'Bridging the Accountability Gap for International Wildlife Trafficking: Efforts of the Wildlife Justice Commission' (2017) 9 *Amsterdam Law Forum* 115, 118), UNCLOS (See *Responsibilities & Obligations of States Sponsoring Persons & Entities with Respect to Activities in the Area* (Advisory Opinion) (SDC, Case No 17, 1 February 2011), ¶180; Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997), 158; Fasía Eirini-Erasmia, 'No Provision Left Behind—Law of the Sea Convention's Dispute Settlement System & Obligations Erga Omnes' (2021) 20 *Law & Practice of International Courts* 519, 531; Johnstone Rachael, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean' (2014) 6 *Yearbook of Polar Law* 3, 29), the 1987 Montreal Protocol (*Montreal Protocol on Substances That Deplete the Ozone Layer* (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3. See Biermann Frank, 'Common Concern of Humankind: Emergence of a New Concept of Environmental Law' (1996) 34 *Archiv des Völkerrechts* 426, 451; Peel, 'New State Responsibility Rules & Environmental Obligations' (n 22), 92; Sands Philippe, 'Compliance with International Environmental Obligations: International Legal Arrangements' in Werksman Jacob, *et al.* (eds), *Improving Compliance with International Environmental Law* (Routledge 1995), 61), the UNFCCC (See Quirico Ottavio, 'Towards a Peremptory Duty to Curb Greenhouse Emissions?' (2021) 44 *Fordham International Law Journal* 923, 929; Treves Tullio, 'Settlement of Disputes & Non-Compliance Procedures' in Treves Tullio, *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009), 513), and the 1997 Kyoto Protocol (*Kyoto Protocol to the UN Framework Convention on Climate Change* (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162; Treves, 'Settlement of Disputes & Non-Compliance Procedures' (n 23), 513–4).

²⁴ ILC, 'Report on the Work of the 53rd Session' (2001) (n 8), 23, 127.

²⁵ Sands, *et al.*, *International Environmental Law* (n 3), 195–200.

²⁶ *Ibid.*, 197 citing *Trail Smelter* (n 10), 1965; Voigt, 'Responsibility & Liability' (n 8), 1011; Malaihollo Medes, 'Due Diligence in International Environmental Law & International Human Rights Law' (2021) 68 *Netherlands International Law Review* 121, 126. Note that there are 'wide differences in perception [on] the

of result,²⁷ but one of conduct or due diligence.²⁸ There is no absolute duty not to cause harm but only ‘to take diligent steps to ensure that harm would not result’.²⁹ Thus, aside from demonstrating harm, it must also be shown that a state, through its acts or omissions failed to exercise due diligence.³⁰ That said, a state also commits a wrongful act if it negligently allows its territory to be used by non-state actors in a way that causes transboundary harm.³¹

The rule’s customary status is unsurprising given that it is based on ‘concepts [common to] legal systems’ such as the ‘abuse of rights’ and ‘good neighbourliness’.³² Indeed, these concepts formed the basis for the 1941 *Trail Smelter*,³³ and 1957 *Lac Lanoux* arbitral decisions.³⁴ States

seriousness of harm’ (Hudec Robert, ‘GATT Legal Restraints on the Use of Measures against Foreign Environmental Practice’ in Bhagwati Jagdish & Hudec Robert (eds), *Fair Trade & Harmonization: Prerequisites for Fair Trade?* (Faculty Books 1996), 112). The evaluation of ‘significance’ depends on the circumstances but the objective is to ensure that ‘minor environmental harm is tolerated’ (Duvic-Paoli, *Prevention Principle* (n 9), 187). The term ‘significant’ refers to harm that is ‘more than “detectable”, but not necessarily “serious” or “substantial”’ (Brunnée, ‘Procedure & Substance’ (n 12), 122; Handl, ‘Transboundary Impact’ (n 11), 535). Likewise, it must be ‘transboundary’ such that ‘there must be a physical effect crossing national boundaries’ (Marte Jervan, ‘Prohibition of Transboundary Environmental Harm: Contribution of the IICJ to the Development of the No-harm Rule’ (PluriCourts, Research Paper No. 14-17), 4 citing Schacter Oscar, ‘Emergence of International Environmental Law’ (1991) 44 *Journal of International Affairs* 457, 464). This includes other states’ territories and ‘areas beyond the limits of national jurisdiction’ (Duvic-Paoli, *Prevention Principle* (n 9), 241).

²⁷ Schmalenbach, ‘Responsibility & Liability for Transboundary Harm’ (n 8), 68

²⁸ Brunnée, ‘Procedure & Substance’ (n 12), 150; Maljean-Dubois, ‘No-Harm Principle’ (n 22), 16 citing Dupuy Pierre-Marie, ‘Ago’s Classification of Obligations of Means & Obligations of Result in Relation to State Responsibility’ (1999) 10 *European Journal of International Law* 371, 371; Voigt, ‘Responsibility & Liability’ (n 8), 1015.

²⁹ Brunnée, ‘Procedure & Substance’ (n 12), 143 citing Birnie, Boyle, & Redgewell, *International Law & the Environment* (n 12), 217. Brent, ‘Certain Activities case’ (n 10), 34 citing Stephens Tim, *International Courts & Environmental Protection* (Cambridge University Press 2009), 124–5; Dupuy Pierre-Marie & Hoss Cristina, ‘Trail Smelter & Terrorism: International Mechanisms to Combat Transboundary Harm’ in Bratspies Rebecca & Miller Russel (eds), *Transboundary Harm in International Law* (Cambridge University Press 2009), 227–30.

³⁰ de Sadeleer Nicolas, *Environmental Principles From Political Slogans to Legal Rules* (Oxford University Press 2020), 63 citing Handl Günther, ‘State Liability for Accidental Transnational Environmental Damage by Private Persons’ (1980) 74 *American Journal of International Law* 525, 540. Tanaka Yoshifumi, ‘Reflections on Transboundary Air Pollution in the Arctic’ (2014) 83 *Nordic Journal of International Law* 213, 220; Boyle Alan, ‘Transboundary Air Pollution: Tale of Two Paradigms’ in Jayakumar S, et al. (eds), *Transboundary Pollution: Evolving Issues of International Law & Policy* (Elgar 2015), 237.

³¹ Schmalenbach, ‘Responsibility & Liability for Transboundary Harm’ (n 8), 55; Horbach, ‘Responsibility & Liability’ (n 8), 55; Maljean-Dubois, ‘No-Harm Principle’ (n 22), 16.

³² Duvic-Paoli, *Prevention Principle* (n 9), 16 citing McCaffrey Stephen, *Law of International Watercourses* (2nd edn, Oxford University Press 2007), 417. See Brunnée, ‘Procedure & Substance’ (n 12), 116 (‘Environmental law initially consisted in the application of general legal rules [...] that today would be understood as environmental harm’) citing Lin Albert, ‘Unifying Role of Harm in Environmental Law’ (2006) 3 *Wisconsin Law Review* 897, 897. Duvic-Paoli, *Prevention Principle* (n 9), 20 (‘It [follows the] tort law logic of corrective justice [and] strives to repair a wrong by compensating victims’) citing Hinteregger M, ‘Tort Law as an Instrument for the Prevention & Remediation of Harm’ in Herwig A & Simoncini M (eds), *Law & Management of Disasters* (Routledge 2017), 209.

³³ Brunnée, ‘Harm Prevention’ (n 9), 270; Tignino Mara & Bréthaut Christia, ‘Role of Case Law in Implementing the Obligation not to Cause Significant Harm’ (2020) 20 *International Environmental Agreements* 632, 637.

³⁴ Brent, ‘Certain Activities case’ (n 10), 35; Viñuales Jorge, ‘Contribution of the ICJ to the Development of Environmental Law’ (2008) 32 *Fordham International Law Journal* 232, 237.

also referred to the rule in several landmark declarations. In the 1972 Stockholm Declaration's Principle 21, states stressed the need to balance the 'right to exploit [...] resources' and the duty to 'ensure that activities within [states'] jurisdiction or control do not cause damage to [other states'] environment [...] [and] areas beyond national jurisdiction'.³⁵ States affirmed this in the 1992 Rio Declaration's Principle 2.³⁶ States' submissions before tribunals also reflect this view,³⁷ such as in the 1973,³⁸ and the 1995 *Nuclear Tests* cases,³⁹ and the 1996 *Nuclear Weapons* opinion.⁴⁰ These developments, for scholars like Fitzmaurice, Sands, and Brunnée, accelerated the customary rule's formation.⁴¹ Indeed, the ICJ asserted in *Nuclear Weapons* that the *no-harm* rule has become customary.⁴²

Nonetheless, some like Duvic-Paoli, argue that the *no-harm* rule is problematic as it focuses on the harm's occurrence.⁴³ Given the environmental harm's impact, scholars like Scovazzi and Brunnée submit that the priority must be its prevention.⁴⁴ The *harm-prevention* rule which

³⁵ 'Report of the UN Conference on the Human Environment, Stockholm' (5–16 June 1972) UN Doc A/CONF.48/14/Rev.1. See Sands, *et al.*, *International Environmental Law* (n 3), 191

³⁶ 'Rio Declaration on Environment & Development' (13 June 1992) UN Doc A/CONF.151/5/Rev.1.

³⁷ Duvic-Paoli, *Prevention Principle* (n 9), 93.

³⁸ 'Memorial of New Zealand', *Nuclear Tests* (New Zealand v France) (Jurisdiction & Admissibility) (ICJ, General List No 58, 29 October 1973), 7–8; *Nuclear Tests* (Australia v France) (Provisional Measures) [1973] ICJ 99, 62

³⁹ *Request for an Examination of the Court's Judgment in the Nuclear Tests* (New Zealand v France) (Judgment) [1995] ICJ 288, 56.

⁴⁰ 'Written Comments of Egypt', *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ, General List No 95, 1 February 1995), 30; 'Written Comments of Nauru', *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ, General List No 95, 15 June 1995), 11, 20; 'Written Statement of Iran', *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ, General List No 95, 19 June 1995), 4; 'Written Comments of the Solomon Islands', *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ, General List No 95, 15 June 1995), 83 ff. See also 'Counter-memorial of Uruguay', *Pulp Mills* (Argentina v Uruguay) (Judgment) (ICJ, General List No 135, 20 July 2007), 52–3; 'Memorial of Costa Rica', *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (ICJ, General List No 150, 5 December 2011), 201–2; 'Counter-memorial of Nicaragua', *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (ICJ, General List No 150, 6 August 2012), 62–3.

⁴¹ Fitzmaurice, 'Responsibility & Climate Change' (n 14), 102; Sands, *et al.*, *International Environmental Law* (n 3), 196, 199; Brunnée, 'Harm Prevention' (n 9), 271; Voigt, 'Responsibility & Liability' (n 8), 1011; Brent, 'Certain Activities case' (n 10), 29, 36; Johnstone, 'Invoking Responsibility for Environmental Injury' (n 23), 11; Tignino & Bréthaut, 'Case Law & the Obligation not to Cause Significant Harm' (n 33), 637; Maljean-Dubois, 'No-Harm Principle' (n 22), 15. But see Arsanjani & Reismann, 'Liability & Protection of the Global Commons' (n 6), 483; Knox J, 'Transboundary Environmental Impact Assessment' (2002) 96 *American Journal of International Law* 291, 295, 319.

⁴² *Nuclear Weapons* [1996] (n 10), 241–2. See (Weeramantry, dissenting), 502–4; *Gabčíkovo-Nagymaros* [1997] (n 2), 41, 112; *Pulp Mills* [2010] (n 10), 56; *Certain Activities* [2015] (n 10), 706.

⁴³ Duvic-Paoli, *Prevention Principle* (n 9), 55, 146–7; Malaihollo, 'Due Diligence' (n 26), 125.

⁴⁴ Scovazzi Tullio, 'State Responsibility for Environmental Harm' (2001) 12 *Yearbook of International Environmental Law* 43, 49; Brunnée, 'Procedure & Substance' (n 12), 158; Malaihollo, 'Due Diligence' (n 26), 125.

complements the *no-harm* rule,⁴⁵ or the result of its evolution per Brunnée,⁴⁶ addresses this. The norm is no longer curative,⁴⁷ but anticipatory.⁴⁸ It still imposes a duty of conduct.⁴⁹ That is, a ‘positive’ *duty to prevent ‘damage to the environment’* and ‘*to reduce, limit or control activities that might cause or risk such damage*’.⁵⁰ However, the ‘causation of harm is [no longer] an element of the rule’.⁵¹ Instead, states commit a wrongful act when its failure to act diligently causes a ‘risk of harm’.⁵² It also imposes specific ‘substantive and procedural’ duties.⁵³ The former requires states to take ‘appropriate rules and measures’ and a ‘certain level of vigilance in their enforcement and the exercise of administrative control [over] public and private operators’.⁵⁴ The latter obliges them to conduct an impact assessment when ‘there is a

⁴⁵ Duvic-Paoli, *Prevention Principle* (n 9), 21–4; Duvic-Paoli & Viñuales, ‘Prevention’ (n 9), 108; Beyerlin & Marauhn, *International Environmental Law* (n 9), 41; Xue, *Transboundary Damage* (n 9), 322.

⁴⁶ Brunnée, ‘Procedure & Substance’ (n 12), 147–8 *citing* Proelß, ‘Prinzipien des Internationalen Umweltrechts’ (n 12), 77–9; Birnie, Boyle, & Redgewell, *International Law & the Environment* (n 12), 134–50.

⁴⁷ de Sadeleer, *Environmental Principles* (n 30), 61.

⁴⁸ Duvic-Paoli, *Prevention Principle* (n 9), 148; Sands, *et al.*, *International Environmental Law* (n 3), 201.

⁴⁹ Brunnée, ‘Harm Prevention’ (n 9), 272; Duvic-Paoli, *Prevention Principle* (n 9), 8; Dupuy, Le Moli, & Viñuales, ‘Custom & the Environment’ (n 11), 394.

⁵⁰ Sands, *et al.*, *International Environmental Law* (n 3), 200; Schmalenbach, ‘Responsibility & Liability for Transboundary Harm’ (n 8), 56; Brunnée Jutta & Schrijver Nicolaas, ‘Règles de prévention des dommages applicables aux espaces ne relevant pas des juridictions nationales’ (Institut de Droit International, 2023), 103, 109.

⁵¹ Brunnée, ‘Procedure & Substance’ (n 12), 151.

⁵² Dupuy, Le Moli, & Viñuales, ‘Custom & the Environment’ (n 11), 394; Handl, ‘Transboundary Impact’ (n 11), 539; Scovazzi, ‘State Responsibility for Environmental Harm’ (n 44), 49. *Note* that some submit that the harm need not be ‘transboundary’ and covers harm ‘within a purely domestic context’ (*See* Sands, *et al.*, *International Environmental Law* (n 3), 201; Duvic-Paoli, *Prevention Principle* (n 9), 235, 242; Birnie, Boyle, & Redgewell, *International Law & the Environment* (n 12), 128–9; Nollkaemper André, ‘Sovereignty & Environmental Justice in International Law’ in Ebbesson J & Okowa Phoebe (eds), *Environmental Law & Justice in Context* (2009), 264)

⁵³ *Note* that there may be three approaches in conceptualising due diligence. The ‘first [sees] due diligence as the primary [duty of] conduct with [substantive] and procedural [duties] as possible requirements for its fulfilment’ (Duvic-Paoli, *Prevention Principle* (n 9), 206 *citing* *Certain Activities* [2015] (n 10) (Owada, separate opinion), ¶¶14–8; (Donoghue, separate opinion), ¶13). The ‘second [...] [submits] that due diligence guides the [substantive and procedural duties] which are [duties] in their own right’ (ibid (Trindade, separate opinion), ¶57). The ‘final approach sees due diligence as a standard of conduct that flows from prevention and operates with the [substantive and procedural duties]’ (*citing* ibid (Dugard, separate opinion), ¶10; Brunnée, ‘Procedure & Substance’ (n 12), 133, 141). *See* Brunnée, ‘Harm Prevention’ (n 9), 274 (‘Lawyers [...] routinely distinguish between “substantive” and “procedural” obligations [...] The ICJ, in *Pulp Mills* and [*Certain Activities*] followed this categorisation’) Duvic-Paoli, *Prevention Principle* (n 9), 204 (‘The difficulty relates to the fact that the boundaries between the two categories are very permeable’).

⁵⁴ Brunnée, ‘Harm Prevention’ (n 9), 274; Campbell-Durufflé Christopher, ‘Significant Transboundary Harm Prevention Rule & Climate Change’ in Mayer Benoit & Zahar Alexander (eds), *Debating Climate Law* (Cambridge University Press 2021), 32. *See* *Pulp Mills* [2010] (n 10), 197; *Activities in the Area* (n 23), 41; *South China Sea Arbitration* (Philippines v China) (Award) (2016) (PCA, 2013–19, 12 July 2016), 375–6. *Note* that ‘while a state is free to decide on how to design its [...] laws and regulations, it should impose [...] an appropriate framework [...] to avoid [...] harm’ (Duvic-Paoli, *Prevention Principle* (n 9), 209; Schmalenbach, ‘Responsibility & Liability for Transboundary Harm’ (n 8), 57; Voigt, ‘Responsibility & Liability’ (n 8), 1018). Nonetheless, ‘the [duty] leaves room for states to determine [...] appropriate measures to preventing [harm]’ (Tanaka, ‘Transboundary Air Pollution in the Arctic’ (n 30), 220).

risk that a proposed activity may have a significant [transboundary] impact'.⁵⁵ If there is, they must 'notify, inform, or consult with potentially affected states'.⁵⁶

Authors like Brunnée submit that the *harm-prevention* rule has also become customary.⁵⁷ This, she argues, is unsurprising as the *duty not to cause harm* arguably entails prevention.⁵⁸ Indeed, the states' duty to act diligently is also implied by the Stockholm Declaration's Principle 21 and the Rio Declaration's Principle 2.⁵⁹ States have also made submissions before courts in support of the rule's customary status.⁶⁰ For its part, the ICJ in *Gabčíkovo* confirmed that 'vigilance and prevention' are required on 'account of [environmental harm's] [...] irreversible character [...] and [...] the mechanisms [for reparation's] limitations'.⁶¹ It also stressed in *Certain Activities* that states have the duty to 'use all the means at [their] disposal [to] avoid activities' in their jurisdiction from 'causing significant [environmental] damage'.⁶²

⁵⁵ *Pulp Mills* [2010] (n 10), 83; *Certain Activities* [2015] (n 10), 706; *Gabčíkovo-Nagymaros* [1997] (n 2), 67; *Activities in the Area* (n 23), 50; ILC, 'Report on the Work of the 53rd Session' (2001) (n 8), 157 ff. Note that it is for each 'state to determine in its domestic legislation [...] the specific content of [EIA] required' (*Pulp Mills* [2010] (n 10), 83). An 'EIA is the 'chief mechanism' by which a state may discharge its duty of prevention' (Duvic-Paoli, *Prevention Principle* (n 9), 211). The 'rationale behind the EIA is to find out if harm is likely to occur' (Fitzmaurice, 'Responsibility & Climate Change' (n 14), 126). The duty to carry-out an EIA is not just 'an *ex ante* evaluation of the risk of significant transboundary harm' but a continuous one (*Certain Activities* [2015] (n 10), 722–3). The '[duty] to undertake EIAs has been included in [many] treaties' (Beyerline, 'Normative Development' (n 14), 440).

⁵⁶ *Pulp Mills* [2010] (n 10), 49.

⁵⁷ Brunnée, 'Harm Prevention' (n 9), 271; Sands, *et al.*, *International Environmental Law* (n 3), 200; Schmalenbach, 'Responsibility & Liability for Transboundary Harm' (n 8), 56; Mayer, 'ILC's Guidelines on the Protection of the Atmosphere' (n 7), 475.

⁵⁸ Duvic-Paoli, *Prevention Principle* (n 9), 20 ('The no-harm [rule also] includes a dose of anticipation in as much as it seeks to dissuade the injuring entity from committing harm that would result in an internationally wrongful act'); Fitzmaurice, 'Responsibility & Liability' (n 8), 1013; Shigeta Yasuhiro, *International Judicial Control of Environmental Protection: Standard Setting, Compliance Control, & the Development of International Environmental Law by the International Judiciary* (Kluwer 2010), 258. See de Sadeleer, *Environmental Principles* (n 30), 62 citing Handl Günther, 'Environmental Security & Global Change: Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 1, 1; Lammers J, 'International & European Community Law: Aspects of Pollution of International Watercourses' in Lang Winfried, *et al.* (eds), *Environmental Protection & International Law* (Nijhoff 1991), 117.

⁵⁹ Sands, *et al.*, *International Environmental Law* (n 3), 200; Fox Sean, 'Responding to Climate Change: Unilateral Trade Measures to Protect the Global Atmosphere' (1996) 84 *Georgetown Law Journal* 2499, 2526.

⁶⁰ See 'Written Statement of Iran', *Legality of the Threat or Use of Nuclear Weapons* (n 30), 4; 'Memorial of Hungary', *Gabčíkovo-Nagymaros* (Hungary v Slovakia) General List 92, 2 May 1994), 192; 'Memorial of Argentina', *Pulp Mills* (Argentina v Uruguay) (Judgement) (ICJ, General List 135, 15 Jan 2007), 115; 'Counter-memorial of Uruguay', *Pulp Mills* (n 40), 125; 'Memorial of Costa Rica', *Certain Activities Carried Out by Nicaragua in the Border Area* (n 40), 200; 'Counter-memorial of Nicaragua', *Certain Activities Carried Out by Nicaragua in the Border Area* (n 40), 127.

⁶¹ *Gabčíkovo-Nagymaros* [1997] (n 2), 78.

⁶² *Certain Activities* [2015] (n 10), 706.

2. *Under Conventional Law*

Treaties, enlivened by norms,⁶³ and environmental principles,⁶⁴ also address environmental problems.⁶⁵ For scholars like Bodansky, the treaties' utility lies in their 'canonical form'.⁶⁶ Compared to customary 'broad-meshed duties',⁶⁷ treaties provide 'greater certainty [as to] the applicable norm'.⁶⁸ They also allow for a flexible approach to rulemaking.⁶⁹ Treaties have not only allowed states to adopt broad agreements and 'progressively deepen' them via protocols,⁷⁰ they have also permitted states to keep agreements 'current' without the need for further

⁶³ Brunnée, 'Reflections on Liability Regimes' (n 8), 358; Fitzmaurice, 'Responsibility & Liability' (n 8), 1012.

⁶⁴ Note that it remains difficult to identify customary rules beyond the *no-harm* and *harm-prevention* rules (Fitzmaurice, 'Responsibility & Liability' (n 8), 1013). There are other norms that some claim are customary (See Beyerline, 'Normative Development' (n 14), 425). These include: 'precaution' (*Southern Bluefin Tuna* (New Zealand/Japan; Australia/Japan) (Provisional Measures) (1999) ITLOS Rep 280, ¶79; *Pulp Mills* [2010] (n 10), 71. See Weiner Jonathan, 'Precaution' in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 604–7; Peel Jacqueline, 'Precaution' in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2021), 308), 'common but differentiated responsibilities' (See Shelton Dinah, 'Equity' in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 657), and 'sustainable development' (See Margaw Daniel & Hawke Lisa, 'Sustainable Development' in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 615 ff). There exists uncertainty if these are proper 'rules' (Fitzmaurice, 'Responsibility & Climate Change' (n 14), 123), such that they impose duties upon states and grant a right others the right to demand their observance (Fitzmaurice, 'General Principles of International Law' (n 14), 7; Dworkin, *Taking Rights Seriously* (n 14), 24) or if they are 'principles', not within the meaning of ICJ Article 38 (Duvic-Paoli, *Prevention Principle* (n 9), 308–9 citing Schacter Oscar, *International Law in Theory & Practice* (Nijhoff 1991), 50–5), but general commitments that 'do not specify particular action' (Bodansky Daniel, 'UN Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale Journal of International Law* 451, 501; Duvic-Paoli, *Prevention Principle* (n 9), 321–3; Dupuy, Le Moli, & Viñuales, 'Custom & the Environment' (n 11), 391) Arguably, they are the latter. They are 'normative concepts' (Dupuy Pierre-Marie, 'Formation of Customary International Law & General Principles' in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 312). While they do not impose duties, they 'inform the decisions of states' in areas of environmental concerns (Nègre, 'International Responsibility' (n 14), 806) especially in the formation, objectives, and structure of other norms (See Brunnée Jutta, 'International Legal Accountability through the Lens of State Responsibility' (2005) 36 *Netherlands International Law Review* 3, 9).

⁶⁵ Brunnée, 'Procedure & Substance' (n 12), 184; Fitzmaurice, 'Liability for Environmental Damage Caused to the Global Commons' (n 2), 310.

⁶⁶ Bodansky, 'Multilateral Environmental Treaty Making' (n 17), 402.

⁶⁷ Brunnée, 'Law & Climate Change' (n 16), 125; Brunnée, 'Harm Prevention' (n 9), 282 ('Such an open-textured standard cannot support the finely calibrated responses required to deal with large-scale problems').

⁶⁸ Brunnée, 'Harm Prevention' (n 9), 282 ('[Treaties] address collective harm [...] goals in relation to specific geographic areas, environmental concerns, or activities'). See Ghering Markus, 'Treaty-Making & Evolution' in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 469.

⁶⁹ Bodansky, 'Multilateral Environmental Treaty Making' (n 17), 402, 418 ('Environmental agreements [allow] for flexibility [to account for] developments in [the] scientific understanding of environmental problems [and] the changing nature of the problems themselves.'). See Schmalenbach, 'Responsibility & Liability for Transboundary Harm' (n 8), 48.

⁷⁰ Bodansky, 'Multilateral Environmental Treaty Making' (n 17), 416. Note that the UNFCCC, which gave rise to the Kyoto Protocol and the Paris Agreement, adopted this step-by-step approach. The same is true for the LRTAP and its eight protocols (Ghering, 'Treaty-Making & Evolution' (n 68), 478, 486).

agreements.⁷¹

More relevant to the present examination, treaties allow states to specify ‘available remedies of redress’.⁷² Some provide for compulsory dispute settlement procedures.⁷³ This is despite the fact that, as will be shown later, states’ resort to judicial dispute resolution remains relatively rare.⁷⁴ Many environmental agreements, as Ghering and Cardesa-Salzman observe, also provide for institutional apparatuses and collective enforcement mechanisms.⁷⁵ Indeed, states appear to have demonstrated a preference for institutionalised enforcement mechanisms as they are based on collective decisions.⁷⁶ The procedures vary but may be broadly ‘categorised into three headings’.⁷⁷ First, there are performance review mechanisms similar to some human rights regimes. These are designed to promote transparency by requiring parties to submit information on their compliance with the relevant duties.⁷⁸ There are also multilateral non-compliance procedures. These review instances of non-compliance and facilitate compliance through non-adversarial proceedings.⁷⁹ Finally, several conventions also provide for non-compliance response measures. These allow for parties’ imposition of penalties on the non-compliant party through additional duties or suspension of privileges.⁸⁰

⁷¹ Note that while this may be done by amending the agreement other regimes have adopted institutional frameworks that allow for ‘complex decision-making procedures’ for adjustments due to changing circumstances (Ghering, ‘Treaty-Making & Evolution’ (n 68), 480). See e.g. *ICRW* (n 23), art V(1); *CITES* (n 20), art XV.

⁷² Fitzmaurice, ‘Responsibility & Liability’ (n 8), 1012; Brunnée, ‘Law & Climate Change’ (n 16), 125.

⁷³ Morgera Elisa, ‘Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law’ (2012) 23(3) *European Journal of International Law* 743, 753; O’Connell Mary, ‘Using Trade to Enforce Environmental Law: Implications for US Law’ (1994) 1 *Indiana Journal of Global Legal Studies* 273, 277. See e.g. *UNCLOS* (n 20), Part XV; *CITES* (n 20), art XVIII; *CBD* (n 20), art 27.

⁷⁴ Brunnée, ‘Procedure & Substance’ (n 12), 104, 213; Bothe Michael, ‘Evaluation of Enforcement Mechanisms in International Environmental Law’ in Wolfrum Rüdger (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means* (Routledge 1996), 32; Tseming Yang, ‘International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in Environmental Agreements’ (2006) 28 *Michigan Journal of International Law* 1331, 1138; Ahn Dukgeun, ‘Environmental Disputes in the GATT/WTO: Before & After US-Shrimp Case’ (1999) 20 *Michigan Journal of International Law* 819, 823.

⁷⁵ Ghering, ‘Treaty-Making & Evolution’ (n 68), 473; Cardesa-Salzman Antonio, ‘Constitutionalising Secondary Rules: Non-Compliance Procedures & Enforcement of Multilateral Environmental Agreements’ (2011) 24 *Journal of Environmental Law* 103, 113; Theobald, ‘Accountability Gap’ (n 23), 116.

⁷⁶ See ‘Rio Declaration’ (1992) (n 36), Principle 12; OECD, ‘Report on Trade & Environment to the OECD Council at Ministerial Level’ (9 March 1995) OECD Doc COM/ENV/TD(95)/48/Final; Boisson de Chazournes Laurence, ‘Use of Unilateral Trade Measures to Protect the Environment’ in Kiss Alexander, et al. (eds), *Economic Globalisation & Compliance with International Environmental Agreements* (Kluwer 2003), 182.

⁷⁷ Rose, ‘Interlinkages between MEAs’ (n 20), 4.

⁷⁸ Bothe, ‘Evaluation of Enforcement Mechanisms’ (n 74), 19, 22; O’Connell, ‘Trade to Enforce Environmental Law’ (n 73), 278 citing *UNFCCC* (n 20), art 12(1)b.

⁷⁹ Rose, ‘Interlinkages between MEAs’ (n 20), 7; Pineschi Laura, ‘Non-Compliance Procedures & State Responsibility’ in Treves Tullio, et al. (eds), *Non-Compliance Procedures & Mechanisms & the Effectiveness of Environmental Agreements* (TMC Asser 2009), 489. See e.g. *Montreal Protocol* (n 23), art 4(8).

⁸⁰ Rose, ‘Interlinkages between MEAs’ (n 20), 8; Fitzmaurice Malgosia, ‘Non-Compliance Procedures & Law

B. Claims regarding *Erga Omnes* or *Erga Omnes Partes* Status

Unlike the norms on force, human rights, and peoples' rights whose *erga omnes* status have enjoyed much support, that of environmental norms remains 'limited and uncertain'.⁸¹ Even the ICJ 'has not pronounced itself on that aspect of the rule'.⁸² Some, like Brunnée, Fitzmaurice, and Strain, doubt if these norms impose duties owed *erga omnes* given the lack of state practice.⁸³ Others, such as Weiss, and Ni, 'express a [...] cautious support' for these duties' *erga omnes* status.⁸⁴ Still, several, including the ILC, submit that the *no-harm* and *harm-prevention* rules impose duties owed *erga omnes*.⁸⁵

of Treaties' in Treves Tullio, *et al.* (eds), *Non-Compliance Procedures & Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009), 483. See e.g. *Montreal Protocol* (n 23), art 8; *Kyoto Protocol* (n 23).

⁸¹ Brunnée, 'International Legal Accountability' (n 64), 25; Ni, 'Articles on State Responsibility' (n 22), 23; Peel, 'New State Responsibility Rules & Environmental Obligations' (n 22), 94; Johnstone, 'Invoking Responsibility for Environmental Injury' (n 23), 29; Strain, 'Regulating Collective Resources' (n 22), 582. See for a discussion on peremptory status: Oral Nilufer, 'Environmental Protection as a Peremptory Norm' in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 591–2 ('There are differing views where there exists any [...] environmental law [norm] has [become] peremptory'); Quirico, 'Peremptory Duty & Emissions' (n 23), 939. Arguing that some environmental norms are peremptory: Orakhelashvili Alexander, *Peremptory Norms in International Law* (Oxford University Press 2006), 65; Byrne Mark, 'Can Responsibility for Climate Change Damage Be Criminalised?' (2010) 4 *Carbon & Climate Change Law Review* 278, 281; Brunnée Jutta, 'Common Interest—Echoes from an Empty Shell? Some Thoughts on Common Interest & International Environmental Law' (1989) 49 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 791, 804 noting Whiteman Marjorie, 'Jus Cogens in International Law, with a Projected List' (1977) 7 *Georgia Journal of International & Comparative Law* 609, 626; Gómez Robledo Antonio, 'Le jus cogens international: Sa genèse, sa nature, ses fonctions' (1981) 172 *Recueil des Cours de l'Académie de Droit International* 9, 172; Alexidze L.A., 'Legal Nature of Jus Cogens in Contemporary International Law' (1981) 172 *Recueil des Cours de l'Académie de Droit International* 219, 245. On possibility of environmental peremptory norms: Uhlmann Eva, 'Community Interests, Jus Cogens, & Protection of the Global Environment: Developing Criteria for Peremptory Norms' (1998) 11 *Georgetown International Environmental Law Review* 101, 114; Tladi Dire, 'Fourth Report on Peremptory Norms' (31 January 2019) UN Doc A/CN.4/727, 61–2. Questioning the existence of environmental peremptory norms: Oral, 'Environmental Protection as a Peremptory Norm' (n 81), 592; Dupuy, Le Moli, & Viñuales, 'Custom & the Environment' (n 11), 393; Birnie, Boyle, & Redgewell, *International Law & the Environment* (n 12), 109–10; Singleton-Cambage Krista, 'International Legal Sources & Global Environmental Crises: Inadequacy of Principles, Treaties & Custom' (1995) 2 *ILSA Journal of International & Comparative Law* 171, 185.

⁸² Brunnée, 'Harm Prevention' (n 9), 280–1; Fitzmaurice, 'Responsibility & Climate Change' (n 14), 97; Brunnée, 'Law & Climate Change' (n 16), 124; Strain, 'Regulating Collective Resources' (n 22), 582–3.

⁸³ See e.g. Fitzmaurice, 'Responsibility & Liability' (n 8), 1012; Brunnée, 'Procedure & Substance' (n 12), 182; Strain, 'Regulating Collective Resources' (n 22), 583. See Omura, 'Countermeasures & MEAs' (n 19), 101.

⁸⁴ See e.g. Johnstone, 'Invoking Responsibility for Environmental Injury' (n 23), 29 noting Weiss Edith Brown, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *American Journal of International Law* 798, 804; Ni, 'Articles on State Responsibility' (n 22), 37. See also Sands, *et al.*, *International Environmental Law* (n 3), 188; Birnie, Boyle, & Redgewell, *International Law & the Environment* (n 12), 130; Ragazzi, *Obligations Erga Omnes* (n 23), 160.

⁸⁵ See generally ILC, 'Report on the Work of the 53rd Session' (2001) (n 8), 126 ('[Duties owed *erga omnes*] have to be "collective obligations" [...] [and] established in some collective interest [...] for example, the environment'); Institut de Droit International, 'Obligations Erga Omnes in International Law' (n 22). On the *no-harm* rule: Scovazzi, 'Responsibility in the Field of Environmental Protection' (n 22), 219; Maljean-Dubois, 'No-Harm Principle' (n 22), 21. On the *harm-prevention* rule: Duvic-Paoli, *Prevention Principle* (n 9), 321–3; Dupuy,

For scholars like Duvic-Paoli, environmental norms impose duties owed *erga omnes* as these norms protect important state interests.⁸⁶ Others, including the ILC, claim that the *erga omnes* status is due to the commonality of states' interests in these norms.⁸⁷ However, as stressed in *Chapter 2*, while the value of the interest that a norm protects and the fact that states share this interest may motivate states to agree that a norm imposes duties owed *erga omnes*,⁸⁸ they do not *per se* dictate the duties' 'enforceability by every legal subject of the [...] legal system'.⁸⁹ Instead, it is states' acceptance and recognition that transform duties owed *inter se* to *erga omnes*.⁹⁰ The question then that must be answered then is whether states consider the duties imposed by the *no-harm* and *harm prevention* rules as owed *erga omnes*.⁹¹

Le Moli, & Viñuales, 'Custom & the Environment' (n 11), 393; Charney, 'Third State Remedies for Environmental Damage' (n 22), 175–6.

⁸⁶ See e.g. Duvic-Paoli, *Prevention Principle* (n 9), 322; Viñuales, 'ICJ & Environmental Law' (n 34), 243; Dupuy, Le Moli, & Viñuales, 'Custom & the Environment' (n 11), 393.

⁸⁷ See e.g. ILC, 'Report on the Work of the 53rd Session' (2001) (n 8), 126; Institut de Droit International, 'Obligations Erga Omnes in International Law' (n 22), Preamble; Brunnée Jutta, 'International Environmental Law & Community Interests: Procedural Aspects' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2018), 152, 161; Cardesa-Salzmänn, 'NCPs & Enforcement of MEAs' (n 75), 104; Duvic-Paoli, *Prevention Principle* (n 9), 321–2; Fancioni Francesco, 'Dispute Avoidance in International Environmental Law' in Kiss Alexander, *et al.* (eds), *Economic Globalisation & Compliance with International Environmental Agreements* (Kluwer 2005), 230; Fitzmaurice, 'Liability for Environmental Damage Caused to the Global Commons' (n 2), 305; Fox, 'Trade Measures & Global Atmosphere' (n 59), 2502; Lehmen Alessandra, 'Case for the Creation of an International Environment Court: Non-State Actors & International Environmental Dispute Resolution' (2015) 25 *Colorado Natural Resources, Energy, & Environmental Law Review* 179, 204; Rest, 'Erga Omnes Obligations & Judicial Control' (n 23), 301–2; Seo Youngmin, 'Marine Environmental Turn in the Law of the Sea & Fukushima Wastewater' (2021) 45 *Fordham International Law Journal* 51, 92; Voigt Christina, 'Delineating the Common Interest in International Law' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 20. See also Gabčíkovo-Nagymaros [1997] (n 2) (Weeramantry, separate opinion), 118; Kiss, 'Protection of Environmental Interests' (n 5), 2; Mayer, 'ILC's Guidelines on the Protection of the Atmosphere' (n 7), 468.

⁸⁸ Hillgruber Christian, 'Right of Third States to Take Countermeasures' in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 271; Sartipi Hossein & Hojatzadeh Ali Reza, 'Erga-Omnisation of International Law' (2018) 2 *International Journal of Humanities & Social Science Studies* 189, 222. See Linderfalk Ulf, 'International Legal Hierarchy Revisited—Status of Obligations Erga Omnes' (2011) 80 *Nordic Journal of International Law* 1, 10; Mao Xiao, 'Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case' (2002) 21 *Chinese Journal of International Law* 589, 598 citing *Nuclear Tests* [1973] (n 38) (Gros, separate opinion), 290.

⁸⁹ Hillgruber, 'Third States & Countermeasures' (n 88), 271. See De Jesús Jose, 'Obligations Erga Omnes as Multilateral Obligations' (DPhil, University of Oxford 2012), 189–90.

⁹⁰ Hillgruber, 'Third States & Countermeasures' (n 88), 271–2. De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 37; Voefray Francois, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 328. See *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422 (Skotnikov, separate opinion), 484; (Xue, dissenting), 575; *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022) (Xue, dissenting), 6.

⁹¹ Arsanjani & Reismann, 'Liability & Protection of the Global Commons' (n 6), 482 ('[It must be] established [that the duty is] directed toward the [...] community [...] such that any member may lodge a claim in case of a violation').

There is evidence to support this claim.⁹² This is unsurprising as every state not only has an interest in the protection of the environment but is affected by the harm caused to it.⁹³ Thus, it is not inconceivable for states to consider the duties imposed by the *no-harm* and *harm-prevention* rules as owed to all states.⁹⁴ As will be shown in *Section II*, states in several instances have asserted that some environmental norms impose duties owed *erga omnes*. In 1972, New Zealand and Australia claimed in *Nuclear Tests* that the *no-harm* rule imposes duties owed to every state.⁹⁵ In 1997, Hungary argued in *Gabčíkovo* that the *harm-prevention rule* imposes duties owed *erga omnes*.⁹⁶ In 2013, Australia, in *Whaling in the Antarctic*, claimed that states may ‘seek to uphold the collective interest’ in environmental norms.⁹⁷ Finally, in 2016, the Marshall Islands asserted the same in *Obligations concerning Nuclear Disarmament*.⁹⁸

Scholars like Rest, Arsanjani, and Reisman, also submit that some environmental conventional norms impose duties owed *erga omnes partes contractes*.⁹⁹ These treaties include those on the conservation of biodiversity and natural resources,¹⁰⁰ regulation of pollution and other harmful activities,¹⁰¹ and mitigation of climate change.¹⁰² For instance, Australia and New Zealand have claimed that every party to the ICRW may demand the ‘compliance by every other party [of] its [duties]’.¹⁰³ Another is the UNCLOS that imposes duties to ‘protect and

⁹² *Contra* *ibid*, 484 (‘State practice does not provide many examples of this’); Brunnée, ‘Harm Prevention’ (n 9), 280; Fitzmaurice, ‘Responsibility & Liability’ (n 8), 1012.

⁹³ Brunnée, ‘Procedure & Substance’ (n 12), 163; Fox, ‘Trade Measures & Global Atmosphere’ (n 59), 2502; Mayer, ‘ILC’s Guidelines on the Protection of the Atmosphere’ (n 7), 468. *See* Kiss, ‘Protection of Environmental Interests’ (n 5), 1–2.

⁹⁴ *See* Brunnée, ‘Law & Climate Change’ (n 16), 123 (‘The most plausible conceptualisation of the [duty] would be that it is owed *erga omnes*’); Mayer, ‘ILC’s Guidelines on the Protection of the Atmosphere’ (n 7), 491.

⁹⁵ ‘Memorial of Australia’, *Nuclear Tests* (Australia v France) (Jurisdiction & Admissibility) (ICJ, General List No 58, 23 November 1973), 337; ‘Memorial of New Zealand’, *Nuclear Tests* (n 38), 203–4.

⁹⁶ ‘Memorial of Hungary’, *Gabčíkovo-Nagymaros* (n 60), 318. *See also* Shigeta Yasuhiro, ‘Obligations to Protect the Environment in the ICJ’s Practice: To What Extent Erga Omnes?’ (2012) 55 *Japanese Yearbook of International Law* 176, 186 *citing Pulp Mills* (Argentina v Uruguay) (Provisional Measures) [2006] ICJ 113, 117.

⁹⁷ ‘Verbatim Record 2013/18’, *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Merits) (ICJ, General List No 148, 9 July 2013), 28, 33–4.

⁹⁸ ‘Memorial of the Marshall Islands’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v the UK) (Preliminary Objections) (ICJ, General List no 160, 16 March 2015) 19, 21, 46–8, 98.

⁹⁹ *See* Rest, ‘Erga Omnes Obligations & Judicial Control’ (n 23), 301; Arsanjani & Reisman, ‘Liability & Protection of the Global Commons’ (n 6), 485; Cardesa-Salzmänn, ‘NCPs & Enforcement of MEAs’ (n 75), 110. *See* Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 31.

¹⁰⁰ Theobald, ‘Accountability Gap’ (n 23), 118.

¹⁰¹ Sands, ‘Compliance with International Environmental Obligations’ (n 23), 61

¹⁰² Maljean-Dubois, ‘No-Harm Principle’ (n 22), 21; Mayer, ‘ILC’s Guidelines on the Protection of the Atmosphere’ (n 7), 490 *citing* Murase Shinya, ‘First Report on the Protection of the Atmosphere’ (14 February 2014) UN Doc A/CN.4/667, 57; ILC, ‘Report on the Work of the 70th Session’ (2018) UN Doc A/73/10, 175.

¹⁰³ ‘Verbatim Record 2013/18’, *Whaling in the Antarctic* (n 97), 28; ‘Declaration of Intervention of New

preserve the marine environment’,¹⁰⁴ including the ‘Area and its resources’.¹⁰⁵ For some, like the ILC, this means that every state party may demand these duties’ observance.¹⁰⁶ As for the Montreal Protocol,¹⁰⁷ Kyoto Protocol,¹⁰⁸ and UNFCCC,¹⁰⁹ scholars like Treves and Murase submit that these treaties’ structures imply that a party’s failure to fulfil its duties entitles all others to invoke the relevant non-compliance procedures or dispute settlement mechanisms.¹¹⁰

II. IMPLEMENTATION BY ‘STATES OTHER THAN AN INJURED STATE’ (1970–2023)

From the discussion above, it may be argued that the duties imposed by some environmental norms are owed *erga omnes* or *erga omnes partes*. Again, this leads to the next question that should be answered—whether states have accepted the competence of ‘states other than an injured state’ to implement these duties. The survey below examines breaches of duties imposed by some environmental norms between 1970 and 2023. It shows that only in a few instances did ‘states other than an injured state’ unilaterally seek to implement these duties.

Zealand’, *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Intervention) (ICJ, General List No 148, 20 November 2012), 14; Tanaka, ‘Locus Standi & Obligations Erga Omnes Partes’ (n 23), 535.

¹⁰⁴ UNCLOS (n 20), arts 192, 194.

¹⁰⁵ Ibid, arts 136–49. See Brunnée, ‘International Environmental Law & Community Interests’ (n 87), 162.

¹⁰⁶ See regarding the marine environment generally: ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 8), 127; Fasía, ‘Law of the Sea Convention’s Dispute Settlement System & Obligations Erga Omnes’ (n 23), 521, 531 citing Birnie, Boyle, & Redgewell, *International Law & the Environment* (n 12), 234; Rao Pemmaraju & Gautier Philippe, *International Tribunal for the Law of the Sea: Law, Practice, & Procedure* (Elgar 2018), 138; Ragazzi, *Obligations Erga Omnes* (n 23), 158 citing Picone Paolo, ‘Obblighi reciproci e erga omnes nel campo della protezione internazionale dell’ambiente marino dall’inquinamento’ in Starace Vincenzo (ed), *Diritto internazionale e protezione dell’ambiente marino* (Giuffrè 1983), 114. See also Tanaka, ‘Locus Standi & Obligations Erga Omnes Partes’ (n 23), 547 citing *South China Sea* (n 54), 370. On areas beyond national jurisdiction: *Activities in the Area* (n 23), 59 cited in Crawford James, ‘Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility’ in Fastenrath Ulrich, et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 238; de Wet Erika, ‘Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction’ (2013) 38 *South African Yearbook of International Law* 1, 17; Sands, ‘Compliance with International Environmental Obligations’ (n 23), 61; Maljean-Dubois, ‘No-Harm Principle’ (n 22), 22; Tanaka, ‘Transboundary Air Pollution in the Arctic’ (n 30), 242; Seo, ‘Fukushima Wastewater’ (n 87), 92; Trindade Antônio, *International Law for Humankind: Towards a New Jus Gentium* (Nijhoff 2013), 169.

¹⁰⁷ Biermann, ‘Common Concern of Humankind’ (n 23), 451; Lang Winfried, ‘Trade Restrictions as a Means of Enforcing Compliance with International Environmental Law’ in Wolfrum Rüdger (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means* (Routledge 1996), 281; Peel, ‘New State Responsibility Rules & Environmental Obligations’ (n 22), 92; Sands, et al., *International Environmental Law* (n 3), 148.

¹⁰⁸ Treves, ‘Settlement of Disputes & Non-Compliance Procedures’ (n 23), 514; Richard SJ & Verheyen Roda, ‘State Responsibility & Compensation for Climate Change Damages: Legal & Economic Assessment’ (2004) 32 *Energy Policy* 1109, 1115 cited in Fitzmaurice, ‘Responsibility & Climate Change’ (n 14), 97.

¹⁰⁹ Murase Shinya, ‘Second Report on the Protection of the Atmosphere’ (2 March 2015) UN Doc A/CN.4/681, 31–2 cited in Quirico, ‘Peremptory Duty & Emissions’ (n 23), 929.

¹¹⁰ Treves, ‘Settlement of Disputes & Non-Compliance Procedures’ (n 23), 513; Quirico, ‘Peremptory Duty & Emissions’ (n 23), 929 citing Murase, ‘Second Report on the Protection of the Atmosphere’ (2015) (n 109), 31–2.

Most of these involved judicial dispute resolution. There were some unilateral measures but all were retorsions not countermeasures.

A. France & Nuclear Weapons Testing (1973, 1995)

After Algeria's independence, France was unable to conduct atmospheric nuclear tests in the Sahara as its agreement with Algeria only permitted underground tests.¹¹¹ Thus, it moved its testing programme to French Polynesia. By 1974, it had conducted forty-six tests in the South Pacific.¹¹²

States had long criticised these tests. In 1959, the GA asked France to 'refrain' from testing in the Sahara.¹¹³ In 1960, it again urged states, including France, not to conduct tests in Africa.¹¹⁴ From 1960, nuclear states including France, faced annual GA resolutions that stressed the 'importance and urgency' of prohibiting nuclear tests.¹¹⁵ France also received protests from individual states.¹¹⁶ New Zealand expressed its concern about its tests in the Pacific.¹¹⁷

¹¹¹ *Declaration by France & the ANLF* (adopted 18 March 1962) 1 ILM 214, chapter III. See Regnault Jean-Marc, 'France's Search for Nuclear Test Sites: 1957–63' (2003) 67 *Journal of Military History* 1223, 1223.

¹¹² Rowe Richard, 'Diplomatic Dimension: Australia & the Nuclear Tests Case' (2021) 21 *Melbourne Journal of International Law* 536, 538. See —, 'Yet another French test' (The Times of India, 16 September 1974) <<https://www.proquest.com/historical-newspapers/yet-another-french-test/docview/739051441>>.

¹¹³ *Question of French Nuclear Tests in the Sahara* Res 1379 (XIV) UNGA (20 November 1959) UN Doc A/RES/1379(XIV) ('[Due to the] dangers and risk which such tests entail'). See —, 'France alone' (The Guardian, 11 November 1959) <<https://www.proquest.com/historical-newspapers/france-alone/docview/184584094>>.

¹¹⁴ *Africa as a Denuclearised Zone* Res 1652(XVI) UNGA (24 Nov 1961) UN Doc A/RES/652(XVI).

¹¹⁵ See *Suspension of nuclear & thermonuclear tests* Res 1577 (XV) UNGA (20 Dec 1960) UN Doc A/RES/1577 (XV); *The urgent need for a treaty to ban nuclear weapons tests under effective international control* Res 1649 (XVI) UNGA (8 Nov 1961) UN Doc A/RES/1649(XVI); Res 1762(XVII) UNGA (6 Nov 1962) UN Doc A/RES/1762(XVII); Res 1910(XVIII) UNGA (27 Nov 1963) UN Doc A/RES/910(XVIII); Res 2032(XX) UNGA (3 Dec 1965) UN Doc A/RES/2032(XX); Res 2163(XXI) UNGA (5 Dec 1966) UN Doc A/RES/2163(XXI); Res 2343(XXII) UNGA (19 Dec 1967) UN Doc A/RES/2343(XXII); Res 2455(XXIII) UNGA (20 Dec 1968) UN Doc A/RES/2455(XXIII); Res 2604(XXIV) UNGA (16 Dec 1969) UN Doc A/RES/2604(XXIV); Res 2663(XXV) UNGA (7 Dec 1970) UN Doc A/RES/2663(XXV); Res 2828(XXVI) UNGA (16 Dec 1971) UN Doc A/RES/2828(XXVI); Res 2934(XXVII) UNGA (29 Nov 1972) UN Doc A/RES/2934(XXVII); Res 3078(XXVIII) UNGA (6 Dec 1973) UN Doc A/RES/3078(XXVIII); Res 3257(XXIX) UNGA (9 Dec 1974) UN Doc A/RES/3257(XXIX); Res 3478(XXX) UNGA (11 Dec 1975) UN Doc A/RES/3478(XXX); Res 32/78 UNGA (12 Dec 1977) UN Doc A/RES/32/78; Res 33/71 UNGA (14 Dec 1978) UN Doc A/RES/33/71; Res 35/145 UNGA (12 Dec 1980) UN Doc A/RES/35/145. See also *Cessation of all test explosions of nuclear weapons* Res 36/84 UNGA (9 Dec 1981) UN Doc A/RES/36/84; Res 37/85 UNGA (9 Dec 1982) UN Doc A/RES/37/85; Res 38/72 UNGA (15 Dec 1983) UN Doc A/RES/38/72; Res 39/60 UNGA (12 Dec 1984) UN Doc A/RES/39/60; Res 40/88 UNGA (12 Dec 1985) UN Doc A/RES/40/88; *Cessation of all nuclear-test explosions* Res 43/63 UNGA (7 Dec 1988) UN Doc A/RES/43/63; Res 44/105 UNGA (15 Nov 1989) UN Doc A/RES/44/105; Res 45/49 UNGA (4 Dec 1990) UN Doc A/RES/45/49; *Nuclear Testing* Res 50/70 UNGA (12 December 1995) UN Doc A/RES/50/70.

¹¹⁶ See Elkind Jerome, 'French Nuclear Testing & Article 41—Another Blow to the Authority of the Court?' (1974) 8 *Vanderbilt Journal of Transnational Law* 39, 39–40; Ris WK Jr, 'French Nuclear Testing: A Crisis for International Law' (1974) 4 *Denver Journal of International Law and Policy* 111, 126–7.

¹¹⁷ Siskin Keith, 'Does International Law Reflect International Opinion—French Nuclear Testing' (1996) 26

Australia did the same.¹¹⁸

In 1972, Australia and New Zealand commenced ICJ proceedings against France for its nuclear tests.¹¹⁹ Yet, it was unclear if France breached any of its duties.¹²⁰ France was not a party to the 1963 Nuclear Test Ban Treaty.¹²¹ Also, there was arguably no customary prohibition against nuclear testing *per se*. Indeed, the GA resolutions cited above stressed the ‘importance and urgency’ of a treaty on nuclear testing.¹²² Australia argued that France violated states’ rights ‘to be free from atmospheric nuclear tests’, from the ‘deposit of radioactive fall-out’, and to the ‘freedom of the high seas’.¹²³ New Zealand made similar claims.¹²⁴ These claims while vague,¹²⁵ appear to refer to the customary *no-harm* rule. That said, Australia and New Zealand’s claims also had a basis in conventional law. Note that France was a signatory and Australia and New Zealand were parties to the 1958 Convention on the High Seas. Among others, this required states to take measures to prevent the pollution of the high seas and the air space above it ‘resulting from any activities with radioactive materials’.¹²⁶

The two states’ claims were mainly based on the tests’ impact on their territories.¹²⁷ Both sought to vindicate their rights as an ‘injured state’. Yet, like Belgium and South Africa in the much later *Obligation to Prosecute or Extradite* and *Application of the Genocide Convention*

Georgia Journal of International & Comparative Law 186, 190. See ‘Application’, *Nuclear Tests* (New Zealand v France) (Institution of Proceedings) (ICJ, General List No 58, 9 May 1973), annexe III.

¹¹⁸ Rowe, ‘Australia & the Nuclear Tests Case’ (n 112), 543.

¹¹⁹ ‘Application of New Zealand’, *Nuclear Tests* (n 117), 8–9; ‘Application’, *Nuclear Tests* (Australia v France) (Institution of Proceedings) (ICJ, General List No 58, 9 May 1973), 28–9.

¹²⁰ See *Nuclear Tests* (Australia v France) (Judgment) [1974] ICJ 253 (Onyeama, Dillard, Jiménez de Aréchaga, & Waldock, dissenting), 369–70 (‘If [...] Australia were to [prove] the existence of a general rule [...] prohibiting atmospheric nuclear tests, the Court would [...] have to determine [...] the precise character and content of that rule’).

¹²¹ *Treaty banning Nuclear Weapons Tests in the Atmosphere, in Outer Space & under Water* (adopted 10 October 1963) 480 UNTS 43.

¹²² See Ni, ‘Articles on State Responsibility’ (n 22), 24.

¹²³ ‘Application of Australia’, *Nuclear Tests* (n 119), 28–9; ‘Memorial of Australia’, *Nuclear Tests* (n 95), 332–43.

¹²⁴ ‘Application of New Zealand’, *Nuclear Tests* (n 117), 8; ‘Memorial of New Zealand’, *Nuclear Tests* (n 38), 203.

¹²⁵ See Kwiatkowska Barbara, ‘New Zealand v France Nuclear Tests’ (1996) 37 *Virginia Journal of International Law* 107, 112; McWhinney Edward, ‘World Court & the French Nuclear Tests Case’ (1975) 3 *Syracuse Journal of International Law & Commerce* 9, 15.

¹²⁶ *Convention on the High Seas* (adopted 29 April 1958, entered into force 03 January 1962) 450 UNTS 11, art 25.

¹²⁷ Arsanjani & Reismann, ‘Liability & Protection of the Global Commons’ (n 6), 470; Lakshman Guruswamy, ‘Use of Courts to Protect the Environmental Commons’ (2019) 41 *University of Hawai’i Law Review* 277, 282.

in *Gaza* cases,¹²⁸ Australia and New Zealand also appear to have claimed the competence as a ‘state other than an injured state’. Australia asserted that the prohibition against nuclear testing was an ‘interest’ of every state.¹²⁹ New Zealand submitted that the rights that it sought to vindicate were held by all states.¹³⁰ Thus, both also deemed the *no-harm* rule to impose a duty owed *erga omnes*,¹³¹ and the 1958 to levy a duty owed *erga omnes partes contractes*. Indeed, this was the observation of some of the Court’s members who criticised the two states for acting ‘as spokesman for the international community’.¹³²

France rejected the Court’s jurisdiction and did not participate in the proceedings.¹³³ In June 1974, the Court issued a provisional measure ordering France to ‘avoid nuclear tests [that could] cause [...] radioactive fall-out’ in Australia and New Zealand.¹³⁴ France ignored this.¹³⁵ It also denounced the General Act for the Pacific Settlement of International Disputes which Australia and New Zealand relied on for jurisdiction.¹³⁶ Yet, due to mounting pressure,¹³⁷ France announced that it would only conduct underground tests.¹³⁸ The ICJ deemed this a unilateral declaration by which France bound itself to every state not to ‘hold further [atmospheric tests] in the South Pacific’.¹³⁹ For the Court, this means that the Applicants’ ‘objective [...] has [...] been accomplished’, the ‘dispute [had] disappeared’, and ‘no further [...]

¹²⁸ ‘Memorial of Belgium’, *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Merits) (ICJ, General List No 144, 1 July 2010), 79–80; ‘Verbatim Record 2024/1’, *Application of the Genocide Convention in Gaza* (South Africa v Israel) (ICJ, General List No 192, 11 January 2024), 54.

¹²⁹ ‘Memorial of Australia’, *Nuclear Tests* (n 95), 337.

¹³⁰ ‘Memorial of New Zealand’, *Nuclear Tests* (n 38), 203–4.

¹³¹ Lakshman, ‘Environmental Commons’ (n 127), 283; MacKay Don, ‘New Zealand & France in the ICJ’ (1996) 19 *Fordham International Law Journal* 1857, 1863; Murase, ‘Transnational Environmental Issues’ (n 5), 312.

¹³² *Nuclear Tests* [1974] (n 120) (de Castro, dissenting), 290 (‘Applicant is not relying on a right of its own disputed by France, and does not base its Application on any material injury [...] Applicant has no legal title authorising it to act as spokesman for the international community and ask the Court to condemn France’s conduct’). See (Onyeama, Dillard, Jiménez de Aréchaga, & Waldock, dissenting), 370 (‘Although we recognise that the existence of a so-called *actio popularis* is a matter of controversy [...] the question is one that may be considered as capable of rational legal argument and a proper subject of litigation’). See (Gros, separate opinion), 290.

¹³³ *Nuclear Tests* (New Zealand v France) (Provisional Measures) [1973] ICJ 135, 137.

¹³⁴ *Nuclear Tests* [1973] (n 38), 106; *Nuclear Tests* [1973] (n 133), 142.

¹³⁵ See Doom John & Butson Thomas, ‘The Nuclear Club continues its Experiments’ (New York Times, 30 June 1974) <<https://www.proquest.com/historical-newspapers/world/docview/120116252>>.

¹³⁶ Siskin, ‘French Nuclear Testing’ (n 117), 191. See *General Act for the Pacific Settlement of International Disputes* (adopted 26 September 1928, entered into force 16 August 1929) 93 LNTS 344.

¹³⁷ Klein Natalie, ‘Litigation over Marine Resources: Lessons for Law of the Sea, International Dispute Settlement & International Environmental Law’ (2009) 28 *Australian Yearbook of International Law* 131, 134.

¹³⁸ *Nuclear Tests* [1974] (n 120), 265; *Nuclear Tests* (New Zealand v France) (Judgement) [1974] ICJ 457, 469.

¹³⁹ *Nuclear Tests* [1974] (n 120), 270; *Nuclear Tests* [1974] (n 138), 475.

action is required'.¹⁴⁰ Thus, it discontinued the proceedings.¹⁴¹

The 1974 decision stated that 'if the [judgement's] basis [...] were to be affected, the Applicants could request an examination of the situation'.¹⁴² New Zealand, whose claims, unlike Australia, were not limited to atmospheric testing relied on this when it sought to re-open the case in 1995 after France announced that it would conduct underground tests.¹⁴³ Again, it appears that New Zealand asserted the competence of a 'state other than an injured state' by asking the Court to declare that France's conduct would breach duties owed by France to 'New Zealand [and to] other states'.¹⁴⁴ Australia also sought to intervene alleging that it has a 'legal interest as a member of the international community' in France's observance of its duties.¹⁴⁵ Yet, the ICJ rejected New Zealand's application by 'applying a strict [and] formalistic interpretation of its earlier decision'.¹⁴⁶ For the Court, the 1974 decision 'only referred to atmospheric nuclear tests and so it was only in the event that France resumed that [...] type of testing that the case could be resumed'.¹⁴⁷

B. *Iceland & Whaling (1988)*

Iceland continued to permit whaling despite ratifying the ICRW in 1948. Yet, this did not contravene its duties as its 'take' fell within the limits set by the the International Whaling

¹⁴⁰ *Nuclear Tests* [1974] (n 120), 271; *Nuclear Tests* [1974] (n 138), 476.

¹⁴¹ Note Klein, 'Litigation over Marine Resources' (n 137), 136 ('The decision of the ICJ reflected its hesitancy to be embroiled in such a highly political dispute, where the security concerns of a powerful state were pitted against the environmental concerns of an entire region') citing Taylor Prudence, 'Testing Times for the World Court: Judicial Process & the 1995 French Nuclear Tests Case' (1997) 8 *Colorado Journal of International Environmental Law & Policy* 199, 206; Lellouche P, 'ICJ & Nuclear Tests Cases' (1975) 16 *Harvard International Law Journal* 614, 636–37.

¹⁴² *Nuclear Tests* [1974] (n 120), 272; *Nuclear Tests* [1974] (n 138), 477.

¹⁴³ 'Application', *Request for an Examination of the Court's Judgment in the Nuclear Tests* (New Zealand v France) (Application) (ICJ, General List No 97, 21 August 1995), 30.

¹⁴⁴ Ibid, 58. See 'Application to Intervene of Australia', *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 23 August 1995), 9 ('If, as New Zealand claims, the [duties] are of an *erga omnes* character [...] it necessarily follows that the New Zealand claim against France puts in issue the rights of all States, including Australia').

¹⁴⁵ 'Application to Intervene of Australia', *Request for Examination of Nuclear Test* (n 144), 9, 11, ('Where the relevant [duty is owed] *erga omnes*, this means that every state has an "interest of a legal nature" which may be affected by the decision in the case", and is entitled to seek permission to intervene under [...] Article 62'); 12 ('As the legal interest of all members of the international community in the observance of [duties owed] *erga omnes* is the same, that legal interest of every state will be affected equally by a decision whether or not to indicate such measures'). Note that the Solomon Islands, Marshall Islands, Micronesia, and Samoa also sought to intervene in the proceedings.

¹⁴⁶ Klein, 'Litigation over Marine Resources' (n 137), 137; MacKay, 'New Zealand & France' (n 131), 1870.

¹⁴⁷ Klein, 'Litigation over Marine Resources' (n 137), 137 citing *Nuclear Tests* [1995] (n 39), 307–7; Craven Matthew, 'New Zealand's Request for an Examination of the Situation of the Court's Judgment in the Nuclear Tests' (1996) 45 *International & Comparative Law Quarterly* 725, 731.

Commission ('IWC') under ICRW Article V(1).¹⁴⁸ The problem for Iceland began in 1982 when the IWC set zero-catch limits on commercial whaling from 1985 onwards.¹⁴⁹ While parties, under ICRW Article V(3), may object to these limits and continue to allow whaling, Iceland, unlike Norway and Japan,¹⁵⁰ did not exercise this privilege and was thus bound by the limit.¹⁵¹

In 1985, Iceland announced that it would resume whaling for scientific purposes under ICRW Article VIII.¹⁵² This allows parties to issue permits to their nationals to engage in lethal research. Yet, this has been controversial. Indeed, some scholars and states have viewed the research exception with 'cynicism [at it may be used to] circumvent [the ICRW's] commercial restrictions'.¹⁵³ For instance, in 1957, Norway accused the Soviet Union of 'manipulating scientific activities under Article VIII to gain an enhanced harvest'.¹⁵⁴ Thus, parties through the IWC required states to demonstrate the research's importance, prove the necessity for lethal methods, and show the programme's viability.¹⁵⁵

The IWC deemed that Iceland's proposals did not fulfil the criteria for scientific whaling.¹⁵⁶

¹⁴⁸ See e.g. IWC, '32nd Report' (1980–1) IWC Doc RS36, 6–7.

¹⁴⁹ IWC, '34th Report' (1982–3) IWC Doc RS38, 72 ff; *ICRW* (n 23), Schedule 10(e).

¹⁵⁰ Charnovitz Steve, 'Environmental Trade Sanctions & the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practice' (1994) 9 *American University International Law Review* 751, 763; Murphy Sean, 'US Sanctions against Japan for Whaling' (2001) 95 *American Journal of International Law* 149, 150.

¹⁵¹ IWC, '33rd Report' (1981–2) IWC Doc RS37, 21; Gillespie Alexander, 'Iceland's Reservation at the International Whaling Commission' (2003) 5 *European Journal of International Law* 977, 978 ('Iceland elected not to [...] [object] to the moratorium [...] to avoid confrontation with strong opposing countries including the United States').

¹⁵² IWC, '36th Report' (1985) IWC Doc RS40, 20.

¹⁵³ See Cadell Richard, 'Antarctic Research Whaling & the International Court of Justice' (2014) 26 *Journal of Environmental Law* 331, 333 citing Scott Baker C, et al., 'Scientific Whaling: Source of Illegal Products for Market?' (2000) 290 *Science* 1695, 1695. Triggs Gillian, 'Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?' (2000) 5 *Asia-Pacific Journal of Environmental Law* 33, 52–3. See IWC, 'Verbatim Record, 38th Meeting' (1988) IWC Doc RS428, 20 ff, 58 ff.; IWC, 'Verbatim Record, 39th Meeting' (1988) IWC Doc RS429, 38 ff.

¹⁵⁴ Cadell, 'Research Whaling & the ICJ' (n 153), 333 citing Tønnessen JN & Johnsen AO, *History of Modern Whaling* (Hurtst & Co 1982), 579.

¹⁵⁵ IWC, 'Resolution on Special Permits for Scientific Research' (1986) IWC Doc 2061, Appendix 2; IWC, 'Resolution on Scientific Research Programmes' (1987) IWC Doc 2062, Appendix 1. See Martin Gene & Brennan James, 'Enforcing the ICRW' (1989) 17 *Denver Journal of International Law & Policy* 293, 301.

¹⁵⁶ See IWC, 'Resolution on Icelandic Proposal for Scientific Catches' (1987) IWC Doc 2062, Appendix 3; IWC, 'Resolution on the Icelandic Proposal for Special Permits' (1988) IWC Res 1988-2; IWC, 'Resolution on the Icelandic Proposal for Scientific Catches' (1989) IWC Res 1989-1. See also IWC, '38th Report' (1986–7) IWC Doc RS42, 14; IWC, '39th Report' (1987–8) IWC Doc RS43, 12–3. But see Greenberg Eldon, Hoff Paul, & Goulding Michael, 'Japan's Whale Research Program & International Law' (2002) 32 *California Western International Law Journal* 151, 174 ('While the IWC resolutions may accurately convey the political positions of the majority of the [states], they scarcely establish that [...] research activities lack scientific merit or are inconsistent with the Convention').

Yet, Iceland continued its programme.¹⁵⁷ It also exported four thousand tonnes of whale meat to Japan.¹⁵⁸ Arguably, Iceland at this point was in breach of its ICRW duties.¹⁵⁹ It was bound by the moratorium but still took whales despite the IWC's rejection of its proposal. As the ICJ would later rule in *Whaling in the Antarctic*, states do not possess unfettered discretion based on their interpretation of the ICRW's research exception.¹⁶⁰ Rather, their activities must be conducted with 'due regard' to the IWC's recommendations.¹⁶¹ Furthermore, while Article VIII(2) does not preclude the sale of whale meat to underwrite research costs, it becomes problematic when done beyond the extent necessary to meet scientific objectives.¹⁶²

While not affected by Iceland's breach, the US threatened to impose measures against Iceland by restricting its fishing access in US waters in 1988.¹⁶³ As Iceland halted its whaling research in 1989 the US did not push through with its threat.¹⁶⁴ Had it been imposed, the measure would have been a retorsion. The US would not have breached any of its duties in denying Iceland fishing access. As Caron observes, as it stands, international law does not mandate states to grant others access to utilise the resources within its waters.¹⁶⁵ Even the UNCLOS which obliges states to 'give other states access to the surplus' when the allowable catch is greater than the estimated allowable domestic catch, provides that this requirement is still subject to 'domestic law'.¹⁶⁶ Thus, had the US been a party to the UNCLOS, its measures against Iceland would have been lawful.¹⁶⁷

¹⁵⁷ Rose Gregory & Paleokrassis George, 'Compliance with International Environmental Obligations: IWC' in Werksman Jacob, *et al.* (eds), *Improving Compliance with International Environmental Law* (Routledge 1995), 170.

¹⁵⁸ Gillespie, 'Iceland's Reservation' (n 151), 978 ('This [was] controversial as the scientific merits of the research were solidly criticised, as was the practice of exporting the resulting whale meat to Japan.'). See Martin & Brennan, 'Enforcing the ICRW' (n 155), 312;

¹⁵⁹ See McCarthy Samantha, 'International Regulation of Whaling: US Role' (1987) 31 *Ocean Law Memo* 1, 11 ('Some IWC members viewed the arrangement [...] to constitute "commercial whaling"').

¹⁶⁰ *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Judgement) [2014] ICJ 226, 298–300.

¹⁶¹ *Ibid.*, 271.

¹⁶² *Ibid.*, 259, 270. See IWC, 'Resolution on Whaling under Special Permit' (2003) IWC Res 2003-2 ('Article VIII [...] [must not] be exploited [...] to provide whale meat for commercial purposes'); IWC, 'Resolution on International Trade in Whale Meat & Products' (1994) IWC Res 1994-7 (noting that products obtained through lethal research activities should only be sold within domestic markets).

¹⁶³ Rose & Paleokrassis, 'IWC' (n 157), 170.

¹⁶⁴ *Ibid.*

¹⁶⁵ Caron David, 'International Sanctions, Ocean Management, & the Law of the Sea: A Study of Denial of Access to Fisheries' (1989) 16(1) *Ecology Law Quarterly* 311, 314, 329.

¹⁶⁶ UNCLOS (n 20), art 62.

¹⁶⁷ Note that Iceland withdrew from the ICRW in 1992. When it re-joined in 2002, it made a reservation to the ban on commercial whaling (Gillespie, 'Iceland's Reservation' (n 151), 977).

C. Japan & Whaling (1988, 2000, 2010)

Japan also allowed commercial whaling despite ratifying the ICRW in 1951.¹⁶⁸ Again, this was not wrongful as Japan objected to the IWC quotas since 1974,¹⁶⁹ and the 1982 moratorium.¹⁷⁰ Nonetheless, Japan's conduct attracted unilateral measures from the US. In 1974, the US threatened to restrict Japan's fishing access in US waters.¹⁷¹ In 1983, it also reduced Japan's catch allocation.¹⁷² These led to Japan's halt of commercial whaling by 1987.¹⁷³ Note that these are not enforcement measures there being no wrongful act but are measures aimed at influencing Japan's domestic policies.

In 1987, Japan announced that it would conduct the Japan Research Programme in the Antarctic ('JARPA I').¹⁷⁴ The IWC, however, deemed that the proposal failed to satisfy the criteria for scientific whaling.¹⁷⁵ Despite pleas from other parties,¹⁷⁶ Japan went ahead with its research.¹⁷⁷ In response, the US in 1988 restricted Japan from fishing within its waters.¹⁷⁸ By

¹⁶⁸ *Whaling in the Antarctic* [2014] (n 160), 271. Note that Norway also ratified the ICRW but continues to harvest whales. It was not bound by the moratorium until 1987 due to its objection. It also conducted 'research whaling' during the period that it was bound by the moratorium despite the IWC rejection of its proposal (See IWC, 'Resolution on the Nowregian Proposal for Special Permits' (1988) IWC Res 1988-1). Yet, no state enforced its implemented its responsibility (Rose & Paleokrassis, 'IWC' (n 157), 170). Since 1992, it has undertaken whaling activities by opting out of the moratorium (See Stein Cliff, 'An Analysis of Norway's Decision to Resume Commercial Whaling' (1994) 8 *Temple International & Comparative Law Journal* 155, 171).

¹⁶⁹ Charnovitz Steve, 'Encouraging Environmental Cooperation through the Pelly Amendment' (1994) 3 *Journal of Environment & Development* 3, 11; — —, 'Whale quotas' (New York Times, 15 July 1974) <<https://www.proquest.com/historical-newspapers/whale-quotas/docview/120119037>>.

¹⁷⁰ IWC, '33rd Report' (n 151), 21; — —, 'Japan Objects to Ban On Commercial Whaling' (New York Times, 25 July 1982) <<https://www.proquest.com/historical-newspapers/japan-objects-ban-on-commercial/docview/122046449>>. See IWC, '37th Report' (1985–6) IWC Doc RS41, 2; IWC, '38th Report' (n 156), 2; IWC, '39th Report' (n 156), 2.

¹⁷¹ Charnovitz, 'Pelly Amendment' (n 169), 11. See also — —, 'Japan under pressure' (New York Times, 08 June 1974) <<https://www.proquest.com/historical-newspapers/japan-under/docview/120127699>>.

¹⁷² Murphy, 'US Sanctions against Japan for Whaling' (n 150), 150; Leich Marian, 'Contemporary Practice of the United States' (1985) 79 *American Journal of International Law* 434.

¹⁷³ Rose & Paleokrassis, 'IWC' (n 157), 170; Burgess John, 'Japan halts whaling in Antarctica' (New York Times, 17 March 1987) <<https://www.proquest.com/newspapers/japan-halts-whaling-antarctica/docview/306866308>>.

¹⁷⁴ Caron, 'Denial of Access to Fisheries' (n 165), 324, 326; Burgess John, 'Japan to renew whale hunt as a research effort' (Washington Post, 09 April 1987) <<https://www.proquest.com/newspapers/japan-renew-whale-hunt-as-research-effort/docview/306882184>>.

¹⁷⁵ IWC, 'Resolution on Japanese Proposal for Special Permits' (1987) IWC Doc 2062, Appendix 1 ('Adopts the view that the [...] proposed research program as described in SC/39/O 4 does not satisfy the criteria set out in the 1986').

¹⁷⁶ IWC, '38th Report' (n 156), 14; IWC, '39th Report' (n 156), 11–2.

¹⁷⁷ Spencer Valeria, 'Domestic Enforcement of International Law: International Convention for the Regulation of Whaling' (1991) 2 *Colorado Journal of International Environmental Law & Policy* 109, 121; Shapiro Margaret, 'Japan Resumes Whaling, Says Purpose Is Research' (Washington Post, 24 December 1987) <<https://www.proquest.com/newspapers/japan-resumes-whaling-says-purpose-is-research/docview/306962753>>.

¹⁷⁸ Caron, 'Denial of Access to Fisheries' (n 165), 327. See also Shabecoff Philip, 'US declares Japan in

this point, Japan arguably has breached its duties under the Convention by pushing through with its research despite the IWC's findings.¹⁷⁹ Thus, the US actions may be deemed an enforcement measure—a retorsion as it did not constitute a breach of the US' duties.

Japan continued to take whales under JARPA I and JARPN ('Japanese Research Programme in the North') and states continued to criticise these programmes.¹⁸⁰ In response, the US in 2000 levied several retorsions against Japan. These included: banning Japanese from fishing in US waters, suspending bilateral fisheries consultation with Japan, and opposing Japan's sitting in the 2001 IWC meeting.¹⁸¹ Thereafter, Japan announced a reduction of its total whale catch beginning in 2000.¹⁸²

However, after concluding JARPA I in 2005, Japan announced a new program for whale research in the Southern Ocean ('JARPA II').¹⁸³ Again, ICRW states protested this move.¹⁸⁴ In 2007, thirty states urged Japan to 'cease all its lethal [...] research on whales'.¹⁸⁵ Yet, Japan did

violation on whaling and may curb trade' (New York Times, 11 February 1988) <<https://www.proquest.com/historical-newspapers/u-s-declares-japan-violation-on-whaling-may-curb/docview/110621314>>.

¹⁷⁹ See *Whaling in the Antarctic* [2014] (n 160), 271. See also Harris AW, 'Whaling Moratorium & Divergent Interpretations of Science' (2004) 29 *William & Mary Law Review* 375, 383–6. *Contra* Greenberg, Hoff, & Goulding, 'Japan's Whale Research Program & International Law' (n 156), 161 ('The [...] program was created in direct response to the moratorium [...] it was intended to provide the scientific basis for the IWC to make precisely the decisions contemplated by the treaty parties when they adopted the moratorium.').

¹⁸⁰ Murphy, 'US Sanctions against Japan for Whaling' (n 150), 151; Cadell, 'Research Whaling & the ICJ' (n 153), 333. See IWC, 'Resolution on the Proposed take by Japan of Whales in the Southern Hemisphere' (1989) IWC Res 1989-3; IWC, 'Resolution on Special Permit Catches by Japan in the Southern Hemisphere' (1990) IWC Doc 2065, Appendix 2; IWC, 'Resolution on Special Permit Catches by Japan in the Southern Hemisphere' (1992) IWC Doc 2067, Appendix 5; IWC, 'Resolution on Special Permit Catches by Japan in the Southern Hemisphere' (1993) IWC Res 1993-7; IWC, 'Resolution on Special Permit Catches by Japan in the North Pacific' (1994) IWC Res 1994-9; IWC, 'Resolution on Special Permit Catches by Japan in the Southern Hemisphere' (1994) IWC Res 1994-10; IWC, 'Resolution on Special Permit Catches by Japan' (1996) IWC Res 1996-7; IWC, 'Resolution on Special Permit Catches in the Southern Ocean by Japan' (1997) IWC Res 1997-5; IWC, 'Resolution on Special Permit Catches in the North Pacific by Japan' (1997) IWC Res 1997-6; IWC, 'Resolution on Whaling under Special Permit' (1999) IWC Res 1999-3; IWC, 'Resolution on Whaling under Special Permit in the North Pacific Ocean' (2000) IWC Res 2000-5.

¹⁸¹ Murphy, 'US Sanctions against Japan for Whaling' (n 150), 151. See Lancaster John, 'US acts against Japan on Whaling' (Washington Post, 31 August 2000) <<https://www.proquest.com/newspapers/u-s-acts-against-japan-on-whaling/docview/408669593>>; Alden Edward, 'US takes action on Japanese whaling' (Financial Times, 14 September 2000) <<https://www.proquest.com/newspapers/us-takes-action-on-japanese-whaling-sanctions/docview/248822598>>.

¹⁸² Murphy, 'US Sanctions against Japan for Whaling' (n 150), 152.

¹⁸³ Cadell, 'Research Whaling & the ICJ' (n 153), 334; Cock Anna, 'Why Japan is increasing its whale catch' (Sunday Telegraph, 20 Nov 2005) <<https://www.proquest.com/newspapers/why-japan-is-increasing-catch/docview/360212311>>. See IWC, 'Resolution on Southern Hemisphere Minke Whales' (2001) IWC Res 2001-7; IWC, 'Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling' (2003) IWC Res 2003-3.

¹⁸⁴ IWC, 'Resolution on JARPA' (2005) IWC Res 2005-1; IWC, 'Resolution on JARPA' (2007) IWC Res 2007-1.

¹⁸⁵ 'Application', *Whaling in the Antarctic* (Australia v Japan) (ICJ, General List No 148, 13 May 2010),

not heed this request. Thus, in 2010, Australia commenced ICJ proceedings against Japan. It asserted that Japan breached its duties under ICRW Schedule paragraph 10(e) which prescribes a zero catch limit on commercial whaling and under paragraph 7(b) which prohibits commercial whaling of fin whales in the Southern Ocean Sanctuary.¹⁸⁶ Australia also claimed that Japan breached its CITES and the CBD duties by failing to ensure that activities under its jurisdiction and control do not cause damage to other states' environments and areas beyond the limits of national jurisdiction.¹⁸⁷ In 2012, New Zealand intervened asserting that the programme did not meet ICRW Article VIII's requirements.¹⁸⁸

Australia did not claim to be a 'state other than an injured state' in its Application.¹⁸⁹ Neither could this be implied from the remedies it sought—declaration of wrongful conduct, cessation, and guarantees of non-repetition—as these are not exclusive to 'states other than injured state'.¹⁹⁰ Furthermore, Australia was arguably 'directly affected' as Japan's programme affected the whales' economic value crucial to its 'whale-watching industry' and occurred in the waters that Australia claims as part of its Antarctic territory.¹⁹¹ Nevertheless, in its Memorial, it referred to the whale stocks' conservation as a 'common interest of all [IWC] members'.¹⁹² In oral proceedings, it also stressed that it 'does not claim to be an injured state' but was 'seeking to uphold [the IWC parties'] collective interest'.¹⁹³ New Zealand also alluded to the ICRW

annexe 1.

¹⁸⁶ Ibid, 16–7.

¹⁸⁷ Ibid, 17–8; Stephens Tim, 'Environmental Litigation by Asia Pacific States at the International Court of Justice' (2021) 21 *Melbourne Journal of International Law* 653, 662. Note that Australia later only focused on the ICRW.

¹⁸⁸ 'Declaration of Intervention of New Zealand', *Whaling in the Antarctic* (n 103), 18.

¹⁸⁹ Johnstone, 'Invoking Responsibility for Environmental Injury' (n 23), 30.

¹⁹⁰ Ibid, 30. But see Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 373.

¹⁹¹ Klein Natalie, 'Whales & Tuna: The Past & Future of Litigation between Australia & Japan' (2009) 21 *Georgetown Environmental Law Review* 143, 162.

¹⁹² 'Memorial of Australia', *Whaling in the Antarctic* (Australia v Japan) (Merits) (ICJ, General List No 148, 9 March 2012), 16, 50–1, 84. See Longobardo Marco, 'Contribution of Humanitarian Law to the Development of the Law on Responsibility regarding Obligations Erga Omnes & Erga Omnes Partes' (2018) 23 *Journal of Conflict & Security Law* 383, 390; Strain, 'Regulating Collective Resources' (n 22), 579; Borg Simone, 'Influence of International Case Law on Aspects of International Law relating to the Conservation of Living Marine Resources beyond National Jurisdiction' (2012) 23 *Yearbook of International Environmental Law* 44, 70.

¹⁹³ 'Verbatim Record 2013/18', *Whaling in the Antarctic* (n 97), 28 ('Australia does not claim to be an injured state because [...] some of the JARPA II take is from waters over which Australia claims [...] rights and jurisdiction [...] Every party has the same interest in ensuring compliance by every other party with its [ICRW duties] [...] Australia is seeking to uphold its collective interest, an interest it shares with all other parties'), 33–4 ('L'Australie, comme tous les autres [...] parties à la convention [...] a un intérêt commun à ce que l'intégrité du régime [...] soit maintenue [...] Cet [...] implique que les obligations en question s'imposent à tout partie à la [ICRW] à l'égard de tous les autres [...] parties [...] L'Australie fait ainsi valoir son intérêt juridique à ce que les droits découlant de la convention [...] soient respectés par le Japon').

parties' 'collective interest' in its intervention.¹⁹⁴ Interestingly, Japan, in its counter-memorial, only briefly touched on Australia's competence,¹⁹⁵ and focused on the ICJ's jurisdiction based on Australia's optional clause declaration.¹⁹⁶

The Court ruled that the JARPA II did not satisfy ICRW Article VIII's requirements and breached ICRW schedule paragraphs 7(b) and 10(e). Thus, it ordered Japan to revoke the JAPRA II whaling permits and refrain from issuing further licences.¹⁹⁷ However, as the issue was not disputed, the ICJ did not address Australia's competence.¹⁹⁸ Even the ICJ's members who were critical of the competence of 'states other than an injured state' to invoke another's responsibility did not address the issue.¹⁹⁹ Yet, at least one member commented that the case presented a 'unique occasion for the Court to pronounce upon a system of collective regulation of the environment'.²⁰⁰

¹⁹⁴ See 'Declaration of Intervention of New Zealand', *Whaling in the Antarctic* (n 103), 14.

¹⁹⁵ See 'Counter-Memorial of Japan', *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Merits) (ICJ, General List No 148, 9 March 2012), 53 ('Australia claims a legal interest in the regulation of the living resources in a large part of those waters. It has made no attempt to explain its *jus standi* in respect to its application to the Court')

¹⁹⁶ See *ibid*, 24. *But see* Ahmadov Farid, *Right of Actio Popularis before International Courts & Tribunals* (Brill Nijhoff 2018), 125 ('Japan's unwillingness to object [...] on the ground of [Australia's] lack of special interest and [on] the question of the [its] right to bring a claim [...] ['as a state other than injured'] may be interpreted as implicit endorsement of *actio popularis* outside the context of human rights protection'); Strain, 'Regulating Collective Resources' (n 22), 577; Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1, 10. *But see* McGarry Brian, 'Obligations Erga Omnes (Partes) & the Participation of Third States in Inter-State Litigation' (2023) 22 *Law & Practice of International Courts & Tribunals* 273, 296–7 ('A respondent is free to [...] waive [its] objections [...] this waiver, it may "cure" defects which might otherwise prove fatal to a case [...] [However], there may be good reasons—litigation strategy, political optics—why [it may choose] not to raise every potentially successful objection').

¹⁹⁷ *Whaling in the Antarctic* [2014] (n 160), 298–300. *But see* (Owada, dissenting), 320; (Abraham, dissenting), 334–5; (Bennuna, dissenting), 347; (Yusuf, dissenting), 403.

¹⁹⁸ See Urs, 'Question of Standing before the ICJ' (n 196), 10 ('Presumably, the Court accepted that Australia [acted] in the collective interest [to assert] Japan's responsibility for the breach of [duties owed] *erga omnes partes*'); Tams Christian, 'Procedural & Jurisdictional Questions Sidestepped in the Whaling Judgment' in Fitzmaurice Malgosia & Tamada Dai (eds), *Whaling in the Antarctic: Significance & Implications of the ICJ Judgment* (Brill Nijhoff 2016), 210 ('[The Court] has now embraced the idea of public interest standing [...] on the basis of multilateral treaties protecting collective interest'). *But see* Strain, 'Regulating Collective Resources' (n 22), 584 ('A more likely inference [...] is that the Court is reluctant to deal with issues not specifically raised by parties') *citing* Ahmadov, *Actio Popularis* (n 196), 124.

¹⁹⁹ Strain, 'Regulating Collective Resources' (n 22), 584 *noting* that Judge Bhandari who raised the question during the oral proceedings and Judge Xue who was critical of the competence of 'states other than injured state' in previous cases did not delve into the issue.

²⁰⁰ *Whaling in the Antarctic* [2014] (n 160) (Trindade, separate opinion), 381. *Note* that as in Iceland's case in 1992, Japan withdrew from the ICRW to pursue commercial whaling in 2018 (Japan Ministry of Foreign Affairs, 'Statement by the Chief Cabinet Secretary' (26 December 2018) <https://www.mofa.go.jp/ecm/fsh/page4e_000969.html>). However, unlike Iceland, it has not since re-joined the Convention.

D. The United Kingdom, India, Pakistan, & Nuclear Disarmament (2014)

In 2014, the Marshall Islands commenced ICJ proceedings against states that ‘possess or are believed to possess nuclear weapons’.²⁰¹ Yet, as it only had ‘jurisdictional bases’ against India, Pakistan, and the UK, only these three cases were docketed.²⁰² It claimed that the respondents failed in their duty ‘to pursue in good faith and bring to a conclusion negotiations [on] nuclear disarmament’.²⁰³ It asserted that this constitutes a breach of the UK’s duty under the Non-Proliferation Treaty’s (‘NPT’) Article VI,²⁰⁴ and India and Pakistan’s customary duties.²⁰⁵ Its claim also had an environmental dimension.²⁰⁶ It also highlighted the ‘threat posed by [...] nuclear weapons’ and its potential to cause ‘long-term damage to the environment, climate, [and] human health.’²⁰⁷ Thus, it appears that the Marshall Islands suggested that the respondents failed to take effective measures to mitigate this risk of harm.²⁰⁸ In turn, this may

²⁰¹ Becker Michael, 'Judgments in the Nuclear Disarmament cases at the ICJ' (2017) 6 *Cambridge International Law Journal* 4, 5. Note that these are China, France, India, Israel, North Korea, Pakistan, Russia, the UK, and the US.

²⁰² Proulx Vincent-Joël, 'World Court's Jurisdictional Formalism & its Lost Market Share: Marshall Islands Decisions & the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes' (2017) 30 *Leiden Journal of International Law* 925, 927. See 'Application', *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v India) (Preliminary Objections) (ICJ, General List no 158, 24 April 2014); Application', *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v Pakistan) (Preliminary Objections) (ICJ, General List no 159, 24 April 2014); Application', *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v the UK) (Preliminary Objections) (ICJ, General List no 160, 24 April 2014).

²⁰³ 'Memorial of the Marshall Islands', *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v India) (Preliminary Objections) (ICJ, General List no 158, 16 December 2014), 4; 'Memorial of the Marshall Islands (Marshall Islands v the UK)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 98), 4; 'Memorial of the Marshall Islands', *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v Pakistan) (Preliminary Objections) (ICJ, General List no 159, 12 January 2015), 4.

²⁰⁴ 'Memorial of the Marshall Islands (Marshall Islands v the UK)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 98), 55.

²⁰⁵ 'Memorial of the Marshall Islands (Marshall Islands v India)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 9; 'Memorial of the Marshall Islands (Marshall Islands v Pakistan)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 10.

²⁰⁶ Note Stephens, 'Environmental Litigation by Asia Pacific States' (n 187), 670 ('Environmental issues have not always featured explicitly in [ICJ] decisions even in disputes [where they have] been the primary underlying concerns')

²⁰⁷ 'Memorial of the Marshall Islands (Marshall Islands v the UK)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 98), 15, 19; 'Memorial of the Marshall Islands (Marshall Islands v India)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 6; 'Memorial of the Marshall Islands (Marshall Islands v Pakistan)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 5–6.

²⁰⁸ See 'Memorial of the Marshall Islands (Marshall Islands v the UK)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 98), 19–20; 'Memorial of the Marshall Islands (Marshall Islands v India)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 5; 'Memorial of the Marshall Islands (Marshall Islands v Pakistan)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 20.

constitute a breach of the duty under the *harm-prevention* rule.²⁰⁹

The Court dismissed the cases, perhaps for the first time,²¹⁰ for lack of jurisdiction.²¹¹ It stressed that the ‘existence of a dispute between the parties is [...] a condition’ for its jurisdiction,²¹² and there must be a ‘disagreement on a point of law or fact, a conflict of legal views or of interests’.²¹³ This is not problematic as the exercise of judicial function requires the existence of an issue that is ‘capable of being adjudicated upon’.²¹⁴ The Court also stated that ‘prior negotiations’ need not be conducted unless required by an applicable rule,²¹⁵ and that formal protests are not a ‘necessary condition’ for the ‘seisin of the Court’.²¹⁶ Yet, as scholars like Proulx, Becker, Venzke, and McIntyre observe, the Court has introduced another requirement—that the applicant, before instituting the proceedings, must have clearly stated its claims against the respondents making them ‘objectively aware’ of the dispute.²¹⁷ Based on this,

²⁰⁹ See Sands, *et al.*, *International Environmental Law* (n 3), 200.

²¹⁰ Becker, ‘Judgments in the Nuclear Disarmament cases’ (n 201), 10; Venzke Ingo, ‘Public Interests in the International Court of Justice—A Comparison Between Nuclear Arms Race (2016) & South West Africa (1966)’ (2017) 111 *American Journal of International Law (Unbound)* 68, 68.

²¹¹ *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v India) (Preliminary Objections) [2016] ICJ 255, 277; *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v UK) (Preliminary Objections) [2016] ICJ 833, 573; *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v Pakistan) (Preliminary Objections) [2016] ICJ 552, 856. Note that it is doubtful if ‘the [Marshall Islands] would have succeeded on its substantive claims (Proulx, ‘World Court’s Jurisdictional Formalism’ (n 202). 942). Indeed, the case appears to be an instance of strategic litigation due to the ‘stymied political process’ on nuclear weapons control (Venzke, ‘Public Interests in the ICJ’ (n 210), 71; Lekhi Pranay, ‘Nuclear Problem: A Communitarian Response’ (2021) 68 *Netherlands International Law Review* 89, 97–8).

²¹² *Obligations on Nuclear Disarmament* (Marshall Islands v UK) [2016] (n 211), 849.

²¹³ Ibid, 849 citing *Mavrommatis Palestine Concessions* (Greece v Britain) (Judgment) [1925] PCIJ Ser A No 5. 11; *Southwest Africa* (Ethiopia & Liberia v South Africa) (Preliminary Objections) [1962] ICJ 319, 328 (‘[It] must be shown that the claim of one party is positively opposed by the other’); *Peace Treaties with Bulgaria, Hungary, & Romania (First Phase)* (Advisory Opinion) [1950] ICJ 65, 74 (‘[The parties must] hold clearly opposite views concerning the question of the performance or non-performance of certain’ international obligations’)

²¹⁴ McIntyre Juliette, ‘Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction & Admissibility before the International Court’ (2018) 19 *Melbourne Journal of International Law* 1, 28 citing *Northern Cameroons* (Cameroon v UK) (Preliminary Objections) [1963] ICJ 15 (Fitzmaurice, separate opinion), 99; *Military & Paramilitary Activities in & against Nicaragua* (Nicaragua v US) (Jurisdiction & Admissibility) [1984] ICJ 14, 453; *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90 (Weeramantry, separate opinion), 159; (Skubiszewski, dissenting), 258.

²¹⁵ *Obligations on Nuclear Disarmament* (Marshall Islands v UK) [2016] (n 211), 849 citing *Land & Maritime Boundary* (Cameroon v Nigeria) (Preliminary Objections) [1998] ICJ 275, 322

²¹⁶ *Obligations on Nuclear Disarmament* (Marshall Islands v UK) [2016] (n 211), 849 citing *Alleged Violations of Sovereign Rights & Maritime Spaces in the Caribbean Sea* (Nicaragua v Colombia) (Preliminary Objections) [2016] ICJ 3, 32; *Land & Maritime Boundary* [1998] (n 215), 297

²¹⁷ Proulx Vincent-Joël, ‘Marshall Islands Judgements & Multilateral Disputes at the World Court’ (2017) 111 *American Journal of International Law (Unbound)* 96, 97 citing *Obligations on Nuclear Disarmament* (Marshall Islands v UK) [2016] (n 211), 850; *Obligations on Nuclear Disarmament* (Marshall Islands v Pakistan) [2016] (n 211), 568; *Obligations on Nuclear Disarmament* (Marshall Islands v India) [2016] (n 211), 271. Becker,

the Court ruled that the Marshall Islands' previous exchanges with the respondents, made in multilateral settings, were insufficient to make them 'aware' that their views were 'positively opposed' to the Marshall Islands'.²¹⁸ Thus, it concluded that there were no disputes—a finding that several of the Court's members and scholars deemed 'formalistic',²¹⁹ and a 'disservice' to multilateral dispute settlement.²²⁰

Having dismissed the cases, the Court did not address the Marshall Islands' standing.²²¹ Arguably, the Marshall Islands may be considered an 'injured state' under 2001 Draft Article 42(b)(ii),²²² as disarmament treaties are deemed to create indivisible obligations.²²³ Yet, it also claimed to be a 'state other than an injured state' under 2001 Draft Article 48.²²⁴ Indeed, it repeatedly stressed that the duty to negotiate towards nuclear disarmament is owed *erga omnes*

'Judgments in the Nuclear Disarmament cases' (n 201), 10; Venzke, 'Public Interests in the ICJ' (n 210), 70; McIntyre, 'Role of the Dispute Requirement in Assessing Jurisdiction & Admissibility' (n 214), 19.

²¹⁸ *Obligations on Nuclear Disarmament (Marshall Islands v UK)* [2016] (n 211), 850; *Obligations on Nuclear Disarmament (Marshall Islands v Pakistan)* [2016] (n 211), 568; *Obligations on Nuclear Disarmament (Marshall Islands v India)* [2016] (n 211), 271.

²¹⁹ See *Obligations on Nuclear Disarmament (Marshall Islands v UK)* [2016] (n 211) (Crawford, dissenting), 1096 ('The Court [...] discards [its] tradition of flexibility [...] which allows it to overlook defects in the Application [...] [placing] emphasis on the "sound administration of justice", "prioritising substance over form"'); (Bedjaoui, dissenting), 1114 ('The greatest danger remains excessive formalism'); (Trindade, dissenting), 914 ('I [criticise] the Court's "formalistic reasoning" in determining the existence of a dispute, introducing a higher threshold that goes beyond [its] *jurisprudence constante*'); Proulx, 'World Court's Jurisdictional Formalism' (n 202), 926 ('Signalled a departure from the considerable flexibility [...] in previous [cases]'), 930 ('Consecrates a shift towards jurisdictional formalism');

²²⁰ See Proulx, 'World Court's Jurisdictional Formalism' (n 202), 932; Proulx, 'Marshall Islands Judgements' (n 216), 98 ('These judgments might have implications for broader questions of access to justice and dispute settlement in the realm of communitarian obligations'); Venzke, 'Public Interests in the ICJ' (n 210), 72; *Obligations on Nuclear Disarmament (Marshall Islands v UK)* [2016] (n 211) (Bennouna, dissenting), 902 ('That is another reason for the principal judicial organ of the United Nations to undertake its role fully. Indeed, how can it shelter behind purely formalistic considerations [...] rather than contributing, as it should do, to peace through international law').

²²¹ McIntyre Juliette, 'Crawford's Multilateralism & the International Court of Justice' (2022) 40 *Australian Yearbook of International Law* 271, 292; Creutz Katja, *State Responsibility in the International Legal Order* (Cambridge University Press 2020), 178. See *Obligations on Nuclear Disarmament (Marshall Islands v UK)* [2016] (n 211) (Crawford, dissenting), 1102 ('It is now established [...] that states can be parties to disputes about [duties] in the performance of which they have no specific material interests. This much is clear from [2001 Draft] Article 48'). But see (Xue, declaration), 202–3 ('Although the Court recognised [duties owed] *erga omnes* [...] in *Barcelona Traction* [...] it did not address the question of standing, locus standi, an issue that is yet to be developed in international law').

²²² See Proulx, 'Marshall Islands Judgements' (n 217), 99; Venzke, 'Public Interests in the ICJ' (n 210), 68.

²²³ ILC, 'Report on the Work of the 53rd Session' (2001) (n 8), 119.

²²⁴ 'Memorial of the Marshall Islands (Marshall Islands v the UK)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 98), 49. See *Obligations on Nuclear Disarmament (Marshall Islands v UK)* [2016] (n 211) (Xue, declaration), 1031; (Crawford, dissenting), 1102. See also Krieger Heike, 'Rights & Obligations of Third Parties in Armed Conflicts' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2018), 452; Paddeau Federica, 'Multilateral Disputes in Bilateral Settings' (2017) 76 *Cambridge Law Journal* 1, 3; Longobardo, 'Contribution of IHL to Law on Responsibility' (n 192), 390; McIntyre, 'Crawford's Multilateralism' (n 221), 292.

or *erga omnes partes*.²²⁵ The UK appears to have accepted the Marshall Islands' competence but argued that the Court lacked jurisdiction.²²⁶ India did the same and further contested the NPT's customary status.²²⁷ However, Pakistan contested the duties' *erga omnes* status and stressed that the Marshall Islands cannot bring the 'proceedings as [...] *actio popularis*'.²²⁸

III. ANALYSIS OF STATE PRACTICE & *OPINIO JURIS*

Like the previous chapters, the survey above is not meant to be comprehensive. In the interest of space, it did not examine other breaches of duties imposed by certain environmental norms including Japan's fishing of Southern bluefin tuna (1998–2000),²²⁹ Nicaragua's dredging at its border with Costa Rica (1998–2009),²³⁰ Uruguay's construction of mills along the River Uruguay affecting Argentina (2003–10),²³¹ and China's building of islands in the South China/West Philippine Sea (2011–).²³² Yet, it is important to note that in none of these cases did 'states other than an injured state' implement the duties imposed by certain environmental norms. These appear to suggest, as will be shown below, that as to these norms, states have not

²²⁵ 'Memorial of the Marshall Islands (Marshall Islands v the UK)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 98), 19, 21, 46–8, 98; 'Memorial of the Marshall Islands (Marshall Islands v India)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 5, 11; 'Memorial of the Marshall Islands (Marshall Islands v Pakistan)', *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 5, 9, 13–6, 20–1, 25.

²²⁶ 'Preliminary Objections of the UK', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v the UK) (Preliminary Objections) (ICJ, General List no 160, 15 June 2015), 24.

²²⁷ 'Counter-memorial of India', *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v India) (Preliminary Objections) (ICJ, General List no 158, 16 December 2015), 21–2, 34.

²²⁸ 'Counter-memorial of Pakistan', *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v Pakistan) (Preliminary Objections) (ICJ, General List no 159, 1 December 2015), 8, 18 ('[The Marshall Islands] has not presented [...] evidence of (a) the existence of [duties owed] *erga omnes* which it seeks to enforce against Pakistan; or (b) [its] very standing on behalf of the international community [...] these proceedings'); 24–5; 34, 39, 45, 52–4.

²²⁹ See Cole-Adams Peter, Dent Jackie, & Millett Michael, 'Defiant Japan warned on fishing' (Sydney Morning Herald, 02 June 1999) <<https://www.proquest.com/newspapers/defiant-japan-warned-on-fishing/docview/363574339>>.

²³⁰ See *Certain Activities* [2015] (n 10).

²³¹ Egan Louise, 'Argentina, Uruguay Split Over Planned Pulp Mills' (Washington Post, 14 August 2005) <<https://www.proquest.com/newspapers/argentina-uruguay-split-over-planned-pulp-mills/docview/409876763>>; Mander Benedict, 'Neighbours eye legal ruling over pulp mills' (Financial Times, 12 April 2006) <<https://www.proquest.com/newspapers/neighbours-eye-legal-ruling-over-pulp-mills/docview/249904428>>.

²³² Bellman Eric, 'Philippines Press for Action on South China Sea Claims' (Wall Street Journal, 20 November 2011) <<https://www.proquest.com/newspapers/philippines-press-action-on-south-china-sea/docview/905031713>>; Page Jeremy & Barnes Julian, 'China Expands Island Construction in Disputed South China Sea' (Wall Street Journal, 2015) <<https://www.proquest.com/newspapers/china-expands-island-construction-disputed-south/docview/1655996143>>. See Davenport Tara, 'Island-Building in the South China Sea: Legality and Limits' (2018) 8 *Asian Journal of International Law* 76; Valdez Amiel, 'Beyond the Arbitral Ruling: A Transboundary Environmental Impact Assessment in the South China Sea' (2019) 9 *Asian Journal of International Law* 251.

accepted as the law the competence of ‘states other than an injured state’ to invoke another’s responsibility via judicial dispute resolution or enforce it through unilateral measures. Thus, as to environmental norms, 2001 Draft Article 48 remains a progressive measure while the status of 2001 Draft Article 54 remains unsettled.

A. Invocation of Responsibility through Judicial Dispute Resolution

As to invocation via judicial dispute resolution, there had only been three instances in which ‘states other than an injured state’ invoked another’s responsibility since 1970.²³³ It would appear, as Judge Xue remarked in *Obligations concerning Negotiations*, that this competence is ‘yet to be developed’.²³⁴ The first was in the 1974 *Nuclear Tests* case where Australia and New Zealand invoked France’s responsibility for conducting nuclear tests citing the rights of all states.²³⁵ In 1995, New Zealand made similar assertions when it attempted to re-open the case.²³⁶ The second was in the 2011 *Whaling in the Antarctic* where Australia invoked Japan’s responsibility for whaling and asserted that it was ‘seeking to uphold [the ICRW parties’] collective interest’.²³⁷ Finally, in the 2016 *Obligations concerning Negotiations*, the Marshall Islands expressly relied on duties owed *erga omnes* and *erga omnes partes* in the proceedings against the UK, India, and Pakistan.²³⁸ Note that these instances of invocation were not without opposition from the respondents—France criticised and boycotted the proceedings in *Nuclear Tests*;²³⁹ Japan asserted that Australia ‘made no attempt to explain its [standing]’ in *Whaling in the Antarctic*; and Pakistan questioned the Marshall Islands’ competence to bring the

²³³ Brunnée, ‘International Environmental Law & Community Interests’ (n 87), 163. (‘The [number of cases relating to] global environmental concern[s] still seems limited’). See Hedemann-Robinson Martin, *Enforcement of International Environmental Law: Challenges & Responses* (Taylor & Francis 2018), 24 (‘Rules on state responsibility have only been engaged relatively rarely by states in the context of transboundary environmental dispute’). *But see* Stephens, ‘Environmental Litigation by Asia Pacific States’ (n 187), 665 (‘[The] track record suggests a reasonably high level of concern across the Asia Pacific [...] and a willingness to turn to adjudicative mechanisms to advance foreign policy’).

²³⁴ See *Obligations on Nuclear Disarmament (Marshall Islands v UK)* [2016] (n 211) (Xue, declaration), 202–3. Compare *Application of the Genocide Convention in Gaza (South Africa v Israel)* (Provisional Measures) [2024] General List No 192 (Xue, declaration), 1–2. *Contra Obligations on Nuclear Disarmament (Marshall Islands v UK)* [2016] (n 211) (Crawford, dissenting), 1102.

²³⁵ ‘Memorial of Australia’, *Nuclear Tests* (n 95), 337; ‘Memorial of New Zealand’, *Nuclear Tests* (n 38), 203–4.

²³⁶ ‘Application’, *Request for an Examination of the Court’s Judgment in the Nuclear Tests* (n 143), 5, 58.

²³⁷ ‘Verbatim Record 2013/18’, *Whaling in the Antarctic* (n 97), 28, 33–4.

²³⁸ ‘Memorial of the Marshall Islands (Marshall Islands v the UK)’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 98) 19, 21, 46–8, 98; ‘Memorial of the Marshall Islands (Marshall Islands v India)’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 5, 11; ‘Memorial of the Marshall Islands (Marshall Islands v Pakistan)’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 203), 5, 9, 13–6, 20–1, 25.

²³⁹ *Nuclear Tests* [1973] (n 133), 137.

‘proceedings [in] *actio popularis*’ in *Obligations concerning Negotiations*.²⁴⁰

Authors like Rest, Nègre, and Brunnée posit that the relative lack of practice may be due, in part, to the lack of clarity in the case law.²⁴¹ Tribunals have been reluctant to address the question of the competence of ‘states other than an injured state’ to implement duties imposed by some environmental norms.²⁴² The ICJ did not address the issue in the *Nuclear Tests* as it discontinued the proceedings.²⁴³ It also avoided the issue when it dismissed New Zealand’s request for re-examination.²⁴⁴ While the Court ruled on the merits in *Whaling in the Antarctic*, the Court did not deal with the question of competence.²⁴⁵ This was surprising given the decision’s proximity to *Obligation to Prosecute & Extradite* which dealt with duties owed *erga omnes partes* albeit in the context of human rights.²⁴⁶ More recently, the ICJ dismissed the cases in *Obligations concerning Negotiations* without addressing competence.²⁴⁷ Other tribunals, like the ITLOS, have done the same. In its 2011 *Responsibility of States with Respect to Activities in the Area* opinion, it asserted that the duties on the ‘preservation of the environment of the high seas and in the Area’ under the UNCLOS are owed ‘*erga omnes partes [contractes]*’.²⁴⁸ Yet, did not say if this means that ‘states other than an injured state’ may invoke another’s responsibility via judicial proceedings.

The lack of practice, according to Sands, Hedemann-Robinson and Rest, may also be attributed to states’ unwillingness to implement environmental duties in the absence of direct effect.²⁴⁹ Given the ‘procedural hurdles’, it is more likely for states ‘to bring a claim because it

²⁴⁰ ‘Counter Memorial of Pakistan (Marshall Islands v Pakistan)’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (n 228), 8, 18; 24–5; 34, 39, 45, 52–4.

²⁴¹ Rest, ‘Erga Omnes Obligations & Judicial Control’ (n 23), 300; Nègre, ‘International Responsibility’ (n 14), 805; Brunnée, ‘International Environmental Law & Community Interests’ (n 87), 161. Note that the lack of clarity regarding environmental norms may also be a contributing factor as it ‘leaves states uncertain about what their [duties] are’ (Duvic-Paoli, *Prevention Principle* (n 9), 93. Hedemann-Robinson, *Enforcement of Environmental Law* (n 233), 24; Brunnée, ‘Common Interest & International Environmental Law’ (n 81), 794)

²⁴² See Klein, ‘Litigation over Marine Resources’ (n 137), 136 (‘Hesitancy to be embroiled in [...] highly political dispute[s] [on] environmental concerns’).

²⁴³ Ni, ‘Articles on State Responsibility’ (n 22), 24. Note that based on several opinions appended to the decision, some of the Court’s members doubted if this competence existed (See *Nuclear Tests* [1974] (n 120) (de Castro, dissenting), 290. See (Onyeama, Dillard, Jiménez de Aréchaga, & Waldock, dissenting), 370)

²⁴⁴ See Craven, ‘New Zealand’s Request’ (n 147), 731; Siskin, ‘French Nuclear Testing’ (n 117), 194.

²⁴⁵ Strain, ‘Regulating Collective Resources’ (n 22), 584–5.

²⁴⁶ See *ibid*, 577.

²⁴⁷ Creutz, *State Responsibility in the International Legal Order* (n 221), 178.

²⁴⁸ *Activities in the Area* (n 23), ¶180.

²⁴⁹ Sands, *et al.*, *International Environmental Law* (n 3), 150; Hedemann-Robinson, *Enforcement of Environmental Law* (n 233), 24; Rest, ‘Erga Omnes Obligations & Judicial Control’ (n 23), 300. See Brunnée, ‘International Legal Accountability’ (n 64), 21; Charnovitz, ‘Environmental Trade Sanctions & the GATT’ (n 150), 755.

had suffered material damage'.²⁵⁰ State practice supports this observation.²⁵¹ In the 1974 *Fisheries Jurisdiction* cases, West Germany and the UK invoked Iceland's responsibility to protect their interests under the Convention on the High Seas and the 1959 North-East Atlantic Fisheries Convention.²⁵² In the *MOX Plant* cases, Ireland initiated proceedings against the UK to safeguard its rights under the UNCLOS and OSPAR due to the harm posed by the UK's facility for processing spent nuclear fuel rods.²⁵³ In the 2009 *Aerial Herbicide* case, Ecuador asserted that Colombia's 'aerial spraying of herbicides, at and over its border with Ecuador' infringed on its rights.²⁵⁴ The same may be said regarding the disputes between Costa Rica and Nicaragua in *Activities in the Border Area* and *Construction of a Road*.²⁵⁵ In both cases, the states were undoubtedly acting to prevent harm to their respective territories.²⁵⁶

A closer examination of other cases also reveals that they were 'driven [...] by [individual] concerns'.²⁵⁷ Australia and New Zealand, in *Southern Blue Fin Tuna*, appear to protect other states' interests under the 1993 Convention for the Conservation of Southern Bluefin Tuna and the UNCLOS when it sued Japan for its experimental fishing program in 1999.²⁵⁸ Yet, the applicants clearly sought to vindicate their rights 'as coastal states' given the Southern Bluefin Tuna's economic value.²⁵⁹ Likewise, Argentina, in *Pulp Mills*, seems to represent other states'

²⁵⁰ Rest, 'Erga Omnes Obligations & Judicial Control' (n 23), 302; Hedemann-Robinson, *Enforcement of Environmental Law* (n 233), 25; Tseming, 'Treaty Enforcement' (n 74), 1139.

²⁵¹ Note the other cases decided prior to 1970 such as the *Trail Smelter* (n 10) and the *Lac Lanoux* (n 10).

²⁵² *Fisheries Jurisdiction* (United Kingdom v Iceland) (Judgement) [1974] ICJ 3, 7; *Fisheries Jurisdiction* (Germany v Iceland) (Judgement) [1974] ICJ 175, 186.

²⁵³ See *OSPAR* (Ireland v the UK) (Final Award) (2003) (PCA, 2001-03, 02 July 2006); *MOX Plant* (Ireland v United Kingdom) (Provisional Measures) (2001) 126 ILR 260; *Commission v Ireland* (C-459/03) [2006] ECR I-4365.

²⁵⁴ 'Memorial of Ecuador', *Aerial Herbicide* (Ecuador v Colombia) (Merits) (ICJ, General List No 148, 28 April 2009), 266 ff.

²⁵⁵ See *Certain Activities* [2015] (n 10).

²⁵⁶ See 'Application', *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (Institution of Proceedings) (ICJ, General List No 150, 18 November 2010), 26–7; 'Request for Provisional Measures of Costa Rica', *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (Provisional Measures) (ICJ, General List No 150, 18 November 2010), 2; 'Memorial of Nicaragua', *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v Costa Rica) (ICJ, General List No 152, 19 December 2012), 238.

²⁵⁷ Hedemann-Robinson, *Enforcement of Environmental Law* (n 233), 24.

²⁵⁸ 'Request for the Prescription of Provisional Measures of Australia', *Southern Blue Fin Tuna* (Australia v Japan) (Provisional Measures) (ITLOS, 15 July 1999), 78; 'Request for the Prescription of Provisional Measures of New Zealand', *Southern Blue Fin Tuna* (New Zealand v Japan) (Provisional Measures) (ITLOS, 15 July 1999), 10. See also 'Reply on Jurisdiction of Australia & New Zealand', *Southern Blue Fin Tuna* (Australia v Japan; New Zealand v Japan) (Reply on Jurisdiction) (ITLOS, 31 March 2000), 11 ('UNCLOS specifies rights and obligations not only for the parties but for all states, and it thus has a certain *erga omnes* effect').

²⁵⁹ 'Request for the Prescription of Provisional Measures of Australia', *Southern Blue Fin Tuna* (n 258), 78; 'Request for the Prescription of Provisional Measures of New Zealand', *Southern Blue Fin Tuna* (n 258), 10; See also Klein, 'Litigation between Australia & Japan' (n 191), 163.

interests in the 1976 Uruguay River Statute, Ramsar Convention, and CITES when it invoked Uruguay's responsibility for constructing mills along the Uruguay River in 2006.²⁶⁰ However, it was undoubtedly acting in its interest to protect the 'riparian population of the Uruguay River under its jurisdiction'.²⁶¹ The same is true for the Philippines, in the 2016 *South China Sea* arbitration. Some suggest that the Philippines acted as a 'state other than an injured state' when it invoked China's responsibility for reclaiming and militarising features that lie beyond the Philippines' exclusive economic zone.²⁶² Yet, the absence of a direct interest on the Philippines' part is doubtful given that it also claims these features.²⁶³ Moreover, as a coastal state, it stands to be directly affected by the harm caused by China to the marine environment.²⁶⁴

Finally, the lack of practice may also be due to states' preference for multilateral procedures. As scholars like Boyle, Massimiliano, and Brunnée observe, there appears to be a 'trend away' from judicial dispute resolution and towards 'endogenous enforcement mechanisms' in addressing environmental concerns.²⁶⁵ As noted in *Section I*, these procedures, similar to mechanisms under some human rights regimes,²⁶⁶ provide a 'non-confrontational approach to compliance'.²⁶⁷ They vary depending on the instrument but broadly include reporting requirements which require parties to submit information for monitoring,²⁶⁸ and review

²⁶⁰ Shigeta, 'Obligations to Protect the Environment in the ICJ's Practice' (n 96), 186. See 'Application', *Pulp Mills (Argentina v Uruguay)* (Institution of Proceedings) (ICJ, General List No 135, 4 May 2006), 19; 'Memorial of Argentina', *Pulp Mills* (n 60), 86–8.

²⁶¹ 'Request for the Indication of Provisional Measures of Argentina', *Pulp Mills (Argentina v Uruguay)* (Provisional Measures) (ICJ, General List No 135, 04 May 2006), 117; 'Memorial of Argentina', *Pulp Mills* (n 60), 111–2.

²⁶² *South China Sea* (n 54), ¶891 cited in Lakshman, 'Environmental Commons' (n 127), 285–8; Tanaka, 'Locus Standi & Obligations Erga Omnes Partes' (n 23), 547–8; Tanaka Yoshifumi, 'South China Sea Arbitration: Environmental Obligations Under the UNCLOS' (2018) 27 *Review of European Community & International Law* 90, 90–1.

²⁶³ See 'Memorial of the Philippines', *South China Sea Arbitration* (The Philippines v China) (PCA, PCA 2013-19, 30 March 2014), ¶¶5.70, 5.73, 5.91, 5.93.

²⁶⁴ *Ibid*, ¶6.109.

²⁶⁵ Boyle Alan, 'Saving the World? Implementation & Enforcement of International Environmental Law through International Institutions' (1991) 3 *Journal of Environmental Law* 229, 232; Massimiliano, 'Improving Compliance with MEAs' (n 15), 162; Brunnée, 'International Legal Accountability' (n 64), 10, 21. See Cardesa-Salzmänn, 'NCPs & Enforcement of MEAs' (n 75), 113; Theobald, 'Accountability Gap' (n 23), 120; Tanaka, 'Transboundary Air Pollution in the Arctic' (n 30), 246.

²⁶⁶ Brunnée, 'International Legal Accountability' (n 64), 33 noting the ICCPR; Bothe, 'Evaluation of Enforcement Mechanisms' (n 74), 22.

²⁶⁷ Milano Enrico, 'Outcomes of the Procedure & their Legal Effects' in Treves Tullio, *et al.* (eds), *Non-Compliance Procedures & Mechanisms & the Effectiveness of International Environmental Agreements* (Asser 2009), 418; Bendel Justine & Suedi Yusra, 'State-to-State Procedures before Environmental Compliance Committees' in Voigt Christina & Foster Caroline (eds), *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation* (Cambridge University Press 2024), 130 ('States [...] prefer more flexibility with regard to their environmental commitments').

²⁶⁸ Bothe, 'Evaluation of Enforcement Mechanisms' (n 74), 22; Boyle, 'Implementation & Enforcement through Institutions' (n 265), 231.

procedures that allow parties to assess states' compliance with its duties, flag concerns, and provide recommendations.²⁶⁹ The increasing resort to these proceedings is not surprising.²⁷⁰ Compared to 'traditional' methods of dispute resolution, they are less 'adversarial',²⁷¹ and are more 'facilitative'.²⁷² They do not 'make explicit determinations' regarding a state's observance of its duties but provide 'advice and assistance' towards fulfilment.²⁷³ The mechanisms are also designed with 'multilateralism' in mind.²⁷⁴ They do not involve a state's invocation of another's responsibility on behalf of others. Rather, states arrive at any decision on non-compliance via multilateral discussions based on the applicable legal standards.²⁷⁵

B. Enforcement through Unilateral Measures

As to enforcement through countermeasures by 'states other than an injured state', the survey above suggests that as to certain environmental norms, this competence has not crystallised into a customary rule.²⁷⁶ Between 1970 and 2023, there were only three instances where 'states other than an injured state' enforced an environmental duty through unilateral measures. All were retorsions. In 1988, the US threatened to ban Iceland from fishing within its waters for breach of the ICRW.²⁷⁷ That same year, the US denied Japan fishing access for similar reasons.²⁷⁸ Finally, in 2000, the US, among others, maintained Japan's zero-catch

²⁶⁹ Brunnée, 'International Legal Accountability' (n 64), 34; Rose, 'Interlinkages between MEAs' (n 20), 8.

²⁷⁰ *But see* regarding the effectiveness of these procedures: Sands, *et al.*, *International Environmental Law* (n 3), 151 ('[T]heir enforcement function is limited'); Cardesa-Salzmänn, 'NCPs & Enforcement of MEAs' (n 75), 115 ('The operation of NCPs in global MEAs shows that they only perform as endogenous enforcement mechanisms in this specific type of environmental regimes'); Brunnée, 'International Legal Accountability' (n 64), 35 ('None of the outcomes of the compliance control processes surveyed [...] are formally binding'); Milano, 'Outcomes of the Procedure & their Legal Effects' (n 267), 412 ('Recommendations and provision of advice are by their very nature not legally binding'); Boyle, 'Implementation & Enforcement through Institutions' (n 265), 230 ('Since it relies for effectiveness on consent and the operation of community pressure, it may be thought to lack real enforcement power')

²⁷¹ Fancioni, 'Dispute Avoidance in International Environmental Law' (n 87), 241; Boyle, 'Implementation & Enforcement through Institutions' (n 265), 233.

²⁷² Brunnée, 'International Legal Accountability' (n 64), 34; Boyle, 'Implementation & Enforcement through Institutions' (n 265), 232; Omura, 'Countermeasures & MEAs' (n 19), 92.

²⁷³ Brunnée, 'International Legal Accountability' (n 64); Fancioni, 'Dispute Avoidance in International Environmental Law' (n 87), 241; Cardesa-Salzmänn, 'NCPs & Enforcement of MEAs' (n 75), 113; Milano, 'Outcomes of the Procedure & their Legal Effects' (n 267), 418; Omura, 'Countermeasures & MEAs' (n 19), 90.

²⁷⁴ Omura, 'Countermeasures & MEAs' (n 19), 92.

²⁷⁵ Boyle, 'Implementation & Enforcement through Institutions' (n 265), 230, 233. *See* Cardesa-Salzmänn, 'NCPs & Enforcement of MEAs' (n 75), 104, 113; Werksman Jacob, 'Designing a Compliance System for the UN Framework Convention on Climate Change' in Werksman Jacob, *et al.* (eds), *Improving Compliance with International Environmental Law* (Routledge 1995), 95.

²⁷⁶ *See* Weiss Edith Brown, 'Strengthening National Compliance with International Environmental Agreements' (1997) 27 *Environmental Policy & Law* 297, 303 ('Sanctions have been rarely used')

²⁷⁷ Rose & Paleokrassiss, 'IWC' (n 157), 170.

²⁷⁸ Caron, 'Denial of Access to Fisheries' (n 165), 327.

allocation due to its whaling programme.²⁷⁹

It is worth noting that states like the US, Canada, and EEC/EU member states have also levied environment-related trade restrictions against other states. Some of these were imposed or threatened to be imposed to conserve animal stocks. In 1978, the US threatened to impose trade restrictions against Chile, Peru, and South Korea, at the time non-ICRW states, for exceeding IWC quotas.²⁸⁰ Others were levied to protect endangered species. In 1986, the US banned wildlife imports from Singapore, then a non-CITES party, due to the latter's failure to provide 'comparable documentation' required by the CITES.²⁸¹ There were also restrictions

²⁷⁹ Murphy, 'US Sanctions against Japan for Whaling' (n 150), 151.

²⁸⁰ Charnovitz, 'Pelly Amendment' (n 169), 764; 92 Stat 786, *Fishermen's Protective Act* (1978) (US).

Note other examples: in 1982, the US reduced Japan's fishing allocation in the US exclusive economic zone for exceeding IWC quotas even if these did not bind Japan (Caron, 'Denial of Access to Fisheries' (n 165), 320. *See* Charnovitz, 'Pelly Amendment' (n 169), 11). The US threatened similar measures against the Soviet Union in 1985 (— —, 'Soviet Share of US Fish to be Slashed' (Seattle Times, 4 April 1985) <<https://www.proquest.com/newspapers/soviet-share-u-s-fish-be-slashed/docview/385180552>>), Norway in 1986, 1992, 1993, and 2011 (Caron, 'Denial of Access to Fisheries' (n 165), 319; Charnovitz, 'Pelly Amendment' (n 169), 14; Walsh Bryan, 'Obama Takes Steps to Stop Icelandic Whaling. Could He Do More?' (Time, 16 September 2011) <<https://science.time.com/2011/09/16/obama-takes-steps-to-stop-icelandic-whaling-could-he-do-more/>>), Canada in 1996 (Campbell Michelle & Thomas Vernon, 'Protection & Conservation of Marine Mammals in Canada: A Case for Legislative Reform' (2002) 7 *Ocean and Coastal Law Journal* 221, 241, 243), and Iceland in 2012 (Crook John, 'United States imposes limited anti-whaling sanctions against Iceland' (2009) 103 *American University International Law Review* 325, 366) even if these states were not bound by the IWC quotas (Charnovitz, 'Pelly Amendment' (n 169), 763–4; McDorman Ted, 'Canada & Whaling: Article 65 of UNCLOS' (1998) 29 *Ocean & Coastal Law Journal* 179; Gillespie, 'Iceland's Reservation' (n 151)). In addition, the US, in 1990 banned yellowfin tuna imports from states such as Mexico where tunas were harvested through purse-seine nets that harmed dolphin populations (PL 92-522, *Marine Mammal Protection Act* (1972) (US). *See* Panel Report, 'US—Restrictions on Imports of Tuna' (3 September 1992) GATT Doc DS21R-392/155, ¶¶5.30–4; Panel Report, 'US—Restrictions on Imports of Tuna' (16 June 1994) GATT Doc DS29/R, ¶¶5.31–9). In 1992, the US expanded these restrictions to include 'intermediary states' such as the Netherlands (*ibid.*, ¶5.39). In 1996, the US also imposed an embargo on shrimps caught in states such as India, Malaysia, Pakistan, and Thailand that do not require excluder devices on fishing vessels thereby harming turtle populations (PL 93-205, *Endangered Species Act* (1973) (US). *See* Appellate Body Report, 'US—Import Prohibition of Certain Shrimp & Shrimp Products' (12 October 1998) WTO Doc WT/DS58/AB/R, ¶¶161, 180). For its part, EEC/EU states banned the products derived from seal pups from Canada in 1982 (Council of the EC, 'Council Directive 83/129/EEC' (28 March 1983) L 91/30; Canada, 'European Community—Ban on Importation of Skins of Certain Seal Pups and Related Products' (19 December 1985) GATT Doc L/5940), 1985 (Council of the EC, 'Council Directive 85/444/EEC' (27 September 1985) L 259/70), 1989 (Council of the EC, 'Council Directive 89/370/EEC' (8 June 1989) L 163/37), and 2009 (Council of the EU, 'Council Regulation No 1007/2009' (16 September 2009) L 286/36; Appellate Body Report, 'European Communities—Measures Prohibiting the Importation and Marketing of Seal Products' (22 May 2014) WTO Doc WT/DS400/AB/R). In 1992, EEC/EU states also banned the importation of products from states that allow leghold traps (Council of the EC, 'Council Regulation No 3254/91' (4 November 1991) L 308/1). In 1977, Canada also restricted the export of unprocessed salmon and herring out of concern for the conservation of the species thereby affecting trade with the US (Panel Report, 'Canada—Measures on Exports of Herring and Salmon' (22 March 1988) GATT Doc L/6268-35S/98, ¶4.7).

²⁸¹ Sand Peter, 'Commodity or Taboo? International Regulation of Trade in Endangered Species' (1997) *Global Green Yearbook* 19, 22; 31 Stat 187, *Lacey Act* (1935) (US); PL 71-361, *Tariff Act* (1930) (US). *Note* similar cases: in 1991, the US threatened to ban imports of Japanese pearls, goldfish, and other animal products due to the Japanese trade of hawksbill and olive ridley sea turtles (Strengold James, 'Japan agrees to gradual ban on imports of turtle shells' (New York Times, 18 May 1991) <<https://www.proquest.com/newspapers/japan-agrees-gradual-ban-on-imports-turtle-shells/docview/428063570>>. *See* *Fishermen's Protective Act* (US), §8; *Endangered Species Act* (US), §9; *CITES* (n 20), art 14(1)(1)) even if Japan lodged a reservation regarding these

imposed to mitigate pollution. In 1996, the US restricted the import of gasoline from states such as Venezuela and Brazil due to concerns regarding the quality of gasoline.²⁸² It must be stressed that while these restrictions serve an environmental purpose,²⁸³ they were not levied in response to a wrongful act. Instead, they were imposed to compel the targeted states to ‘desist from [a certain] behaviour’ or change their policies.²⁸⁴ These restrictions may be ‘outward-looking’ and target environmental concerns elsewhere through limitations on trade.²⁸⁵ They may also be ‘inward-looking’ and protect the environment within the state through restrictions on foreign products.²⁸⁶ However, they are not enforcement measures and do not enrich the kind of practice that this chapter seeks to examine.²⁸⁷

States’ *opinio juris* is also divergent. Some expressed support for these measures. For

species when it acceded to the CITES in 1981 and thus did not breach its duties (Charnovitz, ‘Pelly Amendment’ (n 169), 13). In 1994, the US also imposed import restriction against Taiwan for allowing the trade of rhinoceros horns and tiger parts even if Taiwan was not a CITES party (Sand, ‘International Regulation of Trade in Endangered Species’ (n 281), 22).

²⁸² Panel Report, ‘US—Standards for Reformulated & Conventional Gasoline’ (29 January 1996) WTO Doc WT/DS2/R, ¶¶3.17, 6.27; Appellate Body Report, ‘US—Standards for Reformulated & Conventional Gasoline’ (20 May 1996) WTO Doc WT/DS2/AB/R, ¶3.20. *Note* that another example is the US’s 1990 taxes on luxury and ‘gas-guzzler’ automobiles which restricted the sale of certain vehicles including those manufactured in European states (Panel Report, ‘US—Taxes on Automobiles’ (11 October 1994) GATT Doc DS31/R, 10, 36, 63.)

²⁸³ See Boisson de Chazournes Laurence & Boutruche Théo, ‘Trade Law, UN Law, & Collective Security Issues’ in Bethlehem Daniel (ed), *Oxford Handbook of International Trade Law* (Oxford University Press 2009), 181.

²⁸⁴ Bogdanova Iryna, *Unilateral Sanctions in International Law & the Enforcement of Human Rights: Impact of the Principle of Common Concern of Humankind* (BRILL 2022), 45 citing Carter Barry, ‘International Economic Sanctions: Improving the Haphazard US Legal Regime’ (1987) 75 *California Law Review* 1159, 1170; Kern Alexander, *Economic Sanctions: Law & Public Policy* (Palgrave Macmillan 2009), 10. Eckert Sue, ‘Evolution & Effectiveness of UN Targeted Sanctions’ in van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 58; Happold Matthew, ‘Economic Sanctions & International Law’ in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 2; Watson James, ‘World Trade Organisation & Unilateral Sanctions: Prohibited or Possible?’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart), 186. See Boisson de Chazournes & Boutruche, ‘Trade Law, UN Law, & Collective Security Issues’ (n 283), 181, 187 (‘Unilateral imposition of domestic standards’).

²⁸⁵ Asselt Harro van, ‘Trade’ in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2021), 760; Hudec, ‘Measures against Foreign Environmental Practice’ (n 26), 116. See Charnovitz, ‘Environmental Trade Sanctions & the GATT’ (n 150), 756; Farber Daniel & Hudec Robert, ‘GATT Legal Restraints on Domestic Environmental Regulations’ in Bhagwati Jagdish & Hudec Robert (eds), *Fair Trade & Harmonization: Prerequisites for Fair Trade?* (Faculty Books 1996), 59.

²⁸⁶ Asselt, ‘Trade’ (n 285), 760; Cirone Alexandra & Urpelainen Johannes, ‘Trade Sanctions in Environmental Policy: Deterring or Encouraging Free Riding?’ (2013) *Conflict Management & Peace Science* 1, 4.

²⁸⁷ *Note* that these restrictions, like unilateral enforcement measures, also raise questions of legality especially under the GATT. Recall that the GATT requires states not to impose discriminatory and restrictive measures (*General Agreement on Tariffs and Trade* (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187, arts I, III, XI, XIII) However, the GATT also allows exceptions for environmental purposes provided that they are not ‘arbitrary’, do not amount to an ‘unjustifiable discrimination between [states]’, and are not a ‘disguised restriction on [...] trade’ (ibid, art XX. See Panel Report, ‘US—Import Prohibition of Certain Shrimp & Shrimp Products’ (15 May 1998) WTO Doc WT/DS58/R, ¶¶180–1). Thus, it allows for restrictions that are ‘necessary to protect human, animal or plant life, or health’ (*GATT* (n 287), art XX(b)). It also permits measures ‘relating to the conservation of exhaustible natural resources if such are made effective in conjunction with restrictions on domestic production or consumption’ (ibid, art XX(g)).

instance, the US has broadly asserted that ‘unilateral [measures are] legitimate means to [achieve] legitimate national and international objectives’.²⁸⁸ For this reason, it has frequently imposed unilateral measures to protect the environment.²⁸⁹ It has also enacted laws that permit it to levy measures for this purpose.²⁹⁰ While EU member states have not levied any unilateral measure to enforce environmental duties, they likewise broadly asserted that these ‘measures [are] admissible in certain circumstances’.²⁹¹

Yet, other states do not share this view.²⁹² As observed in the previous chapters, many have condemned the imposition of unilateral measures including countermeasures. While these condemnations did not specifically refer to measures that enforce environmental duties, they are nevertheless couched in general terms and could arguably extend to these measures. Recall that states continue to condemn the imposition of unilateral measures in GA resolutions,²⁹³

²⁸⁸ UNGA, Third Committee, ‘Summary Record of the 69th Session, 52nd Meeting’ (24 November 2014) UN Doc A/C.3/69/SR.52, 6; UNGA, Third Committee, ‘Summary Record of the 68th Session, 49th Meeting’ (21 November 2013) UN Doc A/C.3/68/SR.49, 9; UNGA, Third Committee, ‘Summary Record of the 67th Session, 44th Meeting’ (26 November 2012) UN Doc A/C.3/67/SR.44, 2; UNGA, Third Committee, ‘Summary Record of the 64th Session, 42nd Meeting’ (12 November 2009) UN Doc A/C.3/64/SR.42, 8; UNGA, ‘Verbatim Record, 62nd Session, 78th Meeting’ (19 December 2007) UN Doc A/62/PV.78, 11; UNGA, ‘Verbatim Record, 60th Session, 68th Meeting’ (22 December 2005) UN Doc A/60/PV.68, 8.

²⁸⁹ Klein, ‘Litigation between Australia & Japan’ (n 191), 158; Carlame Cinnamon, ‘International Whaling & Climate Change Politics—Too Much in Common?’ (2007) 80 *Southern California Law Review* 753, 781.

²⁹⁰ See e.g. PL 92–219, *Pelly Amendment to the 1967 Fishermen’s Protective Act* (1971) (US); *Marine Mammal Protection Act* (US); *Endangered Species Act* (US). See also Sand Peter, ‘Enforcing CITES: Rise & Fall of Trade Sanctions’ (2013) 22 *Review of European Community & International Law* 251, 253; Charnovitz, ‘Pelly Amendment’ (n 169), 4; O’Connell, ‘Trade to Enforce Environmental Law’ (n 73), 273 citing Levin Geoffrey, ‘The Environment & Trade—A Multilateral Imperative’ (1992) 1 *Minnesota Journal of Global Trade* 231, 232.

²⁹¹ UNGA, Second Committee, ‘Summary Record of the 62nd Session, 28th Meeting’ (16 November 2007) UN Doc A/C.2/62/SR.28, 5 (Portugal on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 64th Session, 41st Meeting’ (9 December 2009) UN Doc A/C.2/64/SR.41, 4 (Sweden on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (1 December 2011) UN Doc A/C.2/66/SR.37, 4 (Poland on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 68th Session, 28th Meeting’ (16 November 2013) UN Doc A/C.2/68/SR.28, 3 (Lithuania on behalf of the EU); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (28 September 2015) UN Doc A/C.2/70/SR.31, 4 (Luxembourg on behalf of the EU).

²⁹² Boisson de Chazournes, ‘Unilateral Trade Measures & the Environment’ (n 76), 182. See Sand, ‘Enforcing CITES’ (n 290), 252; Farber & Hudec, ‘GATT & Domestic Environmental Regulations’ (n 285), 80, 82; Kirchgässner Gebhard & Mohr Ernst, ‘Trade Restrictions as Viable Means of Enforcing Compliance with International Environmental Law: An Economic Assessment’ in Wolfrum Rüdger (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means* (Routledge 1996), 201.

²⁹³ See e.g. *Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political & Economic Compulsion* Res 57/5 UNGA (16 September 2002) UN Doc A/RES/57/5; *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 56/179 UNGA (21 December 2001) UN Doc A/RES/56/179; Res 76/191 UNGA (17 December 2021) UN Doc A/RES/76/191; *Human Rights & Unilateral Coercive Measures* Res 56/148 UNGA (19 December 2001) UN Doc A/RES/56/148; Res 57/222 UNGA (18 December 2002) UN Doc A/RES/57/222; Res 77/214 UNGA (15 December 2022) UN Doc A/RES/77/214.

declarations of institutional arrangements,²⁹⁴ and individual statements.²⁹⁵ For these states, unilateral measures, including countermeasures, are unlawful as they amount to coercion and intervention,²⁹⁶ constitute an unlawful exercise of extra-territorial jurisdiction,²⁹⁷ have negative

²⁹⁴ See e.g. Conference of Heads of the NAM, 'Final Document of the 17th Summit' (18 September 2016) NAM/2016/CoB/DOC.1/Corr.1, 17, 145; G77 & China Foreign Ministers, 'Declaration adopted at the 43rd Annual Meeting' (27 September 2019), ¶¶228–9; AU Assembly, 'Sanctions & Unilateral Coercive Measures' (Feb 2020) Assembly/AU/Res.1 (XXXIII); BRICS, '9th Summit: Xiamen Declaration' (12 September 2017).

²⁹⁵ See e.g. Ministry of Foreign Affairs of Russia, 'Concept of the Foreign Policy of the Russian Federation' (18 February 2013) <https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICk6BZ29>; UNGA, 'Verbatim Record, 70th Session, 13th Meeting' (28 September 2015) UN Doc A/70/PV.13, 19 (China); Ministry of External Affairs of India, 'Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People's Republic of China' (18 April 2016) <https://mea.gov.in/bilateral-documents.htm?dtl/26628/Joint_Communicu_of_the_14th_Meeting_of_the_Foreign_Ministers_of_the_Russian_Federation_the_Republic_of_India_and_the_Peoples_Republic_of_China>.

²⁹⁶ See e.g. Res 76/191 (n 293); Conference of Heads of the NAM, 'Final Document of the 17th Summit' (n 294), 17, 145; G77 & China Foreign Ministers, 'Declaration adopted at the 43rd Annual Meeting' (n 294), ¶¶228–9; UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2 July 2002) UN Doc A/57/179, 2 (Ecuador); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (15 October 2001) UN Doc A/56/473, 2 (Belarus), 6 (Malaysia), 8 (Yemen); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (11 September 2003) UN Doc A/58/301, 5 (Cuba), 6 (Iran), 13 (Thailand), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (12 August 2005) UN Doc A/60/226, 4 (Bulgaria), 7 (Guatemala), 7 (Honduras), 7 (Cuba), 8 (Jamaica), 12 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (6 August 2007) UN Doc A/62/210, 5 (Belarus), 5 (Benin), 6 (Cuba), 8 (Ukraine); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (14 July 2011) UN Doc A/66/138, 6 (Brunei), 6 (Colombia), 7 (Cuba), 7 (Egypt), 11 (Myanmar), 12 (Oman), 14 (Ukraine); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (29 July 2013) UN Doc A/68/218, 9 (Lao), 10 (Philippines), 10 (Nicaragua), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (16 July 2015) UN Doc A/70/152, 6 (Brunei), 6 (Cambodia), 7 (Central African Republic); 7 (Congo), 7 (Cuba), 10 (Ecuador), 11 (Madagascar), 12 (Sri Lanka), 15 (Tunisia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (9 August 2017) UN Doc A/72/307, 2 (Iran), 6 (Cuba), 10 (Guatemala), 11 (Russia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (31 July 2019) UN Doc A/74/264, 5 (Burundi), 5 (Cambodia), 6 (Cuba), 10 (Ghana), 11 (Nigeria), 12 (Russia), 13 (Sudan); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (30 August 2021) UN Doc A/76/310, 7 (Iran), 13 (Russia), 15 (Syria). See also UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (20 July 2001) UN Doc A/56/207, 3 (Cuba); UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (24 January 2002) UN Doc E/CN.4/2002/51/Add.1, 3 (Cuba); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (11 October 2005) UN Doc A/60/305, 4 (Iraq), 4 (Georgia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (17 August 2006) UN Doc A/61/287, 3 (Libya); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (13 August 2007) UN Doc A/HRC/6/2, 2 (Georgia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (3 August 2009) UN Doc A/64/219, 2 (Algeria), 3 (Angola), 4 (Jamaica); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 August 2010) UN Doc A/HRC/15/43, 4 (Jamaica); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (29 July 2012) UN Doc A/67/181, 6 (Cuba), 10 (Jamaica); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (27 June 2014) UN Doc A/69/97, 2 (Colombia).

²⁹⁷ See e.g. Res 77/214 (n 293); Conference of Heads of the NAM, 'Final Document of the 17th Summit' (n 294), 17, 145; UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 296), 3 (Cuba), 7 (Myanmar), 7 (Malaysia); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 296), 1 (Iran), 2 (Argentina), 2 (Ecuador); 2 (Japan); 3 (Mali), 3 (Namibia), 3 (Qatar), 6 (Libya); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 296), 12 (Libya), 14 (Venezuela); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 296), 8 (Jamaica); 8 (Kazakhstan); 12 (Uruguay); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic

effects on human rights,²⁹⁸ and are not the result of multilateral decision-making processes.²⁹⁹

Coercion: SG Report' (2007) (n 296), 5 (Benin), 6 (Cuba), 7 (Myanmar), 7 (Qatar), 8 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 296), 10 (Malaysia UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 296), 16 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 296), 15 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 296), 5 (Belarus); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 296), 20 (EU). *See also* HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 296), 2 (Algeria), 3 (Argentina); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (5 August 2011) UN Doc A/66/272, 3 (Argentina), 8 (Cuba), 11 (Dominican Republic); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 296), 11 (Mexico).

²⁹⁸ *See e.g.* Res 77/214 (n 293); Conference of Heads of the NAM, 'Final Document of the 17th Summit' (n 294), 17, 145; UN CHR, 'Human Rights & Unilateral Coercive Measures: SG Report' (2001) (n 296), 4 (Guatemala); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2001) (n 296), 2 (Cuba), 3 (Jamaica), 3 (North Korea), 5 (Libya); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 296), 2 (Iraq), 2 (Jamaica), 2 (Qatar); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 October 2004) UN Doc A/59/436, 2 (Cuba), 3 (Mexico); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2005) (n 296), 3 (Mexico), 3 (Cuba), 4 (Lebanon); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2006) (n 296), 2 (Cuba), 4 (Trinidad & Tobago); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2007) (n 296), 2 (Colombia), 4 (Syria); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2009) (n 296), 2 (Algeria), 3 (Angola), 4 (Jamaica), 5 (Paraguay); HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (2010) (n 296), 2 (Algeria), 3 (Belarus), 4 (Jamaica), 5 (Qatar), 6 (Russia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2011) (n 297), 3 (Argentina), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 11 (Ecuador), 13 (Guyana), 14 (Iraq), 14 (Kuwait); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2012) (n 296), 3 (Andorra), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 8 (Iran), 10 (Kuwait), 12 (Syria), 13 (Trinidad & Tobago); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (2014) (n 296), 3 (Iran), 4 (Lebanon), 5 (Mauritius). *See also* UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 296), 4 (Iraq), 6 (Libya), 7 (Malaysia), 8 (Saudi Arabia); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 296), 4 (Argentina), 4 (Cuba); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 296), 7 (Iraq), 8 (Kazakhstan), 9 (Sudan); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 296), 5 (Colombia), 9 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 296), 7 (Cuba), 7 (Egypt), 9 (Guatemala), 9 (Lebanon), 11 (Mexico), 12 (Oman), 13 (Sudan), 15 (Vietnam); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 296), 5 (Brazil), 6 (Burundi), 8 (Cuba), 9 (Iran), 11 (Senegal), 12 (Sudan), 14 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 296), 13 (Syria), 15 (Turkey), 16 (Venezuela), 18 (Zimbabwe); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2017) (n 296), 5 (Armenia), 8 (Cuba), 20 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2019) (n 296), 5 (Burundi), 10 (Jordan), 12 (Russia), 13 (Syria); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2021) (n 296), 4 (Cuba), 10 (Iran), 14 (Syria).

²⁹⁹ *See e.g.* Res 76/191 (n 293); Conference of Heads of the NAM, 'Final Document of the 17th Summit' (n 294), 17, 145; UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2001) (n 296), 3 (Gambia); UNGA, 'Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report' (2002) (n 296), 3 (Mali); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2003) (n 296), 4 (Costa Rica); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2005) (n 296), 9 (Senegal), 9 (Panama); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2007) (n 296), 7 (Egypt); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2011) (n 296), 7 (Egypt); 11 (Mexico); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 296), 5 (Brazil), 9 (Montenegro), 11 (Qatar), 16 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2015) (n 296), 12 (Paraguay); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report'

Nevertheless, as stressed in the previous chapters, these statements and declarations, must not be construed as an ‘unqualified proposition’ that unilateral measures are unlawful.³⁰⁰ Recalling the analysis in *Chapter 5A*, the measures states consider to be ‘not in accordance with international law’ are arguably measures that are not retorsions and are not countermeasures taken by the ‘injured state’. These include measures that involve breaches but whose wrongfulness cannot be precluded including those not imposed as a response to wrongful acts;³⁰¹ not levied against the wrongful state but against third states,³⁰² or against individuals or entities;³⁰³ or measures that go beyond the limits of countermeasures such as those that are not proportional,³⁰⁴ or breach human rights duties.³⁰⁵

Crucially, it would appear, as scholars like Hofer observe, that most states continue to require collective decisions for the imposition of enforcement measures,³⁰⁶ and thus prefer collective measures.³⁰⁷ This explains the repeated condemnation of unilateralism and the

(2017) (n 296), 11 (Lesotho); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 296), 11 (Russia); 13 (South Africa), 19 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2021) (n 296), 7 (Iran), 14 (South Africa). *See also* HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2010) (n 296), 4 (Burkina Faso), 4 (Costa Rica); 6 (Russia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2011) (n 297), 7 (Burkina Faso); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2012) (n 296), 11 (Mexico); 12 (Trinidad & Tobago).

³⁰⁰ Barber Rebecca, ‘An Exploration of the General Assembly’s Troubled Relationship with Unilateral Sanctions’ (2021) 70 *International & Comparative Law Quarterly* 343, 359.

³⁰¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 8), 130 citing *Gabčíkovo-Nagymaros* [1997] (n 2), 55; *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa* (Naulilaa) (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1027.

³⁰² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 8), 130; Ruys Tom & Ryngaert Cedric, ‘Secondary Sanctions: A Weapon out of Control? Legality of, & European Responses to, US Secondary Sanctions’ (2020) *British Yearbook of International Law* 1, 4.

³⁰³ ILC, ‘Summary Records of the 52nd Session’ (2000) I YbILC 1, 266, 271; Crawford, ‘Third Report on State Responsibility’ (2000) (n 99), 84.

³⁰⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 8), 134; *Naulilaa* (n 301), 1028; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 448.

³⁰⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 8), 131–3; Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 337.

³⁰⁶ Hofer Alexandra, ‘Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’ (2017) 16 *Chinese Journal of International Law* 1, 17; Tseming, ‘Treaty Enforcement’ (n 74), 1154; Pineschi, ‘Non-Compliance Procedures & State Responsibility’ (n 79), 494. *See e.g.* UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2003) (n 296), 4 (Costa Rica); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2005) (n 296), 9 (Panama); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2011) (n 296), 7 (Egypt), 8 (Gabon), 10 (Mauritius), 11 (Mexico); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2013) (n 296), 5 (Brazil); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 296), 11 (Russia); 13 (South Africa), 19 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2021) (n 296), 7 (Iran), 14 (South Africa). *See also* HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2010) (n 296), 6 (Russia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2011) (n 297), 7 (Burkina Faso).

³⁰⁷ Hofer Alexandra, ‘Negotiating International Public Policy through Adoption & Contestation of Sanctions’

measures taken by the ‘minority of the powerful states’ purporting to act on the international community’s behalf.³⁰⁸ Thus, it seems that they still have not accepted the competence of ‘states other than an injured state’ to impose countermeasures and, in the absence of a positive rule that provides such competence, states deem that the imposing state’s breach of duty will not be precluded.

This preference for community decisions has been enshrined in several declarations concerning the environment. The 1992 Rio Declaration’s Principle 12 stressed that efforts to address ‘environmental problems should, as far as possible, be based on [...] consensus’.³⁰⁹ Similarly, the OECD’s Environmental Policy and Trade Committee stated in 1995 that it ‘recognises that international cooperation may involve the use of specifically agreed provisions for trade measures in multilateral environmental agreements’.³¹⁰ States have also included procedures for the imposition of non-compliance response measures in several environmental treaties.³¹¹ For instance, the CITES and the Montreal Protocol, allow for the imposition of measures based on parties’ collective decisions to complement ‘softer’ non-compliance procedures.³¹² Examples of collective measures imposed under the CITES include the trade restrictions on wildlife against the United Arab Emirates (1985–90), El Salvador (1986–7), Equatorial Guinea (1988–92), Thailand, (1991–2), and Madagascar (2010).³¹³ One examples of measures levied under the Montreal Protocol were the trade restrictions on certain substances levied against Russia, Belarus, and Ukraine (1995–2000).³¹⁴

CHAPTER CONCLUSION

This chapter examined if states have accepted the competence of ‘states other than an

(2017) 50 *Revue Belge de Droit International* 440, 447; Henry Etienne, ‘Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law’ (2017) 18 *Melbourne Journal of International Law* 1, 17; Boisson de Chazournes, ‘Unilateral Trade Measures & the Environment’ (n 76), 182.

³⁰⁸ Hofer, ‘Divide on Unilateral Coercive Measures’ (n 306), 39; Hofer, ‘Adoption & Contestation of Sanctions’ (n 307), 446 *citing* Jouannet Emmanuelle, ‘Universalism & Imperialism: True-False Paradox of International Law?’ (2007) 18 *European Journal of International Law* 379, 391–2.

³⁰⁹ ‘Rio Declaration’ (1992) (n 36), Principle 12. *See* Hofer, ‘Adoption & Contestation of Sanctions’ (n 307), 447.

³¹⁰ OECD, ‘Report on Trade & Environment to the OECD Council at Ministerial Level’ (n 76).

³¹¹ Fitzmaurice, ‘Non-Compliance Procedures & Law of Treaties’ (n 80), 453; Sands, ‘Compliance with International Environmental Obligations’ (n 23), 58. *But see* Hedemann-Robinson, *Enforcement of Environmental Law* (n 233), 67 (‘Overall, the use of sanctions in MEAs is relatively rare’)

³¹² Tseming, ‘Treaty Enforcement’ (n 74), 1138; Sands, ‘Compliance with International Environmental Obligations’ (n 23), 73.

³¹³ Sand, ‘Enforcing CITES’ (n 290), 254.

³¹⁴ Shigeta, *Judicial Control of Environmental Protection* (n 58), 129 *citing* Montreal Protocol Non-Compliance Protocol Implementation Committee, ‘Report of the 10th Meeting’ (30 August 1995) UNEP/OzL.Pro/ImpCom/10/4, ¶38; Montreal Protocol Non-Compliance Protocol Implementation Committee, ‘Report of the 11th Meeting’ (14 September 1995) UNEP/OzL.Pro/ImpCom/11/1, ¶¶18, 22.

injured state’ to implement duties arising from certain environmental norms. First, it clarified the scope of these duties. It observed that at least two norms have been recognised as customary—the *no-harm* and *harm-prevention* rules. It then analysed the prominent examples of conventional norms that deal with the conservation of species and natural resources, regulate activities and substances that cause pollution and other harmful effects, and mitigate climate change. Thereafter, it noted that certain environmental norms are claimed to impose duties owed *erga omnes* or *erga omnes partes*.

This chapter then analysed the state practice and *opinio juris* in implementing duties imposed by these environmental norms. An examination of breaches of these duties suggests that states have not accepted as law the competence of ‘states other than an injured state’ to implement duties owed *erga omnes* and *erga omnes partes*. Indeed, only in a few instances did ‘states other than an injured state’ invoke another’s responsibility through judicial dispute resolution. In contrast, while some states have levied retorsions, no ‘state other than an injured state’ has levied countermeasures to enforce these duties. Thus, the chapter submits that as to certain environmental norms, 2001 Draft Article 48 remains a progressive measure and the question left by 2001 Draft Article 54 is still unanswered.■

PART III: REVISITING THE RULES ON THE IMPLEMENTATION OF DUTIES ARISING FROM COLLECTIVE NORMS

CHAPTER 9: OTHER STATE RESPONSES TO BREACHES OF DUTIES OWED *ERGA OMNES* THAT ARE NOT MEASURES OF IMPLEMENTATION

The observations in *Part II* suggest that it remains to be seen if states have accepted the competence of ‘states other than an injured state’ to implement breaches of duties owed *erga omnes*.¹ As to these states’ capacity to invoke another’s responsibility via judicial dispute resolution, the practice and *opinio juris* when it comes to certain human rights norms appear to be ‘evolving’.² The same, however, cannot be said regarding the norms on force, self-determination, and the environment.³ As to enforcement through unilateral measures, only a few states, have adopted the practice, albeit inconsistently, and expressed support for this prerogative.⁴ Many continue to oppose this competence.⁵ Of course, this does not mean that states deny the existence of duties owed *erga omnes*.⁶ Rather, it suggests that states have yet to agree on the means to implement these duties.⁷ In a decentralised legal system where laws, from one view, are largely based on consent,⁸ this competence cannot be based on the importance and commonality of states’ interests in a norm.⁹ Instead, as stressed in *Chapter 2*, it is their

¹ See Villalpando Santiago, *L'émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 12 (‘La pratique des réactions à l’illicite est tellement sélective et irrégulière qu’elle en devient suspecte’)

² *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192 (Xue, declaration), 1–2.

³ See Tams Christian, ‘Individual States as Guardians of Community Interests’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 385, 399; Ahmadov Farid, *Right of Actio Popularis before International Courts & Tribunals* (Brill Nijhoff 2018), 34–5 citing Leckie S, ‘Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?’ (1988) 10 *Human Rights Quarterly* 249, 249–301, 452.

⁴ Hofer Alexandra, ‘Unilateral Sanctions as a Challenge to the Law of State Responsibility’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 194; Focarelli Carlo, ‘International Law & Third-Party Countermeasures in the Age of Global Instant Communication’ (2016) 29 *Questions of International Law* 18, 31.

⁵ Subedi Surya, ‘Status of Unilateral Sanctions in International Law’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 38; Tams, ‘Guardians of Community Interests’ (n 3), 386.

⁶ See Duvic-Paoli Leslie-Anne, *Prevention Principle in International Environmental Law* (Cambridge University Press 2018), 94 (‘The discrepancy between declarations and actual practice does not necessarily question [its] customary status [but] [...] highlights the existence of implementation challenges’)

⁷ Villalpando, *La communauté internationale* (n 1), 12 (‘Nombreuses dissensions au sujet des intérêts et obligations qui concernent la communauté internationale dans son ensemble et du régime juridique qui s’y rattacherait’).

⁸ See Weil Prosper, ‘Towards Relative Normativity in International Law?’ (1983) 77(3) *American Journal of International Law* 413, 421.

⁹ Annacker Claudia, ‘Legal Regime of Erga Omnes Obligations in International Law’ (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 140; Hillgruber Christian, ‘Right of Third States to Take Countermeasures’ in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 271. See Linderfalk Ulf,

acceptance and recognition that transform duties owed *inter se* to *erga omnes*.¹⁰

Part III employs both fundamental and theoretical analysis.¹¹ It grounds *Part II*'s findings—the uncertain status of the rules on implementation by ‘states other than an injured state’ under the 2001 Draft Articles—to the international order’s social phenomenon. Thereafter, it explores a possible remedy by revisiting the synallagmatic view’s merits. But first, to further contextualise this examination, this chapter analyses alternative responses—as opposed to implementation measures—to breaches of duties owed *erga omnes* that states not ‘directly affected’ have actually taken. The discussion is not intended to be comprehensive. Indeed, each response outlined in this chapter has been the subject of separate studies. Yet, it is useful to set them out given the uncertain status of the rules articulated under the 2001 Draft Articles and highlight any issues from state practice and *opinio juris* that these responses may engender.

This chapter begins with the responses via judicial proceedings that states not ‘directly affected’ by breaches of duties owed *erga omnes* have taken without attracting the question of competence to invoke responsibility. One option for states is to request advisory opinions from tribunals through international organisations. Once used to clarify the laws applicable to organisations,¹² advisory opinions have found increasing use in responding to breaches of duties owed *erga omnes*,¹³ as they adhere to the view that actions protecting collective interest must be based on collective decisions.¹⁴ Another option is to intervene in judicial proceedings.

'International Legal Hierarchy Revisited—Status of Obligations Erga Omnes' (2011) 80 *Nordic Journal of International Law* 1, 10;

¹⁰ Hillgruber, 'Third States & Countermeasures' (n 9), 271–2. De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 37; Voefray Francois, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 328. See *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422 (Skotnikov, separate opinion), 484; (Xue, dissenting), 575; *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022) (Xue, dissenting), 6; *Application of the Torture Convention* (Canada & The Netherlands v Syria) (Provisional Measures) [2023] General List No 188, (Xue, dissenting), 1–2.

¹¹ See Hutchinson Terry & Duncan Nigel, 'Defining & Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 101–2 citing Pearce Dennis, Campbell Enid, & Harding Don, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education* (Australian Government Publishing Service 1987).

¹² Boisson de Chazournes Laurence, 'Advisory Opinions & the Furtherance of the Common Interests of Humankind' in Boisson de Chazournes Laurence, *et al.* (eds), *International Organisations & International Dispute Settlement: Trends & Prospects* (BRILL 2002), 106.

¹³ See *ibid*, 107; Tanaka Yoshifumi, 'Legal Consequences of Obligations Erga Omnes in International Law' (2021) 68 *Netherlands International Law Review* 1, 27;

¹⁴ See Tanaka, 'Consequences of Obligations Erga Omnes' (n 13), 26; Rosenne Shabtai, 'Some Reflections on Intervention in the International Court of Justice' (1987) 34 *Netherlands International Law Review* 75, 89; Barnes Richard, 'An Advisory Opinion on Climate Change Obligations under International Law' (2022) 53 *Ocean Development & International Law* 180, 185.

Like advisory opinions, interventions allow states to participate in the proceedings and present their views thereby ‘multilateralising’ the dispute to protect common interests.¹⁵ Finally, this chapter also examines states’ use of targeted unilateral measures or measures levied against individuals or entities responsible for, have supported, or have contributed to states’ wrongful acts.¹⁶ These measures are not levied against the state and thus may not ‘fit within the scope of the [implementation of] responsibility’.¹⁷ If the imposing state breaches duties owed to the targeted individual or entity, then it commits a wrongful act.¹⁸ Furthermore, as they do not involve the suspension of duties solely owed to the wrongful state, they cannot be considered countermeasures.¹⁹

I. REQUESTS FOR ADVISORY OPINIONS

One option for states to respond to breaches of duties owed *erga omnes* is to work within international organisations to request advisory opinions from courts.²⁰ The discussion below focuses on the ICJ’s advisory competence. Other tribunals also possess this capacity albeit more limited. Yet, it will not analyse that of the ECtHR, IACtHR, AfCtHR, and the CJEU,²¹ as these have seldom dealt with the collective norms discussed in this thesis.

A. Function & Requirements

Like the PCIJ, the ICJ, aside from settling inter-state disputes in its ‘contentious jurisdiction’,²² may also give, under the Statute’s Article 65, ‘advisory [opinions] on any legal

¹⁵ Benzing Markus, 'Community Interests in the Procedure of International Courts & Tribunals' (2006) 5 *Law & Practice of International Courts & Tribunals* 369, 398 citing Yen Kong NH, 'Third Party Rights & the Concept of Legal Interest in the World Trade Organization Dispute Settlement: Extending Participatory Rights to Enforcement Rights' (2004) 38 *Journal of World Trade* 757, 761. See Longobardo Marco, 'Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: the Gambia v Myanmar & Beyond' (2021) *International Community Law Review* 1, 6.

¹⁶ Hofer Alexandra, 'The “Curiouser & Curiouser” Legal Nature of Non-UN Sanctions: US Sanctions against Russia' (2018) 23 *Journal of Conflict & Security Law* 76, 78.

¹⁷ Ibid, 103; Subedi, 'Status of Unilateral Sanctions' (n 5), 49.

¹⁸ Hofer, 'US Sanctions against Russia' (n 16), 89; Douhan Alena, 'Unilateral Coercive Measures: Notion, Types, & Qualification' (UN Doc A/HRC/48/59) 8 July 2021, 15.

¹⁹ ILC, 'Summary Records of the 52nd Session' (2000) I YbILC 1, 266, 271; Hofer, 'Unilateral Sanctions & Responsibility' (n 19), 190–1; Subedi, 'Status of Unilateral Sanctions' (n 5), 49; Kolb Robert, *International Law of State Responsibility* (Elgar 2017), 178. *Contra* Dawidowicz Martin, 'Public Law Enforcement without Safeguards? Analysis of State Practice on Third-party Countermeasures & their Relationship to the UNSC' (2006) 77(1) *British Yearbook of International Law* 333, 392.

²⁰ Chinkin Christine, *Third Parties in International Law* (Oxford University Press 1993), 216.

²¹ See Ruys Tom & Soete Anemoon, '"Creeping" Advisory Jurisdiction of International Courts & Tribunals? Case of the International Tribunal for the Law of the Sea' (2016) 29 *Leiden Journal of International Law* 155, 158; Contese Jorge, 'Rule of Advise in International Human Rights Law' (2021) 115 *American Journal of International Law* 367, 368.

²² Aljaghoub Mahasen, *The Advisory Function of the International Court of Justice: 1946–2005* (Springer

question at the request' of bodies authorised by the UN Charter.²³ This is not a 'form of judicial recourse for states' and does not involve the invocation of responsibility.²⁴ An advisory opinion is 'given not to states' but to 'the organ requesting it',²⁵ to aid them in their functions'.²⁶ It is also up to the organs and states if they wish to attribute to the opinion 'particular effects' in 'their mutual relations'.²⁷ For these reasons, they are 'deprived of any binding force' within the meaning of the Statute's Articles 94(1) and 59.²⁸

Because of its purpose and the lack of binding force, scholars like Thirlway and Greig submit that unlike in contentious cases, states' consent is 'not necessary for the [Court's] exercise of its advisory function'.²⁹ Some like Lauterpacht, Aljaghoub, and Ruys go as far as to argue that states had impliedly accepted this function by acceding to the UN Charter.³⁰ Yet,

2006), 1; Matheson Michael, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons' (1997) 91 *American Journal of International Law* 417, 419; Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014), 42 citing Gross Leo, 'The International Court of Justice & the United Nations' (1967) 120 *Recueil des Cours de l'Académie de Droit International* 313, 320.

²³ *Statute of the International Court of Justice* (adopted 18 April 1946) 33 UNTS 993, art 65.

²⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ 404, 417 cited in Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol II (Oxford University Press 2013), 1731; Frowein Jochen & Oellers-Frahm Karin, 'Article 65' in Zimmermann Andreas, et al. (eds), *Statute of the International Court of Justice: Commentary* (3rd edn, Oxford University Press 2019), 1788.

²⁵ *Peace Treaties with Bulgaria, Hungary, & Romania (First Phase)* (Advisory Opinion) [1950] ICJ 65, 71.

²⁶ Falk Richard, 'Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall' (2005) 99 *American Journal of International Law* 42, 46; Thirlway (ed), *ICJ Law & Procedure vol II* (n 24), 1723–4 citing *Legal Consequences of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1970] ICJ 16, 26–7; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136 (Higgins, dissenting) 210; *Western Sahara* (Advisory Opinion) [1975] ICJ 12, 26–7.

²⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ 62, 77; *Peace Treaties* [1950] (n 25), 71.

²⁸ Frowein & Oellers-Frahm, 'Article 65' (n 24), 1808; Kolb Robert, *The International Court of Justice* (Hart 2013), 1095; *Peace Treaties* [1950] (n 25), 71. But note Thirlway Hugh, *The International Court of Justice* (Oxford University Press 2016), 109 ('Except in situations where a particular treaty text, on the basis of which an opinion is requested, provides that the opinion so given shall be binding [to] the parties') citing *Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ 12, 188. Brower Charles & Bekker Pieter, 'Understanding "Binding" Advisory Opinions of the International Court of Justice' in Ando Nisuke, et al. (eds), *Liber Amicorum Shigeru Oda* (BRILL 2002), 352 ('The Court's jurisprudence on "binding" advisory opinions evolved [based on the] procedure established for reviewing judgments of the [UNAT]').

²⁹ Thirlway, *ICJ* (n 28), 109; Greig DW, 'Advisory Jurisdiction of the International Court & the Settlement of Disputes between States' (1966) 15 *International & Comparative Law Quarterly* 325, 335. See *Peace Treaties* [1950] (n 25), 72; *Article VI, Section 22 of the Convention on the Privileges & Immunities of the UN* (Advisory Opinion) [1989] ICJ 177, 189–9. But see *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Ser B No 5, 28–9.

³⁰ Lauterpacht Hersch, *Development of International Law by the International Court* (Stevens 1958), 357–8 cited in Ruys & Soete, '"Creeping" Advisory Jurisdiction' (n 21), 174; Aljaghoub, *Advisory Function of the ICJ* (n 22), 112. See Higgins Rosalyn, 'A Comment on the Current Health of Advisory Opinions' in Lowe Vaughan & Fitzmaurice Malgosia (eds), *Fifty Years of the ICJ: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 2009), 571 ('[States] must be prepared to bear the risk of the Court fulfilling its advisory function in these circumstances'),

this does not mean that the absence of states' consent has not been an issue.³¹ As will be examined later, the absence of states' consent has been a prominent question when it comes to 'judicial propriety' or the Court's 'exercise of [...] discretion [in giving] an advisory opinion'.³²

The Court's exercise of this function is subject to the conditions in Article 65. First, only organs with an 'original' prerogative—the GA and SC, and 'derivative'—all others authorised, may request opinions.³³ Second, the question must be legal.³⁴ If not, it is outside the Court's competence.³⁵ That said, the Court, has adopted a 'presumption of jurisdiction' insisting that it 'should not, in principle, refuse to give an opinion'.³⁶ So long as the question is 'susceptible of a reply based on law',³⁷ even if it needs clarification,³⁸ needs factual determinations,³⁹ or has

³¹ See Aljaghoub, *Advisory Function of the ICJ* (n 22), 97; Hernandez, *ICJ & Judicial Function* (n 22), 74

³² Thirlway (ed), *ICJ Law & Procedure vol II* (n 24), 843 citing *Western Sahara* [1975] (n 26), 24. Berman Franklin, 'Uses & Abuses of Advisory Opinions' in Ando Nisuke, *et al.* (eds), *Liber Amicorum Shigeru Oda* (BRILL 2002), 814.

³³ Aljaghoub, *Advisory Function of the ICJ* (n 22), 35 ('[The Court needs to inquire into] the standing of the organ [and the] subject matter of the requested opinion'); 40 citing Bowett Derek, *The Law of International Institutions* (Stevens & Sons 1982), 277. Note that the 'possibility for states to bring requests for advisory opinions was deliberately excluded' as this may '[circumvent] the consensual basis of contentious proceedings' (Ruys & Soete, '"Creeping" Advisory Jurisdiction' (n 21), 161; Kolb, *ICJ* (n 28), 1053–2). However, the 'question remains [if] [...] the [GA] and the [SC] have a totally unlimited power of requesting advisory opinions on any question' (Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol I (Oxford University Press 2013), 841). For some, the GA and SC absolute' prerogative to request an opinion on 'any legal question' (Schwebel Stephen, *Justice in International Law: Selected Writings* (Grotius 1994), 18–9; Greig, 'Advisory Jurisdiction & Settlement of Disputes' (n 29), 332; Falk, 'ICJ Ruling on Israel's Security Wall' (n 26), 46. See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ 2, 232–3). Yet, others disagree and submit that the request must 'relate to their activities' (Rosenne Shabtai, *Law & Practice of the International Court* (Nijhoff 1985), 660; Higgins, 'Current Health of Advisory Opinions' (n 30), 580). In contrast, the privilege of other organs and agencies is 'more circumscribed' (Matheson, 'ICJ on Nuclear Weapons' (n 22), 419; Akande Dapo, 'Competence of International Organisations & the Advisory Jurisdiction of the International Court of Justice' (1998) 8 *European Journal of International Law* 437, 444). They must be authorised by the GA to request an opinion (*Application for Review of Judgement No 273 of the United Nations Administrative Tribunal* (Advisory Opinion) [1982] ICJ 325, 333–4). Moreover, the subject must pertain to 'questions arising within the scope of their activities' (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ 66, 77).

³⁴ *Nuclear Weapons* [1996] (n 33), 233–4; *Western Sahara* [1975] (n 26), 18; *Kosovo* [2010] (n 24), 414. See Kolb, *ICJ* (n 28), 1062 ('[These] [...] concern the existence, determination, interpretation, or application of a legal rule').

³⁵ Berman, 'Uses & Abuses of Advisory Opinions' (n 32), 811; *Nuclear Weapons* [1996] (n 33), 233–4; *Western Sahara* [1975] (n 26), 18; *Kosovo* [2010] (n 24), 414–5; *Southwest Africa* (Ethiopia & Liberia v South Africa) (Preliminary Objections) [1962] ICJ 319, 155. Note that this precludes questions that do not have 'practical and contemporary effects and [...] are [...] devoid of object and purpose' (Kolb Robert, 'General Principles of Procedural Law' in Zimmermann Andreas, *et al.* (eds), *Statute of the International Court of Justice: Commentary* (2006), 793, 808).

³⁶ *Peace Treaties* [1950] (n 25), 71; *Namibia* [1970] (n 26), 16; *Western Sahara* [1975] (n 26), 23–4; *Nuclear Weapons* [1996] (n 33), 235; *Wall* [2004] (n 26), 136, 157–8; *Kosovo* [2010] (n 24), 416.

³⁷ *Western Sahara* [1975] (n 26), 18.

³⁸ *Wall* [2004] (n 26), 153–4 ('[The] lack of clarity [...] does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation'); *Legal Consequences of the Separation of the Chagos Archipelago* (Advisory Opinion) [2019] ICJ 95, 112–3.

³⁹ Kolb, *ICJ* (n 28), 1068; *Southwest Africa* [1962] (n 35), 155; *Namibia* [1970] (n 26), 27; *Western Sahara*

political implications,⁴⁰ the Court will consider the requirement met. Finally, requests are subject to ‘judicial discretion’ especially when the Court’s ‘independence and integrity are at stake’.⁴¹ For the Court, there may be ‘compelling reasons’ for it to ‘exercise its discretion’ not to give an opinion.⁴² Yet what these are remains to be seen.⁴³ Aside from citing instances where its ‘judicial role would be endangered or discredited’,⁴⁴ it has not specified these reasons. States in several instances have ‘urged the Court not to exercise its [...] function’ citing, among others, the questions’ political nature, circumvention of consent to adjudication,⁴⁵ and the existence of parallel disputes.⁴⁶ Yet, the ICJ has ‘never exercised its discretion’ not to answer a request.⁴⁷

B. Practice

The ICJ’s early opinions mostly dealt with ‘constitutional issues’,⁴⁸ or questions of ‘procedure and competence of UN organs [and agencies]’.⁴⁹ This was important during the UN’s initial years ‘when there [were] uncertainties about [its] institutional arrangements’,⁵⁰ and opinions clarified the ‘*corpus juris* applicable’.⁵¹ Advisory opinions were also used to settle

[1975] (n 26), 155.

⁴⁰ Greig, ‘Advisory Jurisdiction & Settlement of Disputes’ (n 29), 326; Higgins Rosalyn, *Problems & Process: International Law & How We Use It* (Clarendon 1995), 202; *Nuclear Weapons* [1996] (n 33), 234 (‘The fact that this question also has political aspects [...] does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute”’); *Conditions of Admission to the UN* (Advisory Opinion) [1948] ICJ 57, 61; *Certain Expenses of the UN* (ICJ 151) [1962] Advisory Opinion, 155.

⁴¹ Aljaghoub, *Advisory Function of the ICJ* (n 22), 113; Beckett Samuel, ‘Waiting for Godot: An Analysis of the Advisory Opinion on Kosovo’ (2011) 24 *Leiden Journal of International Law* 331, 333. See Kolb, *ICJ* (n 28), 1094 (‘[This] ensures that it has [the] freedom of manoeuvre to enable it to react with [...] flexibility to requests for opinions’); Abi-Saab George, ‘On Discretion’ in Boisson de Chazournes Laurence & Sands Philippe (eds), *International Law, the International Court of Justice, and Nuclear Weapons* (1999), 37.

⁴² *Western Sahara* [1975] (n 26), 25; *Convention on the Privileges & Immunities of the UN* [1989] (n 29), 191.

⁴³ See Fitzmaurice Gerald, *Law & Procedure of the International Court of Justice* (1986), 565.

⁴⁴ *Judgement No 273 of the UNAT* [1982] (n 33), 347.

⁴⁵ Charlesworth Hillary & Young Margaret, ‘Australian Encounters with the Advisory Jurisdiction of the ICJ’ (2021) 21 *Melbourne Journal of International Law* 698, 702; Kolb, *ICJ* (n 28), 1093.

⁴⁶ Higgins, ‘Current Health of Advisory Opinions’ (n 30), 561.

⁴⁷ Akande, ‘IOs & ICJ’s Advisory Jurisdiction’ (n 33), 459; Hernandez, *ICJ & Judicial Function* (n 22), 78.

⁴⁸ Dominicé Christian, ‘Request of Advisory Opinions in Contentious Cases’ in Boisson de Chazournes Laurence, *et al.* (eds), *International Organisations & International Dispute Settlement: Trends & Prospects* (BRILL 2002), 91.

⁴⁹ Frowein & Oellers-Frahm, ‘Article 65’ (n 24), 1628.

⁵⁰ Higgins, ‘Current Health of Advisory Opinions’ (n 30), 574 (‘All of these matters required the advice of the Court in the first ten years. Comparable advice was sought only a handful of times in the next thirty years’).

⁵¹ Boisson de Chazournes, ‘Opinions & Common Interests’ (n 12), 106. Examples include those that resolved questions on the admission of states to the UN (*Conditions of Admission* [1948] (n 40); *Competence of the General Assembly for the Admission of a State to the UN* (Advisory Opinion) [1950] ICJ 4.); delved into the UN’s legal personality and protections afforded to its staff (*Reparation for Injuries Suffered in the Service of the UN* (Advisory Opinion) [1949] ICJ 149); examined its powers on the supervision of mandates and trusteeships (*Voting Procedure*

disputes among organisations and states,⁵² or review some UN organs' decisions.⁵³ As to the former, parties in some conventions have accepted the Court's opinion as 'decisive'.⁵⁴ As to the latter, the UN Administrative Tribunal, until recently,⁵⁵ has utilised the ICJ's advisory function for the review of its decisions.⁵⁶

States have also used advisory opinions to address common concerns.⁵⁷ The 1951 *Reservations* opinion dealt with the validity of several states' reservations to the Genocide Convention. Responding to the GA's request,⁵⁸ the ICJ ruled that when states object to another's reservation, it would still be a party to the relevant agreement to the extent that the reservation was compatible with the treaty's object and purpose.⁵⁹ There were also the 1996 *Nuclear Weapons* and *Nuclear Weapons in Armed Conflict* opinions.⁶⁰ In the latter, the Court

on Questions relating to Reports and Petitions Concerning the Territory of South West Africa (Advisory Opinion) [1956] ICJ 57; *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (Advisory Opinion) [1956] ICJ 23; and dealt with internal administrative matters (*Certain Expenses of the UN* [1962] (n 40)).

⁵² Ago Roberto, "'Binding" Advisory Opinions of the ICJ' (1991) 85 *American Journal of International Law* 439, 439.

⁵³ Brower & Bekker, "'Binding" Advisory Opinions' (n 28), 352.

⁵⁴ Dominicé, 'Request of Advisory Opinions in Contentious Cases' (n 48), 91. For example, the Convention of the Privileges and Immunities of Specialised Agencies provides that should a difference arise between an agency and a party, 'a request shall be made for an advisory opinion on any legal question involved' that shall be 'accepted as decisive by the parties' (*Convention on the Privileges & Immunities of the Specialised Agencies* (adopted 16 August 1949, entered into force 2 December 1948) 33 UNTS 261, art IX, §32. See *Immunity from Legal Process* [1999] (n 27), 77; *Applicability of the Obligation to Arbitrate under Section 21* [1988] (n 28), 188).

⁵⁵ *Review of the Procedure provided for under Article 11 of the Statute of the UNAT* Res 50/54 UNGA (29 January 1996) UN Doc A/RES/50/54, ¶1(a) ('Decides to amend the statute of the Administrative Tribunal of the [UN] with respect to judgements rendered by the Tribunal after 31 December 1995 as follows: (a) Delete article 11 [...]').

⁵⁶ Dominicé, 'Request of Advisory Opinions in Contentious Cases' (n 48), 352 *noting Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO* (Advisory Opinion) [1956] ICJ 77; *Application for Review of Judgement No 158 of the UNAT* (Advisory Opinion) [1973] ICJ 166; *Judgement No 273 of the UNAT* [1982] (n 33); *Application for Review of Judgement No 333 of the UNAT* (Advisory Opinion) [1987] ICJ 18. Note that these do not necessarily change the 'nature of the [advisory] function carried out by the Court' (Brower & Bekker, "'Binding" Advisory Opinions' (n 28), 360. See Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 826). It remains 'advisory'. However, these show that states and organisations may attribute 'particular effects' in 'their mutual relations, to an advisory opinion of the Court' (*Immunity from Legal Process* [1999] (n 27), 77; *Peace Treaties* [1950] (n 25), 71). Here, the 'binding force' of the opinion derives from the consent of the parties to the relevant instrument (Ago, "'Binding" Advisory Opinions of the ICJ' (n 52), 440–1 *citing* Rosenne, *Law & Practice of the International Court* (n 33), 683; Bacot G, 'Reflexions sur les clauses qui rendent obligatoires les avis consultatifs de la CPJI et de la CIJ' (1980) 84 *Revue générale de droit international public* 1027. Hambro Edvard, 'The Authority of the Advisory Opinions of the International Court of Justice' (1954) 3 *International & Comparative Law Quarterly* 2, 4).

⁵⁷ Frowein & Oellers-Frahm, 'Article 65' (n 24), 1628.

⁵⁸ *Reservations to Multilateral Conventions* Res 478(V) UNGA (16 November 1950) UN Doc A/RES/478(V).

⁵⁹ *Reservations to the Genocide Convention* (Advisory Opinion) [1951] ICJ 15, 26–7. Note 23 ('In such a convention [...] states do not have any interests of their own; they merely have [...] a common interest [...] [It does not] speak of individual advantages or disadvantages [...] or of the maintenance of a contractual balance between rights and duties').

⁶⁰ Matheson, 'ICJ on Nuclear Weapons' (n 22), 417; Charlesworth & Young, 'Australia & the ICJ Advisory

found that it had no competence to entertain the request made by the World Health Organisation ('WHO') as the question did not arise from the WHO's 'scope of activities'.⁶¹ In the former, it ruled that 'neither customary nor conventional [...] law contained any [...] universal prohibition on the threat or use of nuclear weapons' *per se*.⁶² Some states have worked towards obtaining an opinion on climate change. In 2011, Palau proposed a GA resolution to request an opinion on states' responsibilities to 'ensure that activities [...] under their jurisdiction or control that emit greenhouse gases do not [cause] damage to others'.⁶³ Yet, this was 'abandoned [due to] resistance from key countries'.⁶⁴ Vanuatu also explored 'the possibility of an ICJ [...] opinion' on this matter.⁶⁵ This initiative gained more ground. It was endorsed by the Pacific Islands Forum in 2019,⁶⁶ formally announced in 2021,⁶⁷ and adopted by the GA in 2023.⁶⁸

Jurisdiction' (n 45), 715. See World Health Organisation, 'Health & Environmental Effects of Nuclear Weapons' (14 May 1993) Resolution WHA46.40.

⁶¹ See *Request for an advisory opinion from the ICJ on the legality of the threat or use of nuclear weapons* Res 49/75 UNGA (15 December 1994) UN Doc A/RES/49/75; World Health Organisation, 'Resolution WHA46.40' (n 60).

⁶² *Nuclear Weapons* [1996] (n 33), 266. See Berman, 'Uses & Abuses of Advisory Opinions' (n 32), 815 ('It is doubly surprising [...] that the Court, having expressly decided that the question put to it, properly interpreted, was one capable of being given a legal answer, ended up concluding that it was not in a position to give a [...] legal answer to it.').

⁶³ Burkett Maxine, 'A Justice Paradox: On Climate Change, Small Island Developing States, & the Quest for Effective Legal Remedy' (2013) 34 *University of Hawai'i Law Review* 633, 657 citing Republic of Palau, 'Statement to the 66th Regular Session of the UNGA' (21 September 2011) <<http://gadebate.un.org/66/palau>>. Beck Stuart & Burleson Elizabeth, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice & Security at the United Nations' (2014) 3 *Transnational Environmental Law* 17, 19. But see Stephens Tim, 'The Settlement of Disputes in International Environmental Law' in Alam Shawkat, *et al.* (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013), 187 ('Contentious or advisory proceedings in relation to climate change are unlikely to bear a great deal of fruit in terms of outcome [...] it is not a regulatory challenge that is readily soluble through inter-state dispute settlement').

⁶⁴ Brunnée Jutta, 'Harm Prevention' in Rajamani Lavanya & Peel Jacqueline (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2021). 282; Beck & Burleson, 'Palau's Pursuit of Climate Justice & Security at the UN' (n 63), 26 ('As the ICJ initiative became a serious force, the US threw its full diplomatic weight against it').

⁶⁵ Freestone David, Barnes Richard, & Akhavan Payam, 'Agreement for the Establishment of the Commission of Small Island States on Climate Change & International Law (COSIS)' (2022) 37 *International Journal of Marine & Coastal Law* 166, 173. See also World Conservation Congress, 'Request for an Advisory Opinion on the Principle of Sustainable Development' (1 September 2016) WCC-2016-Res-079.

⁶⁶ Pacific Islands Forum Secretariat, '50th Pacific Islands Forum Communiqué' (13–6 August 2019) PIF(19)14, ¶16.

⁶⁷ Freestone, Barnes, & Akhavan, 'COSIS & International Law' (n 65), 173.

⁶⁸ *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change* Res 77/276 UNGA (29 March 2023) UN Doc A/77/276. See UNGA, 'Verbatim Record, 77th Session, 64th Meeting' (29 March 2023) UN Doc A/77/PV.64. Note that other tribunals, like the ITLOS, have also exercised this function. In 2011, following Nauru's request made through the International Seabed Authority (Tanaka Yoshifumi, 'Obligations & Liability of Sponsoring States concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of February 2011' (2013) 60 *Netherlands Law Review* 205, 206), the ITLOS Seabed Disputes Chamber ('SBD'), under its UNCLOS competence (*UN Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 191), gave its advice on the Responsibilities of States Sponsoring Activities in the Area (See *Responsibilities & Obligations of States*

More relevant to the present examination, states through the UN have also engaged the ICJ's advisory function where parallel disputes exist concerning breaches of duties owed *erga omnes*.⁶⁹ These primarily concern peoples' rights to self-determination and have already been noted in *Chapter 7* but are worth revisiting. For instance, South Africa's occupation of Southwest Africa/Namibia (1948–91) prompted the GA and the SC to request opinions to deal with the matter. The Court, in its 1950 *Southwest Africa* opinion found that South Africa's Mandate continued to exist, that it may not annex the territory, and it had the duty to cooperate with the supervisory system.⁷⁰ In its 1970 *Namibia* opinion, it ruled that following GA's termination of the Mandate in 1966,⁷¹ and the SC's demand for South Africa's withdrawal from Namibia in 1969,⁷² South Africa's continued presence in Namibia was illegal and it must withdraw from the territory.⁷³ Likewise, Morocco and Mauritania's claims over Western

Sponsoring Persons & Entities with Respect to Activities in the Area (Advisory Opinion) (SDC, Case No 17, 1 February 2011)). It ruled that sponsoring states have a 'direct' duty to take measures that are 'reasonably appropriate' to 'secure compliance from persons under their jurisdiction' (ibid, ¶¶120–2). If the sponsored contractors cause damage, the state's liability is triggered (ibid, ¶184. See Ahmadov, *Actio Popularis* (n 3), 144). In 2013, the full tribunal rendered an opinion at the Sub-Regional Fisheries Commission's ('SRFC') request on illegal, unreported, and unregulated fishing (Sub-Regional Fisheries Commission, 'Request for Advisory Opinion' (27 March 2013) No 437 CSRP/SP). It concluded that flag states have the due diligence duty to ensure that its vessels comply with the relevant environmental duties (*Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion) (ITLOS, Case No 21, 2 April 2015), 87–9). Note however that unlike the Seabed Authority, the full ITLOS tribunal does not have the express competence to render advisory opinions (Ruys & Soete, '"Creeping" Advisory Jurisdiction' (n 21), 156). Some states asserted that this may be 'implicitly' derived from the ITLOS Statute (See 'Written Statement of Germany', *Request for an Advisory Opinion submitted by the SRFC* (Advisory Opinion) (ITLOS, 18 November 2013), ¶¶8–9). Yet, others disagreed (Freestone, Barnes, & Akhavan, 'COSIS & International Law' (n 65), 170. See Lando M, 'Advisory Jurisdiction of the ITLOS' (2016) 29 *Leiden Journal of International Law* 441, 456–8; Barnes, 'Advisory Opinion on Climate Change' (n 14), 184). Recently, several states formed the Commission of Small Islands States on Climate Change and International Law ('COSIS') and granted it the authority, on its members' behalf, to request ITLOS opinions on UNCLOS questions (*Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law* (adopted 31 October 2021, entered into force 31 October 2021) UNTS 56940). In 2022, it transmitted a request to the Tribunal for advice on the UNCLOS parties' duties to 'protect and preserve the marine environment [from] climate change' (Commission of Small Islands States on Climate Change & International Law, 'Request for Advisory Opinion' (12 December 2022)). Note again that the COSIS's request, like that of the SRFC, raises several issues including the competence of the tribunal to render an advisory opinion; the capacity of COSIS to make the request (Barnes, 'Advisory Opinion on Climate Change' (n 14), 192–3) and the political nature of the questions posed (Holst Rozemarijn Roland 'Prospects & Challenges for an ITLOS Advisory Opinion on Oceans & Climate Change' (2022) *Review of European, Comparative, & International Environmental Law* 1, 3).

⁶⁹ Boisson de Chazournes, 'Opinions & Common Interests' (n 12), 107 ('Advisory opinions should also be considered avenues [to protect] common interests').

⁷⁰ *International Status of Southwest Africa* (Advisory Opinion) [1950] ICJ 128, 143–4, 182. See *Question of South West Africa* Res 338(IV) UNGA (16 December 1950) UN Doc A/RES/Res 338(IV).

⁷¹ *Question of South West Africa* Res 2145(XXI) UNGA (27 October 1966) UN Doc A/RES/2145(XXI). See

⁷² See Res 264 UNSC (20 March 1969) UN Doc S/RES/264; Res 269 UNSC (12 August 1969) UN Doc S/RES/269; Res 276 UN SC (30 January 1970) UN Doc S/RES/276.

⁷³ *Namibia* [1970] (n 26), 54. See Res 284 UNSC (20 July 1970) UN Doc S/RES/284. Note that the opinion also found that due to the SC's declaration of South Africa's conduct's illegality, states have the duty not to

Sahara,⁷⁴ led to the GA's request for an opinion on Western Sahara's status and its legal ties to Morocco and Mauritania.⁷⁵ In the 1975 *Western Sahara* opinion, the Court ruled that Western Sahara, having been inhabited by peoples that were socially and politically organised, could not be considered *terra nullius*.⁷⁶ It also found that Western Sahara had no ties of sovereignty to Morocco or Mauritania.⁷⁷ There was also Israel's continued occupation of the Palestinian Territories (1949–). Israel's decision to construct a 'security fence' in 2002 that 'deviated significantly from the "Green Line" [and] 'ran virtually [...] within' Occupied Palestinian Territories,⁷⁸ led the GA to seek an opinion on the legal effects of Israel's conduct.⁷⁹ In the 2004 *Wall* opinion, the Court ruled that Israel, as the occupying power, breached its duty to respect the Palestinian people's right to self-determination,⁸⁰ and certain duties under humanitarian law.⁸¹ Due to Israel's continued occupation of Palestinian Territories, the GA sought another opinion in 2022 on the 'legal [effects of Israel's] ongoing violation of the Palestinians' [right] to self-determination'.⁸² Kosovo's 2008 unilateral declaration of independence from Serbia,⁸³ also led the GA to seek guidance as to whether the declaration was 'in accordance with international law'.⁸⁴ Interestingly, the Court, in the 2010 *Kosovo* opinion, limited its response to whether the declaration 'did not violate [...] international law'.⁸⁵ It found that international law contained 'no prohibition of declarations of independence'.⁸⁶ Thus, it

recognise the legality of South Africa's presence in Namibia and not to lend support to it (*Namibia* [1970] (n 26), 54, 56).

⁷⁴ Feinäugle Clemens, 'Western Sahara (Advisory Opinion)' (Max Planck Encyclopedia, March 2007) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e233?prd=MPI>>.

⁷⁵ Res 3292(XXIX) UNGA (13 December 1974) UN Doc A/RES/3292(XXIX). See Charlesworth & Young, 'Australia & the ICJ Advisory Jurisdiction' (n 45), 711.

⁷⁶ *Western Sahara* [1975] (n 26), 38–40.

⁷⁷ *Ibid.*, 41–4, 45–8.

⁷⁸ Watts Arthur & Jorritsma Remy, 'Israeli Wall (Advisory Opinion)' (Max Planck Encyclopedia, June 2019) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e150?prd=MPIL>>.

⁷⁹ *Illegal Israeli actions in Occupied East Jerusalem & the Rest of the Occupied Palestinian Territory* Res ES-10/14 UNGA (8 December 2003) UN Doc A/RES/ES-10/14. Note that a resolution condemning the fence failed in the SC due to a US veto (*Draft Resolution (Guinea, Malaysia, Pakistan, & Syria)* UNSC (14 October 2003) UN Doc S/2003/980).

⁸⁰ *Wall* [2004] (n 26), 171, 200.

⁸¹ *Ibid.*, 177, 182–94, 191–2, 200. Note that the opinion also found that 'third states' have the duty not to recognise the illegal situation created by Israel's actions, not to aid Israel in maintaining the situation, and to cooperate to end the alleged violations (*ibid.*, 200).

⁸² *Israeli Practices affecting the Human Rights of the Palestinian people in the Occupied Palestinian Territory* Res 77/247 UNGA (30 December 2022) UN Doc A/RES/77/247.

⁸³ *Kosovo* [2010] (n 24), 434.

⁸⁴ Res 63/3 UNGA (8 October 2008) UN Doc A/RES/63/3.

⁸⁵ *Kosovo* [2010] (n 24), 423–6.

⁸⁶ *Ibid.*, 436.

concluded that Kosovo's declaration did not violate international law.⁸⁷ Finally, the UK's continued administration of the Chagos Archipelago (1965–) led to the GA's request for an opinion on the legality of the UK's conduct.⁸⁸ In the 2019 *Chagos* opinion, the ICJ found that the archipelago was an 'integral part of [the NSGT]',⁸⁹ that its detachment 'was not based on the free and genuine expression of the [people's] will',⁹⁰ and that 'Mauritius' decolonisation was not lawfully completed'.⁹¹

C. Observations: Legitimacy & Utility

1. Legitimacy

Scholars like Boisson de Chazournes, Chinkin, and Tanaka suggest, that advisory proceedings offer an alternative response to breaches of duties owed *erga omnes*,⁹² and allow for the 'exercise of judicial function' over public interest questions.⁹³ For Tanaka, they address the procedural 'tension between the [collective norms'] multilateral nature', and the judicial dispute resolution's bilateral nature.⁹⁴ Unlike contentious cases which are 'limited to the parties to the dispute' and intervening states, advisory proceedings allow others 'to have their voices heard',⁹⁵ and for a 'public debate based on legal considerations'.⁹⁶ Indeed, many states have

⁸⁷ Ibid, 452.

⁸⁸ See Res 71/292 UNGA (22 June 2017) UN Doc A/RES/71/292.

⁸⁹ *Chagos* [2019] (n 38), 137.

⁹⁰ Ibid. See McCorquodale Robert, Robinson Jennifer, & Peart Nicola, 'Territorial Integrity & Consent in the Chagos Advisory Opinion' (2020) 69 *International & Comparative Law Quarterly* 221, 229.

⁹¹ *Chagos* [2019] (n 38), 137.

⁹² Boisson de Chazournes, 'Opinions & Common Interests' (n 12), 107; Chinkin, *Third Parties* (n 20), 216; Tanaka, 'Consequences of Obligations Erga Omnes' (n 13), 21.

⁹³ Hofbauer Jane, 'Not Just a Participation Trophy? Advancing Public Interests through Advisory Opinions at the International Court of Justice' (2023) 22 *Law & Practice of International Courts & Tribunals* 234, 240.

⁹⁴ Tanaka, 'Consequences of Obligations Erga Omnes' (n 13), 26; Almeida Paula Wojcikiewicz, 'Enhancing ICJ Procedures to Promote Fundamental Values: Overcoming the Tension between Bilateralism & Community Interests' in Iovane Massimo, *et al.* (eds), *Protection of General Interests in Contemporary International Law* (Oxford University Press 2021), 242; Hofbauer, 'Public Interests & Advisory Opinions' (n 93), 236. See Nollkaemper André, 'International Adjudication of Global Public Goods: Substance & Procedure' (2012) 23 *European Journal of International Law* 769, 785; Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1, 15 citing Simma Bruno, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 297; Paddeau Federica, 'Multilateral Disputes in Bilateral Settings' (2017) 76 *Cambridge Law Journal* 1, 2–3.

⁹⁵ Bodansky Daniel, 'Role of the ICJ in Addressing Climate Change: Preliminary Reflections' (2017) 49 *Arizona State Law Journal* 689, 711. See Boisson de Chazournes, 'Opinions & Common Interests' (n 12), 114; Paulus Andreas, 'Article 66' in Zimmermann Andreas, *et al.* (eds), *Statute of the International Court of Justice: Commentary* (Oxford University Press 2012), 1819–21

⁹⁶ Frowein & Oellers-Frahm, 'Article 65' (n 24), 1810 ('Rather than power politics'); Boisson de Chazournes, 'Opinions & Common Interests' (n 12), 115 ('[Levels] the field [and allows] all [...] to express their views').

participated in these ‘proceedings in recent decades’.⁹⁷ The Court ‘has [also] [...] been liberal in admitting [states’ written and oral] statements’.⁹⁸ It ‘rather welcomes [their] views’ and does not require them to ‘prove an interest “of a legal nature”’ to participate.⁹⁹ These proceedings, for scholars like Hofbauer, also ‘avoid [the] procedural [...] difficulties [posed by duties] owed *erga omnes*’.¹⁰⁰ States need not ‘find a [...] jurisdictional basis, obtain the respondent’s [consent], or comply with the indispensable third party rule’.¹⁰¹ The Court itself ‘does not operate with [...] rigidity when it comes to advisory proceedings’.¹⁰² Thus, it allows for participation akin to domestic ‘public-interest litigation’,¹⁰³ where there is the ‘fullest possible [...] representation of those affected’.¹⁰⁴

Advisory opinions also provide a greater sense of ‘legitimacy’ over proceedings involving duties owed *erga omnes*.¹⁰⁵ In contentious cases, a ‘state other than in injured state’, from one view, acts ‘on behalf of the international community’.¹⁰⁶ Yet, as will be discussed in *Chapter*

⁹⁷ Wigard Kyra, Ori Pomson, & McIntyre Juliette, ‘Keeping Score: An Empirical Analysis of the Interventions in Ukraine v Russia’ (2023) 14 *Journal of International Dispute Settlement* 1, 12.

⁹⁸ Jessup Philip, ‘Intervention in the International Court’ (1981) 75 *American Journal of International Law* 903, 905; See Collier John & Lowe Vaughan, *The Settlement of Disputes in International Law* (Oxford University Press 1999), 14; Paulus, ‘Article 66’ (n 95), 1819 (‘[The Court’s] discretion is limited by the principles of fairness and the nature of the proceedings’). See also on the use of amicus briefs by states, international organisations, and NGOs as a means of participation in judicial proceedings: Savoie Pierre-Olivier, ‘La CIJ, l’avis consultatif et la fonction judiciaire: entre décision et consultation’ (2004) 42 *Canadian Yearbook of International Law* 35, 66; Holst, ‘ITLOS Advisory Opinion on Oceans & Climate Change’ (n 68), 4; Hofbauer, ‘Public Interests & Advisory Opinions’ (n 93), 246, 250.

⁹⁹ Jessup, ‘Intervention’ (n 98), 905. See Boisson de Chazournes, ‘Opinions & Common Interests’ (n 12), 115; Watson Geoffrey, ‘“Wall” in Legal & Political Context’ (2005) 99 *American Journal of International Law* 6, 7; Falk Richard, ‘Kosovo Advisory Opinion: Conflict Resolution & Precedent’ (2011) 105 *American Journal of International Law* 50, 52.

¹⁰⁰ Hofbauer, ‘Public Interests & Advisory Opinions’ (n 93), 241.

¹⁰¹ Ibid.

¹⁰² Ibid, 261.

¹⁰³ Ibid, 239; Mao Xiao, ‘Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case’ (2002) 21 *Chinese Journal of International Law* 589, 608; McIntyre Juliette, ‘Procedural Values in the Intervention Procedure at the International Court of Justice’ (2022) 1 *Ukrainian Law Review* 1, 46 citing Grossman Nienke, ‘The Normative Legitimacy of International Courts’ (2013) 86 *Temple Law Review* 61, 87.

¹⁰⁴ McIntyre, ‘Procedural Values’ (n 103), 46 citing de Búrca Gráinne, ‘Developing Democracy beyond the State’ (2008) 46 *Columbia Journal of Transnational Law* 221; 47 (‘Increased participation in proceedings before the Court is simply a benefit in and of itself. It could make [it] more relevant in international litigation, demonstrate confidence, [...] and increase the authority of its decisions’) citing Gross Leo, ‘Intervention in Proceedings before the International Court of Justice’ in Gross Leo (ed), *The Future of the International Court of Justice* (Oceana 1976), 542.

¹⁰⁵ See Broude Tomer, ‘The Legitimacy of the ICJ’s Advisory Competence in the Shadow of the Wall’ (2005) 39 *Israel Law Review* 189, 192–3 (‘Formal-legalistic theory has defined legitimacy as a “property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normative”’) citing Franck Thomas, *Power of Legitimacy among Nations* (Oxford University Press 1990), 24.

¹⁰⁶ See ILC, ‘Report on the Work of the 53rd Session’ (2001) II(2) YbILC 20, 126; Crawford James,

10, whether states can act for others in a decentralised order remains to be seen.¹⁰⁷ This is not an issue for advisory proceedings. By design, no state can unilaterally request an advisory opinion.¹⁰⁸ Instead, states must do so through the UN's organs,¹⁰⁹ and convince others 'to take this step'.¹¹⁰ A 'key part of the process' is that a 'request must garner [...] support [from states]'.¹¹¹ In short, it is dependent on 'collective and cooperative action[s]'.¹¹² If a 'majority [...] supports the request', it arguably 'signif[ies] an *a priori* majority belief that the action is proper'.¹¹³

Yet, while advisory opinions offer an alternative response to breaches of duties owed *erga omnes*, problems persist, as Higgins observes, concerning 'the request for and the giving of opinions'.¹¹⁴ Indeed, several proceedings have faced opposition from states due to the political implications of questions involved and the possibility of circumventing consent to adjudication.¹¹⁵ The first pertains to the view that courts are an 'inappropriate fora for resolving political issues' and the provision of 'legal advice to political organs' is an 'executive rather than a judicial function'.¹¹⁶ For some like Jennings and Hambro, the courts' capacity over these matters is limited rendering them non-justiciable.¹¹⁷ Thus, they 'should be settled by political

'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 227.

¹⁰⁷ See Hernandez, *ICJ & Judicial Function* (n 22), 206; Crawford James, 'Responsibility to the International Community as a Whole' (2001) 8 *Indiana Journal of Global Legal Studies* 303, 344 ('In a decentralised system, there is no all-purpose representative [...] who can act securely on the collective behalf').

¹⁰⁸ Ruys & Soete, '"Creeping" Advisory Jurisdiction' (n 21), 161–2 ('The possibility for states to [request] [...] opinions was excluded [...] this was perceived as a recipe for circumventing [consent]'); Kolb, *ICJ* (n 28), 1053–2.

¹⁰⁹ See Schwebel, *Justice in International Law* (n 33), 65 ('The [GA] and [SC] acts as conduit').

¹¹⁰ Chinkin, *Third Parties* (n 20), 216; Schwebel, *Justice in International Law* (n 33), 65.

¹¹¹ Barnes, 'Advisory Opinion on Climate Change' (n 14), 185; Aljaghoub, *Advisory Function of the ICJ* (n 22), 133.

¹¹² Tanaka, 'Consequences of Obligations Erga Omnes' (n 13), 26. See Rosenne, 'Reflections on Intervention' (n 14), 89.

¹¹³ Broude, 'ICJ's Advisory Competence' (n 105), 197. See Berman, 'Uses & Abuses of Advisory Opinions' (n 32), 816 citing *Nuclear Weapons* [1996] (n 33), 341 (Oda, dissenting). Note Hofbauer, 'Public Interests & Advisory Opinions' (n 93), 255–6 ('Lobbying for the passing of a request [...] is an inherently difficult task, and often builds on several years of previous engagement by states'); 257 ('[Some] attempts at requesting advisory opinions under the pretext of the protection of public interests [have failed] as they are largely [...] tied to specific state interests')

¹¹⁴ Higgins, 'Current Health of Advisory Opinions' (n 30), 567.

¹¹⁵ *Ibid.*

¹¹⁶ Coleman Andrew, 'ICJ & Highly Political Matters' (2003) 4 *Melbourne Journal of International Law* 29, 30. See *Marbury v Madison* (1803) 5 US (1 Cranch) 137 (USA); *R (Miller) v Prime Minister* (2019) EWHC 2381 (QB) (UK); *Tanada & Macapagal v Cuenca et al* (1957) GR No L-10520 (PHL).

¹¹⁷ Jennings Robert, 'Proper Work & Purposes of the ICJ' in Muller AS, *et al.* (eds), *ICJ: Future Role after Fifty Years* (Nijhoff 1997), 40 cited in Coleman, 'ICJ & Highly Political Matters' (n 116), 32. Hambro, 'Authority of Advisory Opinions' (n 56), 19. See Matheson, 'ICJ on Nuclear Weapons' (n 22), 421.

means'.¹¹⁸ This objection was raised by several states in the *Namibia*,¹¹⁹ *Nuclear Weapons*,¹²⁰ *Wall*,¹²¹ and *Kosovo* opinions.¹²² In response, the Court stated that the 'fact that a [...] question also has political aspects' does not mean that it is not a legal question,¹²³ that it is 'not concerned with the [...] motives [behind] the request or the [opinion's] political implications,¹²⁴ and that its exercise of advisory function 'represents its participation in the [UN's] activities [...] and, in principle, should not be refused'.¹²⁵ Nevertheless, some scholars like Broude, Falk, and Pomerance submit that these 'mechanical' and 'formalistic' rationales are not sufficient to justify the Court's decision to render an opinion in these cases.¹²⁶

The second refers to opinions involving parallel disputes. While the Court has stressed that its advisory jurisdiction may not be used to circumvent the requirement of states' consent to adjudication,¹²⁷ it has entertained requests that are 'relevant to ongoing controversies' and even against the will of states concerned as in *Peace Treaties*,¹²⁸ *Reservations*,¹²⁹ *Namibia*,¹³⁰ *Western Sahara*,¹³¹ *Wall*,¹³² and *Chagos*.¹³³ In these instances, the Court justified its rendering

¹¹⁸ Hambro, 'Authority of Advisory Opinions' (n 56), 19.

¹¹⁹ *Namibia* [1970] (n 26), 23–4.

¹²⁰ See 'Verbatim Record 1995/23', *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ, General List No 95, 1 November 1995), 48 (France); 'Verbatim Record 1995/24', *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ, General List No 95, 2 November 1995), 30–1 (Germany). See *Nuclear Weapons* [1996] (n 33), 234; (Schwebel, dissenting), 311; (Oda, dissenting), 149–50.

¹²¹ *Wall* [2004] (n 26), 155. See 'Written Statement of Russia', *Wall* (Advisory Opinion) (ICJ, General List No 131, 29 January 2004), 4; 'Written Statement of Canada', *Wall* (Advisory Opinion) (ICJ, General List No 131, 30 January 2004), 1; 'Written Statement of the US', *Wall* (Advisory Opinion) (ICJ, General List No 131, 30 January 2004), 2; 'Written Statement of Japan', *Wall* (Advisory Opinion) (ICJ, General List No 131, 30 January 2004), 1; 'Written Statement of the UK', *Wall* (Advisory Opinion) (ICJ, General List No 131, 30 January 2004), 23; 'Written Statement of Australia', *Wall* (Advisory Opinion) (ICJ, General List No 131, 19 December 2003), 6–9.

¹²² *Kosovo* [2010] (n 24), 417. See 'Written Statement of the Netherlands', *Kosovo* (Advisory Opinion) (ICJ, General List No 141, 16 April 2009), 5; 'Written Statement of Japan', *Kosovo* (Advisory Opinion) (ICJ, General List No 141, 17 April 2009), 1.

¹²³ *Kosovo* [2010] (n 24), 415; *Wall* [2004] (n 26), 154; *Nuclear Weapons* [1996] (n 33), 234

¹²⁴ *Kosovo* [2010] (n 24), 415; *Wall* (n 26), 160; *Nuclear Weapons* [1996] (n 33), 234

¹²⁵ *Kosovo* [2010] (n 24), 415; *Wall* [2004] (n 26), 156

¹²⁶ Broude, 'ICJ's Advisory Competence' (n 105), 196. See Pomerance Michla, 'ICJ's Advisory Jurisdiction & Crumbling Wall between Political & Judicial' (2005) 99 *American Journal of International Law* 26, 41.

¹²⁷ *Western Sahara* [1975] (n 26), 25. See *Status of Eastern Carelia* [1923] (n 29), 27.

¹²⁸ *Peace Treaties* [1950] (n 25), 70–1.

¹²⁹ *Reservations to the Genocide Convention* [1951] (n 59), 19.

¹³⁰ 'Written Statement of South Africa', *Namibia* (Advisory Opinion) (ICJ, Vol I Pleadings, Oral Arguments, Documents 337, 1970), 537; *Namibia* [1970] (n 26), 22–3; (Petrén, dissenting), 115.

¹³¹ *Western Sahara* [1975] (n 26), 25.

¹³² *Wall* [2004] (n 26), 157–9; 'Written Statement of Israel', *Wall* (Advisory Opinion) (ICJ, General List No 131, 30 January 2017), 93–5. See 'Written Statement of the US', *Wall* (n 121), 19–20; 'Written Statement of Australia', *Wall* (n 121), 5; 'Written Statement of the UK', *Wall* (n 121), 2.

¹³³ 'Written Statement of the UK', *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 15

of an opinion by stating that it is only ‘advisory and has no binding force’;¹³⁴ it is ‘given not to the states but to the [requesting] organ’;¹³⁵ that ‘differences of views among states on legal issues [exist] in practically every advisory proceeding’;¹³⁶ that the controversy did not arise from ‘bilateral relations’ but in the ‘[UN’s] proceedings’;¹³⁷ and that states are ‘bound by the [Charter’s] Article 96 that empowers [UN organs] to request opinions on any legal question’.¹³⁸ Scholars like Pomerance and Falk submit that this ‘*pro forma* reiteration’ of precedent does not completely address the consent issue.¹³⁹ While the advisory function is not meant to be a ‘dispute-settlement mechanism’,¹⁴⁰ the ICJ has ‘engage[d] with issues that could [...] be addressed under [its] contentious jurisdiction’, going beyond ‘merely “opining”’, and blurring the distinction between advisory and contentious proceedings.¹⁴¹ Note that while the opinions’ subjects have a multilateral dimension, they also have a bilateral one,¹⁴² which is at the ‘heart of the request’.¹⁴³ Thus, Pomerance, among others, argues that advisory opinions have been used to create a ‘back door’ to compulsory jurisdiction.¹⁴⁴ Simply, they enable states to cast another ‘in the role of [a] *de facto* defendant’ without its consent.¹⁴⁵

2. Utility

The next issue pertains to ‘utility’.¹⁴⁶ The Court still exercises its ‘judicial function’ in

February 2018), 102–15. See ‘Written Statement of Germany’, *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 15 January 2018), XI; ‘Written Statement of Russia’, *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 27 February 2018), 11; ‘Written Statement of Australia’, *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 27 February 2018), 8–14; ‘Written Statement of France’, *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 2018), 2–4; ‘Written Statement of China’, *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 1 March 2018), 13–4; ‘Written Statement of the US’, *Chagos Archipelago* (Advisory Opinion) (ICJ, General List No 169, 1 March 2018), 12–5.

¹³⁴ *Peace Treaties* [1950] (n 25), 71; *Western Sahara* [1975] (n 26), 24; *Wall* [2004] (n 26), 157–8.

¹³⁵ *Peace Treaties* [1950] (n 25), 71; *Namibia* [1970] (n 26), 24; *Wall* [2004] (n 26), 159; *Chagos* [2019] (n 38), 118.

¹³⁶ *Namibia* [1970] (n 26), 24; *Wall* [2004] (n 26), 158; *Chagos* [2019] (n 38), 118.

¹³⁷ *Western Sahara* [1975] (n 26), 25; *Wall* [2004] (n 26), 158; *Chagos* [2019] (n 38), 118.

¹³⁸ *Namibia* [1970] (n 26), 22; *Western Sahara* [1975] (n 26), 23–4.

¹³⁹ Pomerance, ‘Crumbling Wall between Political & Judicial’ (n 126), 40; Falk, ‘Kosovo’ (n 99), 48, 53.

¹⁴⁰ *Kosovo* [2010] (n 24), 417

¹⁴¹ Contese, ‘Rule of Advise’ (n 21), 373, 408; Greig, ‘Advisory Jurisdiction & Settlement of Disputes’ (n 29), 325; Broude, ‘ICJ’s Advisory Competence’ (n 105), 191. See Lang Andrew, ‘The Role of the International Court of Justice in a Context of Fragmentation’ (2013) 62 *International & Comparative Law Quarterly* 777, 798

¹⁴² Thirlway (ed), *ICJ Law & Procedure vol II* (n 24), 1825

¹⁴³ *Chagos* [2019] (n 38) (Donoghue, dissenting), 263.

¹⁴⁴ Pomerance, ‘Crumbling Wall between Political & Judicial’ (n 126), 40; Greig, ‘Advisory Jurisdiction & Settlement of Disputes’ (n 29), 327. See Falk, ‘Kosovo’ (n 99), 53; Ruys & Soete, ‘“Creeping” Advisory Jurisdiction’ (n 21), 156; Contese, ‘Rule of Advise’ (n 21), 373.

¹⁴⁵ Falk Richard, *Reviving the World Court* (University Press of Virginia 1986), 32.

¹⁴⁶ See Hambro, ‘Authority of Advisory Opinions’ (n 56), 3 citing Moore John, ‘Rules of Court Preparation, Annex 58A’ (30 January 1922) Series D No 2, Acts & Documents concerning the Court’s Organisation, 383 (‘It

giving opinions.¹⁴⁷ Given its status, its opinions have a ‘persuasive character and substantive authority’.¹⁴⁸ Indeed, advisory opinions have aided international law’s development,¹⁴⁹ clarified some of its rules,¹⁵⁰ and provided actors ‘guidance [on] standards of behaviour’.¹⁵¹ Yet, it is not a ‘form of judicial recourse for states’ that results in a binding decision.¹⁵² An ‘advisory opinion [...] is what it purports to be’—advisory.¹⁵³ It does not require the ‘body requesting the opinion to give [it] effect’,¹⁵⁴ nor does [it] impose duties upon states.¹⁵⁵ It is up to them to

is hardly compatible with [the Court’s] design that [it] should be obliged to render [...] opinions lacking any element of authority or of finality. But it is by no means clear that such [a duty] has been imposed on the Court’).

¹⁴⁷ Falk, ‘ICJ Ruling on Israel’s Security Wall’ (n 26), 48; Akande, ‘IOs & ICJ’s Advisory Jurisdiction’ (n 33), 464; Contese, ‘Rule of Advise’ (n 21), 371; Aljaghoub Mahasen, ‘Absence of State Consent to Advisory Opinions of the International Court of Justice’ (2010) 24 *Arab Law Quarterly* 191, 203. Note Hofbauer, ‘Public Interests & Advisory Opinions’ (n 93), 240 (‘[It] [...] consists of pronouncing on the law [or] interpreting legal rules [...] to clarify their applicability or application’) citing Kolb, *ICJ* (n 28), 1020–1.

¹⁴⁸ Oellers-Frahm Karin, ‘Lawmaking Through Advisory Opinions?’ (2011) 12 *German Law Journal* 1033, 1046, 1050; Kolb, *ICJ* (n 28), 1099; Eichberger Fabian, ‘The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case—Judgement on Preliminary Objections’ (2021) 22 *Melbourne Journal of International Law* 1, 16; Aljaghoub, *Advisory Function of the ICJ* (n 22), 120, 226 citing *Western Sahara* [1975] (n 26) (De Castro, separate opinion), 138. Greig, ‘Advisory Jurisdiction & Settlement of Disputes’ (n 29), 361. See Hernandez, *ICJ & Judicial Function* (n 22), 45 (‘Lawyers often cling to the judicial ascertainment of legal rules as determinative’), 92 (‘Court’s greatest contribution has been to lending authority to the rules that it enunciates and applies’).

¹⁴⁹ Almeida, ‘Enhancing ICJ Procedures’ (n 94), 242 citing von Bogdandy Armin & Venzke Ingo, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014), 15. See Nedeski Nataša, Sparks Tom, & Hernandez Gleider, ‘A Plea for Interim Protection against Climatic Change at the ICJ’ (2023) 22 *Law & Practice of International Courts & Tribunals* 301, 302. But see Greenwood Christopher, ‘Advisory Opinion on Nuclear Weapons & the Contribution of the International Court to International Humanitarian Law’ (1997) 37 *International Review of the Red Cross* 65, 74; Hernandez, *ICJ & Judicial Function* (n 22), 45, 85–6 citing Rosenne Shabtai, *Law & Practice of the International Court: 1920–2005*, vol I (4th edn, Nijhoff 2006), 169.

¹⁵⁰ Ruys & Soete, ‘“Creeping” Advisory Jurisdiction’ (n 21), 156; Oellers-Frahm, ‘Lawmaking Through Advisory Opinions’ (n 148), 1046, 1053; Boisson de Chazournes, ‘Opinions & Common Interests’ (n 12), 107; Hernandez, *ICJ & Judicial Function* (n 22), 91.

¹⁵¹ Falk, ‘Kosovo’ (n 99), 49, 52 (‘Read and treated as the most authoritative [legal] assessments available’).

¹⁵² *Kosovo* [2010] (n 24), 417. But see Schwebel, *Justice in International Law* (n 33), 30 (‘The view that advisory opinions are not binding is more theoretical than real’); Kolb, *ICJ* (n 28), 1097 citing *Abi-Saab George, Les exceptions préliminaires d’arrs la procédure de la Cour internationale* (Pedone 1968), 75–83 (‘There is no fundamental difference between the intrinsic value of the content of the Court’s opinion and that of a judgment [...] both are authoritative judicial pronouncements deciding questions [of law] that have been submitted to the Court’).

¹⁵³ Hambro, ‘Authority of Advisory Opinions’ (n 56), 5 citing *Peace Treaties* [1950] (n 25), 71.

¹⁵⁴ Oellers-Frahm, ‘Lawmaking Through Advisory Opinions’ (n 148), 1047; Hambro, ‘Authority of Advisory Opinions’ (n 56), 17. Greig, ‘Advisory Jurisdiction & Settlement of Disputes’ (n 29), 364 (‘[The GA] in theory the right to reject the Court’s opinion’); Hannum Hurst, ‘Advisory Opinion on Kosovo: Opportunity Lost or Poisoned Chalice Refused’ (2011) 24 *Leiden Journal of International Law* 155, 155 (‘[The GA] was not bound to act in accordance with the opinion. [It] could take other factors into consideration [and] to accept or reject the opinion’). But see Kolb, *ICJ* (n 28), 1097 (‘They are binding on the UN’s organs as regards the point of law’).

¹⁵⁵ Aljaghoub, *Advisory Function of the ICJ* (n 22), 6 citing Nantwi Emmanuel, *Enforcement of International Judicial Decisions & Arbitral Awards in International Law* (2nd edn, Sijthoff 1966), 74; Thirlway Hugh, ‘International Court of Justice’ in Evans Malcolm (ed), *International Law* (Oxford University Press 2003), 582. See Fouchard Felix, ‘International Court of Justice’s Use of Avoidance Techniques’ (2020) 33 *Leiden Journal of International Law* 767, 769

attribute ‘particular effects [...] in their mutual relations to [the] opinion’.¹⁵⁶ For organisations, they offer ‘authoritative legal guidance’ on possible courses of action.¹⁵⁷ For this reason, they ‘usually acted in accordance’ with the opinions.¹⁵⁸ For states, they provide leverage in ‘promoting respect for the law’.¹⁵⁹ They ‘strengthen the position of [states that] seek to enforce international law on reluctant states’.¹⁶⁰ Moreover, the Court having given its authoritative advice as to what the law is, ‘a state would have to justify its actions if acting contrary to [the] advisory opinion’.¹⁶¹

Yet, expectations need to be tempered. As Frowein and Oellers-Frahm observe, opinions on disputes involving duties owed *erga omnes* may have a ‘limited effect’ on states’ behaviour.¹⁶² In most cases, ‘states have refused to act in accordance with the opinion’ especially where it ‘[adversely affected] their [...] interests’.¹⁶³ This was the case for South Africa despite the *Southwest Africa* and *Namibia* opinions,¹⁶⁴ Morocco notwithstanding the *Western Sahara* opinion,¹⁶⁵ Israel despite the *Wall* opinion,¹⁶⁶ and the UK notwithstanding the

¹⁵⁶ *Peace Treaties* [1950] (n 25), 71.

¹⁵⁷ Hernandez, *ICJ & Judicial Function* (n 22), 76; Frowein & Oellers-Frahm, ‘Article 65’ (n 24), 1808. See Higgins, ‘Current Health of Advisory Opinions’ (n 30), 576.

¹⁵⁸ Kolb, *ICJ* (n 28), 1099 citing Rosenne, *Law & Practice of the International Court: 1920–2005* (n 149), 309 ff. See Aljaghoub, *Advisory Function of the ICJ* (n 22), 225, 233; Falk, ‘Kosovo’ (n 99), 50; Webb Philippa, ‘The United Kingdom & Chagos Archipelago Advisory Opinion: Engagement & Resistance’ (2021) 21 *Melbourne Journal of International Law* 726, 737, 740.

¹⁵⁹ Boisson de Chazournes, ‘Opinions & Common Interests’ (n 12), 105; Falk, ‘Kosovo’ (n 99), 54 (‘An opinion can also help shape wider public attitudes that over time may exert pressure on governments to act in accordance with [...] its findings’); Oellers-Frahm, ‘Lawmaking Through Advisory Opinions’ (n 148), 1047 (‘A state would have to justify its actions if acting contrary to an advisory opinion’); Ruys & Soete, ‘“Creeping” Advisory Jurisdiction’ (n 21), 155.

¹⁶⁰ Aljaghoub, *Advisory Function of the ICJ* (n 22), 6. See Charlesworth & Young, ‘Australia & the ICJ Advisory Jurisdiction’ (n 45), 711; Broude, ‘ICJ’s Advisory Competence’ (n 105), 193; Falk, ‘Kosovo’ (n 99), 56; Kattan Victor, ‘Chagos Advisory Opinion & the Law of Self-Determination’ (2020) 10 *Asian Journal of International Law* 12, 13; Rrecaj Besfort, ‘Legal Consequences of the Separation of the Chagos Archipelago’ (2020) 35 *Utrecht Journal of International & European Law* 50, 54; Brownlie Ian, ‘Why do States take Disputes to the International Court?’ in Ando Nisuke, et al. (eds), *Liber Amicorum Shigeru Oda* (BRILL 2002), 831–2.

¹⁶¹ Oellers-Frahm, ‘Lawmaking Through Advisory Opinions’ (n 148), 1051–2; Kolb, *ICJ* (n 28), 1099.

¹⁶² Frowein & Oellers-Frahm, ‘Article 65’ (n 24), 1628. See Hambro, ‘Authority of Advisory Opinions’ (n 56), 21.

¹⁶³ Coleman, ‘ICJ & Highly Political Matters’ (n 116), 40 citing Charney Jonathan, ‘Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, & Non-Performance’ in Damrosch Lori (ed), *The International Court of Justice at a Crossroads* vol Transnational (1987), 298. Webb, ‘UK & Chagos Opinion’ (n 158), 745 (‘Resistance has been the more typical response’); Falk, ‘Kosovo’ (n 99), 52 (‘Attempts to implement such [...] opinions have produced confrontations that have rarely been resolved by compliance’),

¹⁶⁴ Higgins, ‘Current Health of Advisory Opinions’ (n 30), 576; Aljaghoub, *Advisory Function of the ICJ* (n 22), 231–2; Heyns Christof & Killander Magnus, ‘South West Africa/Namibia (Advisory Opinion)’ (Max Planck Encyclopedia, Mar 2007) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e209>>.

¹⁶⁵ Charlesworth & Young, ‘Australia & the ICJ Advisory Jurisdiction’ (n 45), 714.

¹⁶⁶ Watson, ‘“Wall” in Legal & Political Context’ (n 99), 25. But note Oellers-Frahm, ‘Lawmaking Through

Chagos opinion.¹⁶⁷ These seem to weaken the view that advisory opinions offer a way to ‘overcome’ international adjudication’s weaknesses,¹⁶⁸ and provide an alternative response to breaches of duties owed *erga omnes*.¹⁶⁹ Indeed, as Falk submits, the Court’s function should not be enlarged more than it should be.¹⁷⁰ As Higgins puts it ‘little purpose is served by [...] inventing new business [for] advisory opinion’.¹⁷¹ Rather, international actors must ‘work with the seams of political and institutional realities and not against the grain’.¹⁷²

II. INTERVENTIONS IN CONTENTIOUS PROCEEDINGS

Another option for states to respond to breaches of duties owed *erga omnes* is to intervene in contentious proceedings before courts.¹⁷³ Interventions allow ‘third states’—those that are not parties to the case—to participate in the proceedings and protect their interests.¹⁷⁴ Again, it is worth noting that other tribunals, such as ECtHR, IACtHR, ECJ, and ITLOS, allow for this procedure.¹⁷⁵ Yet, due to limitations on space, the discussion below focuses on interventions before the ICJ.

A. Function & Requirements

Interventions are ‘incidental’ proceedings that are ‘engrafted’ or ‘integrated’ into an existing case.¹⁷⁶ They allow states to participate and present their arguments or evidence.¹⁷⁷ In doing so, they permit states that are not original parties to pending cases to protect their interests provided that the intervention’s ‘subject matter’ is ‘closely connected with that of the original

Advisory Opinions’ (n 148), 1042; Gross Aeyal, ‘Construction of a Wall between The Hague & Jerusalem: Enforcement & Limits of Humanitarian Law & the Structure of Occupation’ (2006) 19 *Leiden Journal of International Law* 393, 396.

¹⁶⁷ Eichberger, ‘Maurities/Maldives Delimitation Case’ (n 148), 3; Webb, ‘UK & Chagos Opinion’ (n 158), 737.

¹⁶⁸ See Tanaka, ‘Consequences of Obligations Erga Omnes’ (n 13), 27.

¹⁶⁹ See Boisson de Chazournes, ‘Opinions & Common Interests’ (n 12), 107; Chinkin, *Third Parties* (n 20), 216.

¹⁷⁰ Acharya Upendra, ‘ICJ’s Kosovo Decision: Economical Reasoning & Questions of Legitimacy of the Court’ (2012) 12 *Chicago-Kent Journal of International & Comparative Law* 1, 6 (‘Advisory opinions are not capable of reconciling disputes between states as a matter of law’) citing Falk, ‘Kosovo’ (n 99), 52.

¹⁷¹ Higgins, ‘Current Health of Advisory Opinions’ (n 30), 580.

¹⁷² *Ibid.*

¹⁷³ Tanaka, ‘Consequences of Obligations Erga Omnes’ (n 13), 28.

¹⁷⁴ Chinkin, *Third Parties* (n 20), 149.

¹⁷⁵ See Chinkin Christine, ‘Third Party Intervention before the International Court of Justice’ (1986) 80 *American Journal of International Law* 495, 498; Benzing, ‘Community Interests in the Procedure of Courts & Tribunals’ (n 15), 403. See also the grant of ‘observer’ status to some states in *South China Sea Arbitration* (Philippines v China) (Jurisdiction & Admissibility) (2015) (PCA, 2013-19, 29 October 2015), ¶¶54, 65–8.

¹⁷⁶ Kolb, *ICJ* (n 28), 698; Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1016.

¹⁷⁷ Thirlway, *ICJ* (n 28), 177.

proceedings'.¹⁷⁸

There are two kinds of interventions under the ICJ Statute—‘special’ under Article 63 and ‘general’ under Article 62.¹⁷⁹ The former allows intervention in cases involving a treaty’s construction. Its ‘limited object’ is to allow parties to make submissions on the relevant provisions’ interpretation,¹⁸⁰ and protect their treaty interests.¹⁸¹ While there is ‘no doctrine of *stare decisis* in international proceedings’ and decisions only bind parties, the Court’s interpretation and application of the treaty may affect future litigation among treaty parties.¹⁸² Furthermore, they are ‘bound to be influenced by [the] decision’ and ‘adopt [...] [its] interpretation’.¹⁸³ Thus, ‘it is appropriate that [they be permitted] to present their views on the treaty’s construction’.¹⁸⁴ Yet, having done so, they must accept the interpretation as authoritative as a ‘matter of procedural fairness’.¹⁸⁵ The judgement as to the treaty’s interpretation binds the intervenor.¹⁸⁶ Note that ‘special interventions’ do not require the original parties’ consent. As some like Fitzmaurice submit, the Court’s competence to entertain

¹⁷⁸ Chinkin, *Third Parties* (n 20), 155.

¹⁷⁹ Note that it is more precise to refer to these as ‘special’ and ‘general’ rather than ‘intervention as a right’ and ‘discretionary intervention’ (Kolb, *ICJ* (n 28), 695, 732.) The Court does not have the ‘faculty to reject intervention if the statutory conditions are met’ (Miron Alison & Chinkin Christine, ‘Article 62’ in Zimmermann Andreas, *et al.* (eds), *Statute of the International Court of Justice: Commentary* (3rd edn, 2012), 1698 citing Fitzmaurice Gerald, ‘Law & Procedure of the International Court of Justice, 1951–54’ (1958) 34 *British Yearbook of International Law* 1, 127) What it has is a ‘margin of appreciation’ in assessing if requirements were met (Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1016; Miron Alison & Chinkin Christine, ‘Article 63’ in Zimmermann Andreas, *et al.* (eds), *Statute of the International Court of Justice: Commentary* (3rd edn, Oxford University Press 2012), 1748; Kolb, *ICJ* (n 28), 695, 732) Under Article 63, a state need only show that it is a party to the relevant multilateral agreement. Under Article 62, it must demonstrate that it has an ‘interest of a legal nature’ that may be affected by the proceedings (*ibid.*, 732).

¹⁸⁰ Almeida, ‘Enhancing ICJ Procedures’ (n 94), 245; Rosenne, ‘Reflections on Intervention’ (n 14), 76; Kolb, *ICJ* (n 28), 700, 731 (‘The object of Article 63 is not only to [...] positively to promote, a relative unity in the law on multilateral conventions’). Note that ‘Article 63 [...] only refers to the construction of multilateral conventions’ (Almeida Paula Wojcikiewicz, ‘International Procedural Regulation in the Common Interest: Role of Third-Party Intervention & Amicus Curiae before the ICJ’ (2019) 18 *Law & Practice of International Courts & Tribunals* 163, 177). ‘No comparable right to intervene in respect of general international law’ (Urs, ‘Question of Standing before the ICJ’ (n 94), 13).

¹⁸¹ Miron & Chinkin, ‘Article 63’ (n 179), 1773; Reghizzi Zeno, ‘Objects & Effects of Non-Party Intervention’ (2022) 35 *Leiden Journal of International Law* 163, 168. See Jessup, ‘Intervention’ (n 98), 904.

¹⁸² Miron & Chinkin, ‘Article 63’ (n 179), 1773.

¹⁸³ Chinkin, *Third Parties* (n 20), 153 citing Günther Konstantin, ‘Zulassigkeit und Grenzen der Intervention bei Streitigkeiten vor dem IGH’ (1991) 34 *German Yearbook of International Law* 254, 288.

¹⁸⁴ Chinkin, *Third Parties* (n 20), 153. See McIntyre Juliette, ‘Crawford’s Multilateralism & the International Court of Justice’ (2022) 40 *Australian Yearbook of International Law* 271, 286 (‘It is commonly agreed that the object of Article 63 was to acknowledge the “*res interpretata*” effect’ of the Court’s judgments, and to expand the “normative legitimacy” of such decisions by enabling broader state participation in the act of interpretation’).

¹⁸⁵ Reghizzi, ‘Non-Party Intervention’ (n 181), 177 citing Greig DW, ‘Third Party Rights & Intervention before the International Court’ (1991) 40 *Virginia Journal of International Law* 285, 286.

¹⁸⁶ Kolb, *ICJ* (n 28), 741; Miron & Chinkin, ‘Article 63’ (n 179), 1743. See *Whaling in the Antarctic* (Australia v Japan) (Intervention of New Zealand) [2013] ICJ 3 (Gaja, declaration), 41–2; Jessup, ‘Intervention’ (n 98), 904

requests for intervention is ‘implicitly derived’ from the states’ consent to the Statute.¹⁸⁷

In contrast, ‘general’ interventions allow states to intervene if they have ‘[a legal interest] which may be affected by the decision in the case’.¹⁸⁸ There are also two kinds of ‘general interventions’—‘as a party’ or ‘as a non-party’.¹⁸⁹ An intervenor ‘as a party’ presses ‘its [...] claim against one or both parties.’¹⁹⁰ Thus, it requires a jurisdictional link between the state intervening ‘as a party’ and the original parties.¹⁹¹ As a party, it also becomes bound by the

¹⁸⁷ Fitzmaurice, ‘Law & Procedure of the ICJ: 1951–4’ (n 179), 127; Almeida, ‘Enhancing ICJ Procedures’ (n 94), 247, 250; Hernandez, *ICJ & Judicial Function* (n 22), 62 citing *Land, Island, & Maritime Frontier* (El Salvador/Honduras) (Application to Intervene by Nicaragua) [1990] ICJ 92, 127. Note that while Article 63 suggests ‘that there is little room for [...] discretion’, the Court still needs to ascertain that the conditions have been met (Chinkin, *Third Parties* (n 20), 178. See *Haya de la Torre* (Colombia v Peru) (Judgement) [1951] ICJ 71, 76–7; *Military & Paramilitary Activities in & against Nicaragua* (Nicaragua v US) (Declaration of Intervention by El Salvador) [1984] ICJ 215, 216; *Whaling in the Antarctic* (Declaration of Intervention of New Zealand) [2013] (n 186), 5–6). Yet, even if the Article 63’s requirements are easier to meet than that of ‘general’ interventions, it was, for a time, ‘practically dormant’ (Thirlway (ed), *ICJ Law & Procedure vol II* (n 24), 1837). Before *Allegations of Genocide*, there had only a few states have availed this prerogative ‘possibly because its practical advantages remain obscure’ or due to the apprehension concerning [its] ‘binding effect’ (ibid, 1837. See e.g. *Haya de la Torre* [1951] (n 187), 74; *Military & Paramilitary Activities* (Declaration of Intervention by El Salvador) [1984] (n 187), 215; ‘Application to Intervene & Declaration of Intervention of the Solomon Islands’, *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 24 August 1995), 1; ‘Application to Intervene & Declaration of Intervention of Micronesia’, *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 24 August 1995), 1–2; ‘Application to Intervene & Declaration of Intervention of the Marshall Islands’, *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 24 August 1995), 1–2; ‘Application to Intervene & Declaration of Intervention of Samoa’, *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 24 August 1995), 1–2; *Whaling in the Antarctic* (Declaration of Intervention of New Zealand) [2013] (n 186), 4).

¹⁸⁸ *ICJ Statute* (n 23), art 62.

¹⁸⁹ Note that there was been a great ‘degree of uncertainty’ regarding ‘general’ interventions especially as to the role of the intervening state (Kolb, *ICJ* (n 28), 696; Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1036. See *Continental Shelf* (Tunisia/Libya) (Application to Intervene by Malta) [1981] ICJ 3 (Oda, separate opinion), 13–4; *Continental Shelf* (Libya/Malta) (Application to Intervene by Italy) [1984] ICJ 3 (Mbaye, dissenting), 35, 84, 115). For instance, there was the question of whether the original parties consent is required for the intervention (Rosenne, ‘Reflections on Intervention’ (n 14), 76; Miron & Chinkin, ‘Article 62’ (n 179), 1732; Kolb, *ICJ* (n 28), 698; Reghizzi, ‘Non-Party Intervention’ (n 181), 163). Only in 1990 did the Court distinguish between two types of ‘general’ intervention—‘as a party’ and ‘as a non-party’ (*Land, Island, & Maritime Frontier* (Application to Intervene by Nicaragua) [1990] (n 187), 134–5 (‘A state which is [intervening], does not, by reason only of being an intervenor, become also a party to the case’).

¹⁹⁰ Kolb, *ICJ* (n 28), 696; Hernandez, *ICJ & Judicial Function* (n 22), 63; Reghizzi, ‘Non-Party Intervention’ (n 181), 167 citing *Land, Island, & Maritime Frontier* (Application to Intervene by Nicaragua) [1990] (n 187), 132. See Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1038, 1044, 1048 citing ‘Application to Intervene by Fiji’, *Nuclear Tests* (New Zealand v France) (Intervention) (ICJ, General List No 59, 9 May 1973), 91 (‘Fiji is affected by French conduct at least as much as New Zealand and that similar legal considerations affect its position’). But see Thirlway (ed), *ICJ Law & Procedure vol II* (n 24), 1841 (‘Since the state seeking to intervene becomes a party [...] if its intervention is admitted, the situation is no longer one of two contending states as parties plus an intervening state, but the case [...] becomes a three-party case’) citing *Land, Island, & Maritime Frontier* (Application to Intervene by Nicaragua) [1990] (n 187) (Abraham, dissenting), 390; Chinkin, *Third Parties* (n 20), 213 (‘If a state prefers to commence parallel proceedings instead of [intervening], the Court may promote [...] economy and efficiency through directing joinder of proceedings’).

¹⁹¹ *Land, Island, & Maritime Frontier* (Application to Intervene by Nicaragua) [1990] (n 187), 135 (‘Article 62 [...] [does not make an] intervenor a party’); *Sovereignty over Pulau Ligitan & Pulau Sipadan* (Indonesia/Malaysia) (Application to Intervene by the Philippines) [2001] ICJ 575, 589 (‘The absence of a

decision to the extent of its claims.¹⁹² Yet, to date, only in one instance has a state sought to intervene—Nicaragua in the *Application of the Genocide Convention in Gaza*—and the Court is yet to decide on the intervention.¹⁹³ Thus, the exact nature of these proceedings ‘has not yet been fully worked out’¹⁹⁴

In contrast, a state intervening as ‘as a non-party’ only seeks to safeguard its ‘rights or interests’ and inform the Court of their ‘nature and scope’.¹⁹⁵ While the ‘relative effect of *res judicata*’ necessarily protects states,¹⁹⁶ the Court’s ‘decision and the reasoning’ invariably have ‘factual and [...] legal effects on third states’.¹⁹⁷ The Court would likely ‘rely on its jurisprudence’ and its decisions may affect ‘future litigation’.¹⁹⁸ They may also shape states’ ‘future behaviour’.¹⁹⁹ Thus, interventions allow states to ‘ensure that the Court is ‘fully aware’ of their interests so as ‘to narrow the [decision’s] scope [and] not to affect [...] intervenor’.²⁰⁰

As ‘non-party’ intervenors do not assert claims against the original parties, the parties’ consent, as Hernandez submits, is not required.²⁰¹ Like ‘special’ interventions, states’ ‘acceptance of the Statute entails [their consent to] the competence conferred on the Court by Article 62’.²⁰² Yet, the Court has a wider discretion in assessing if the conditions for

jurisdictional link [...] does not present a bar to the [...] intervention’). *Territorial & Maritime Dispute* (Nicaragua v Colombia) (Application to Intervene by Honduras) [2011] ICJ 420, 432 (‘[Intervening] as a party requires [...] a basis of jurisdiction [among] the states’).

¹⁹² *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 133 (‘Those states are “parties” to the proceedings and are bound by the [...] eventual decision [as they] conferred jurisdiction on the Court’).

¹⁹³ See ‘Application to Intervene of Nicaragua’, *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Intervention) (ICJ, General List No 192, 23 January 2024), 10.

¹⁹⁴ Thirlway (ed), *ICJ Law & Procedure vol II* (n 24), 1840; McIntyre Juliette, ‘Why Nicaragua’s Article 62 Intervention in South Africa v Israel is Potentially Unhelpful’ (Verfassungsblog, 11 February 2024) <<https://verfassungsblog.de/why-nicaraguas-article-62-intervention-in-south-africa-v-israel-is-potentially-unhelpful/>>.

¹⁹⁵ Barrie George, ‘Third-party State Intervention in Disputes before the International Court of Justice: A Reassessment of Articles 62 & 63’ (2020) 53 *Comparative & International Law Journal of Southern Africa* Article 1, 9. See *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 133–4; *Land & Maritime Boundary* (Cameroon v Nigeria; Equatorial Guinea intervening) (Judgement) [2002] ICJ 303, 421.

¹⁹⁶ Miron & Chinkin, ‘Article 62’ (n 179), 1715; Thirlway, *ICJ* (n 28), 180. See *ICJ Statute* (n 23), art 59. Contra Reghizzi, ‘Non-Party Intervention’ (n 181), 178 citing Greig, ‘Third Party Rights & Intervention’ (n 185), 326

¹⁹⁷ Kolb, *ICJ* (n 28), 695

¹⁹⁸ Chinkin, ‘Third Party Intervention’ (n 175), 502.

¹⁹⁹ *Ibid.*

²⁰⁰ Reghizzi, ‘Non-Party Intervention’ (n 181), 168, 170; Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1049, 1051, 1071; Palchetti Paolo, ‘Opening the ICJ to Third States: Intervention & Beyond’ (2002) 6 *Max Planck Yearbook of UN Law* 139, 146; Barrie, ‘Third-party State Intervention’ (n 195), 11 citing Kolb, *ICJ* (n 28), 728.

²⁰¹ Hernandez, *ICJ & Judicial Function* (n 22), 63.

²⁰² *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 133; *Land & Maritime Boundary* (Cameroon v Nigeria) (Application to Intervene by Equatorial Guinea) [1999] ICJ 1029;

intervention have been fulfilled.²⁰³ Article 62 imposes three conditions. First, a state must raise a ‘legal interest’ and not a ‘purely political, economic, or strategic’ one.²⁰⁴ How ‘legal interests’ differ from ‘rights’ remains to be seen. Some, including the ICJ, suggest that the former is ‘broader’ and intervening states do not need to prove that any ‘entitlement based on law’ is affected.²⁰⁵ Yet, others disagree arguing that ‘rights’ and ‘legal interests’ are the same.²⁰⁶ This distinction between ‘rights’ and ‘legal interests’, or perhaps lack thereof for the purposes of competence to invoke responsibility and intervention,²⁰⁷ is further discussed in *Chapter 11*. Second, the interest must be concrete and individual rather than a general interest in the applicable law.²⁰⁸ Finally, it ‘must be connected with the [dispute’s] subject’ which ‘may be affected by the [Court’s] decision’.²⁰⁹

Sovereignty over Pulau Ligitan & Pulau Sipadan (Application to Intervene by Philippines) [2001] (n 191), 588–9.

²⁰³ Chinkin, *Third Parties* (n 20), 275; Miron & Chinkin, ‘Article 62’ (n 179), 1698. See *Territorial & Maritime Dispute (Application to Intervene by Honduras)* [2011] (n 191), 434 (‘It is for the Court [...] to decide [if the conditions] laid down by [Article 62] [have] been fulfilled’); *Continental Shelf (Application to Intervene by Italy)* [1984] (n 189), 12; *Territorial & Maritime Dispute (Nicaragua v Colombia)* (Application to Intervene by Costa Rica) [2011] ICJ 348, 358.

²⁰⁴ *Territorial & Maritime Dispute (Application to Intervene by Costa Rica)* [2011] (n 203), 358.

²⁰⁵ See *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 36; *Territorial & Maritime Dispute (Application to Intervene by Costa Rica)* [2011] (n 203), 358 (‘[A] state seeking to intervene as a non-party does not have to establish that one of its rights may be affected, it is sufficient [...] that its [legal interest] may be affected’); (Abraham, dissenting), 385; Donoghue, dissenting), 476. See also Kolb, *ICJ* (n 28), 706 (‘The expression ‘interest of a legal nature’ goes beyond legal rights’). Benzing, ‘Community Interests in the Procedure of Courts & Tribunals’ (n 15), 399 (‘It is [...] doubtful [if] the intervener is required to prove a subjective legal right protecting it’).

²⁰⁶ See *Continental Shelf (Application to Intervene by Italy)* [1984] (n 189) (Ago, dissenting), 124 (‘An interest of a legal nature [is] nothing other than a right’); *Territorial & Maritime Dispute (Application to Intervene by Honduras)* [2011] (n 191) (Keith, declaration), 469 (‘If the claim is based on law and is real and concrete, is it not a claim of a right (or a liberty or a power) recognised by the law?’); (Al-Khasawneh, declaration), 381–2 (‘Legal interests [are] nothing other than rights [...] [Indeed], the words “right”, “legal interests” and “entitlements” are used interchangeably [...] when the word “interest” is qualified by the adjective “legal”, we are of necessity expressing the concept of “rights” through other words’). See also *Land & Maritime Boundary (Application to Intervene by Equatorial Guinea)* [1999] (n 202), 1031.

²⁰⁷ Urs, ‘Question of Standing before the ICJ’ (n 94), 525 (‘There is no distinction between the interest of the state instituting the proceedings and the interests of states seeking to intervene [under Article 62]’).

²⁰⁸ *Continental Shelf (Application to Intervene by Malta)* [1981] (n 189), 11; *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 124; *Territorial & Maritime Dispute (Application to Intervene by Honduras)* [2011] (n 191), 434. See Miron & Chinkin, ‘Article 62’ (n 179), 1707 (‘[A] contrary position would virtually open the gate of intervention to all states’); Palchetti, ‘Intervention & Beyond’ (n 200), 162.

²⁰⁹ *Territorial & Maritime Dispute (Application to Intervene by Honduras)* [2011] (n 191), 435; *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 122; 1034; Reisman William, *Nullity & Revision: Review & Enforcement of International Judgments & Awards* (Yale University Press 1971), 480. Note that there remain issues in the requirements for ‘general’ interventions which contribute to their rarity (Kolb, *ICJ* (n 28), 703; Murphy Sean, ‘Amplifying the World Court’s Jurisdiction through Counter-Claims & Third-Party Intervention’ (2000) 33 *George Washington International Law Review* 5, 21). Only fourteen requests have been made in eleven cases and merely three have been granted (See e.g. *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187); *Land & Maritime Boundary (Application to Intervene by*

B. Practice

Most of the interventions to date have been made to protect individual interests rather than common ones.²¹⁰ These interventions, save for one, were made in delimitation cases where states sought to protect rights or legal interests in ‘overlapping geographical areas’.²¹¹ The exception was Greece’s ‘general’ intervention in Italy’s *Jurisdictional Immunities* case against Germany. Greece was concerned with the enforceability in Italy of Greek courts’ judgements regarding Nazi Germany’s breaches of humanitarian law.²¹²

There were also interventions made both to protect individual concerns and the international community.²¹³ When Australia and New Zealand initiated the *Nuclear Tests* cases

Equatorial Guinea) [1999] (n 202); *Jurisdictional Immunities of the State* (Germany v Italy) (Application for Permission to Intervene by Greece) [2011] ICJ 494)

²¹⁰ Almeida, ‘Intervention & Amicus Curiae’ (n 180), 169; Bonafé Beatrice, ‘Collective Dimension of Bilateral Litigation: Ukraine v Russia case before the ICJ’ (2022) 96 *Questions of International Law* 27, 29

²¹¹ Kolb, *ICJ* (n 28), 703; Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1038. See Malta in the continental shelf dispute between Tunisia and Libya: ‘According to Malta, it has [an interest] in the legal principles and rules for [...] the delimitation [...] of [the] continental shelf’ (*Continental Shelf (Application to Intervene by Malta)* [1981] (n 189), 8–9) The Court deemed the intervention inadmissible as Malta’s interest was a ‘mere preoccupation with rules and principles of law’ (ibid, 8–9, 11); Italy in the continental shelf delimitation between Libya and Malta: ‘The zones [...] over which Italy considers that it has rights [...] are comprised within the region which is [...] the subject-matter of the case’ (*Continental Shelf (Application to Intervene by Italy)* [1984] (n 189), 10–1) Italy’s intervention was deemed inadmissible as they necessitate the Court to ‘make a finding [...] on disputes between Italy and [...] the parties’ without a jurisdictional link (ibid, 19); Nicaragua in the territorial dispute between El Salvador and Honduras: ‘The condominium, if it is declared [...] would [...] involve three riparians, and not only the parties to the [case]’ (*Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 121) The Court admitted this intervention as its object, ‘to inform the Court of the [...] intervening states [...] legal rights’, was proper (ibid, 130); Equatorial Guinea in the land and maritime case between Cameroon and Nigeria: ‘The prolongation of the maritime boundary between the parties [...] will eventually run into [...] zones where the rights and interests of Cameroon and Nigeria will overlap those of third states’ (*Land & Maritime Boundary (Application to Intervene by Equatorial Guinea)* [1999] (n 202), 1031–2) This intervention was admitted as ‘Equatorial Guinea has [...] established that it has [a legal] interest which could be affected by [the Court’s] judgment’ (ibid, 1034); The Philippines in the sovereignty dispute between Indonesia and Malaysia: ‘The Philippine [legal] interest [...] “is solely and exclusively addressed to the treaties, agreements and other evidence furnished by parties and appreciated by the Court”’ (*Sovereignty over Pulau Ligitan & Pulau Sipadan (Application to Intervene by Philippines)* [2001] (n 191), 580) The application was deemed inadmissible as the Philippines had no legal interest that might be affected by Court’s decision (ibid, 607); Honduras and Costa Rica in the territorial delimitation between Nicaragua and Colombia: ‘Honduras’ [objective is] to protect its rights and legal interests and to inform the Court of the nature of these’: (*Territorial & Maritime Dispute (Application to Intervene by Honduras)* [2011] (n 191), 429); ‘[The intervention] “would have the limited purpose of informing the Court of [...] Costa Rica’s legal rights and interests’ (*Territorial & Maritime Dispute (Application to Intervene by Costa Rica)* [2011] (n 203), 357); Both were deemed inadmissible as they have ‘not demonstrated that [they have] a [legal] interest which may be affected by the decision in the main proceedings’ (*Territorial & Maritime Dispute (Application to Intervene by Honduras)* [2011] (n 191), 444; *Territorial & Maritime Dispute (Application to Intervene by Costa Rica)* [2011] (n 203), 373).

²¹² Note that the Court accepted the object of Greece’s intervention, ‘to inform the Court of its legal rights and interests’, as proper. It also deemed that Greece ‘may be affected’ if it ‘declared Greek judgements [to be] enforceable in Italy’ (*Jurisdictional Immunities of the State (Application to Intervene by Greece)* [2011] (n 209), 495–6).

²¹³ Almeida, ‘Intervention & Amicus Curiae’ (n 180), 169. See McGarry Brian, ‘A Rush to Judgment? The Wobbly Bridge from Judicial Standing to Intervention in ICJ Proceedings’ (2023) 100 *Questions of International Law* 5, 11.

against France in 1972, Fiji sought a ‘general’ intervention not only because it would be ‘affected by [the] French conduct’ but because France’s conduct ‘constitute[d] a hazard to [the] environment’.²¹⁴ When New Zealand sought to re-open the case in 1995, the Solomon Islands, Micronesia, the Marshall Islands, and Samoa sought to intervene under Articles 62 and Article 63. The states claimed that they had an interest in preventing the ‘introduction [of radioactive materials] into the [...] environment’ both ‘within [their] maritime areas’ and areas ‘beyond the limits of national jurisdiction’.²¹⁵

Still, some interventions were made purely for common concerns. This appears to affirm the view that interventions, both ‘special’ and ‘general’,²¹⁶ ‘represent a natural avenue for states other than the contending parties’ to raise ‘matters of common interests’.²¹⁷ When New Zealand attempted to revisit the *Nuclear Tests*, Australia applied for a ‘general’ intervention claiming that the duties that New Zealand sought to implement were owed *erga omnes* putting in issue all states’ rights ‘including Australia’.²¹⁸ Thus, Australia claimed that it has a ‘legal interest as a member of the [...] community’ in France’s observance of its duties that is ‘identical to [New Zealand’s]’.²¹⁹ Likewise, when Australia initiated the *Whaling in the Antarctic* case against Japan in 2010, New Zealand filed a declaration for ‘special’ intervention citing its interests in the ICRW’s Article VIII’s construction and the marine environment’s preservation.²²⁰ It further

²¹⁴ ‘Application to Intervene by Fiji’, *Nuclear Tests* (n 190), 89, 91–2; ‘Application to Intervene by Fiji’, *Nuclear Tests* (Australia v France) (Intervention) (ICJ, General List No 58, 16 May 1973), 149, 151. See Thirlway (ed), *ICJ Law & Procedure vol II* (n 24), 1044 (‘[If] the objective of Fiji [...] was to enforce against France a claim for injury then it needed to be recognised as a party to the case’). Note that the Court did not rule on the intervention’s admissibility as it discontinued the proceedings (*Nuclear Tests* (Australia v France) (Judgment) [1974] ICJ 253, 271; *Nuclear Tests* (New Zealand v France) (Judgment) [1974] ICJ 457, 476).

²¹⁵ ‘Application to Intervene & Declaration of Intervention of the Solomon Islands’, *Request for Examination of Nuclear Test* (n 187), 4; ‘Application to Intervene & Declaration of Intervention of Micronesia’, *Request for Examination of Nuclear Test* (n 187), 4; ‘Application to Intervene & Declaration of Intervention of the Marshall Islands’, *Request for Examination of Nuclear Test* (n 187), 4; ‘Application to Intervene & Declaration of Intervention of Samoa’, *Request for Examination of Nuclear Test* (n 187), 4. Note that the Court did not rule on the interventions’ admissibility following its rejection of New Zealand’s application (*Request for an Examination of the Court’s Judgment in the Nuclear Tests* (New Zealand v France) (Judgment) [1995] ICJ 288, 307).

²¹⁶ Tanaka, ‘Consequences of Obligations Erga Omnes’ (n 13), 28. But note Bonafé, ‘Ukraine v Russia case before the ICJ’ (n 210), 32 (‘Article 63 intervention is premised on [...] collective interests [...] as opposed to Article 62’).

²¹⁷ Almeida, ‘Enhancing ICJ Procedures’ (n 94), 245, 247; McIntyre, ‘Procedural Values’ (n 103), 28–9 citing Palchetti, ‘Intervention & Beyond’ (n 200), 6; Gaja Giorgio, ‘A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice’ in Fastenrath Ulrich, et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), 665.

²¹⁸ ‘Application to Intervene of Australia’, *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 23 August 1995), 9.

²¹⁹ Ibid, 11, (‘Where the relevant [duty is owed] *erga omnes*, [...] every state has an “interest of a legal nature” which may be affected by the decision in the case”, and is entitled to seek permission to intervene under [...] Article 62’); 12 (‘As the legal interest of all [states] in the observance of [duties owed] *erga omnes* is the same, that legal interest of every state will be affected equally by a decision whether or not to indicate such measures’).

²²⁰ ‘Declaration of Intervention of New Zealand’, *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Intervention) (ICJ, General List No 148, 20 November 2012), 8 ff.

stressed that ICRW parties ‘have a collective interest’ in ‘[enabling] the IWC to perform its functions’.²²¹

There was also the volume of interventions in the *Allegations of Genocide* case.²²² Recall that Russia claimed that Ukraine committed genocide in Luhansk and Donetsk and its use of force against Ukraine was in response to this genocide.²²³ In 2022, Ukraine initiated proceedings against Russia under the Genocide Convention requesting, what is essentially a declaratory judgement,²²⁴ that it has not committed genocide and that Russia’s actions cannot be justified under the Convention.²²⁵ Several states then sought to intervene under Article 63 citing the collective interests in the Convention’s interpretation.²²⁶ Arguably, these

²²¹ Ibid, 14. Note that the Court deemed New Zealand’s intervention admissible as it ‘falls within the provisions of Article 63 of the Statute’ (*Whaling in the Antarctic (Declaration of Intervention of New Zealand)* [2013] (n 186), 9)

²²² Bonafé, ‘Ukraine v Russia case before the ICJ’ (n 210), 27; McGarry Brian, ‘Obligations Erga Omnes (Partes) & the Participation of Third States in Inter-State Litigation’ (2023) 22 *Law & Practice of International Courts & Tribunals* 273, 274. Note these states have lodged declarations: Latvia, Lithuania, New Zealand, the UK the US, Sweden, France, Romania, Italy, Poland, Denmark, Finland, Estonia, Spain, Australia, Portugal, Austria, Luxembourg, Greece, Croatia, Czechia, Bulgaria, Malta, Norway, Belgium, Canada, the Netherlands, Slovakia, Slovenia, Cyprus, and Liechtenstein.

²²³ ‘Application’, *Allegations of Genocide* (Ukraine v Russia) (ICJ, General List No 182, 27 February 2022)

²²⁴ See McIntyre Juliette, ‘Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?’ (2016) 29 *Leiden Journal of International Law* 177, 179.

²²⁵ ‘Application of Ukraine’, *Allegations of Genocide* (n 223), 16. See *Allegations of Genocide* (Ukraine v Russia) (Provisional Measures) [2022] (ICJ, General List 182, 22 March 2022), 2; *Allegations of Genocide* (Ukraine v Russia) (Admissibility of Declarations for Intervention) [2023] (ICJ, General List 182, 5 June 2023) (Xue dissenting), 6.

²²⁶ Bonafé, ‘Ukraine v Russia case before the ICJ’ (n 210), 27; McIntyre Juliette, Pomson Ori, & Wigard Kyra, ‘Reviewing Key Themes & Arguments in Ukraine v Russia’ (CIL Dialogues, 27 October 2022). See e.g. ‘Declaration of Intervention of New Zealand’, *Allegations of Genocide* (Ukraine v Russia) (Declaration of Intervention) (ICJ, General List No 182, 28 July 2022), 4; ‘Declaration of Intervention of the UK’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 1 August 2022), 5–6; ‘Declaration of Intervention of Germany’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 1 September 2022), 4–6; ‘Declaration of Intervention of the US’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 7 September 2022), 6; ‘Declaration of Intervention of Sweden’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 9 September 2022), 6–7; ‘Declaration of Intervention of Poland’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 15 September 2022), 9; ‘Declaration of Intervention of Denmark’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 16 September 2022), 7; ‘Declaration of Intervention of Ireland’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 19 September 2022), 3; ‘Declaration of Intervention of Finland’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 21 September 2022), 2–3; ‘Declaration of Intervention of Spain’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 29 September 2022), 7; ‘Declaration of Intervention of Australia’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 30 September 2022), 10; ‘Joint Declaration of Intervention of Canada & the Netherlands’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 7 December 2022), 3. Note that except for one, the Court deemed the interventions admissible ‘at the preliminary objections stage’ in so far ‘as they concern the construction of Article IX and other provisions of the [...] Convention that are relevant for the determination [...] jurisdiction *ratione materiae*’ (*Allegations of Genocide* [2023] (n 225), 20). It contrasted this with its decision in *Military & Paramilitary Activities (Declaration of Intervention by El Salvador)* [1984] (n 187) where El Salvador ‘failed to identify the provisions of any convention the interpretation which [...] would be in question at the stage of the proceedings concerning the jurisdiction of the Court’ (*Allegations of Genocide* [2023] (n 225), 13). The Court

interventions are ‘largely performative’.²²⁷ All supported Ukraine.²²⁸ That said, the intervenors’ submissions varied. Several argued that the Court has jurisdiction over the dispute.²²⁹ Some stressed genocide’s narrow definition presumably to cast doubt on whether any occurred in Ukraine.²³⁰ Others emphasised the duty to act in good faith and exercise due diligence before taking any action to prevent genocide.²³¹ Still, a few argued that responding to genocide cannot justify aggression and breaches of humanitarian law.²³²

considered the US intervention inadmissible at [the preliminary] stage given its reservation to the Convention that excludes Article IX (ibid, 19). *But note* ibid (Xue dissenting), 3 (‘The declarations of intervention [...] even where identifying Article IX for construction, all concern the merits of the case [...] an intervenor should not be allowed to address the merits [...] at the preliminary objections phase’), 5 (‘Some of the declarations explicitly disregard the distinction between jurisdiction and merits [...] the submissions of some states apparently extend far beyond the construction of the Genocide Convention’).

²²⁷ McIntyre Juliette, ‘Less a Wave Than a Tsunami: Procedural Implications for the ICJ of the Article 63 Interventions in Ukraine v Russia’ (Völkerrechtsblog, 10 November 2022) <<https://voelkerrechtsblog.org/less-a-wave-than-a-tsunami/>>.

²²⁸ Wigard, Ori, & McIntyre, ‘Intervention in Ukraine v Russia’ (n 97), 2; *Allegations of Genocide* [2023] (n 225) (Xue dissenting), 6 (‘Virtually all of them [seek] a “negative declaration” [of] the absence of genocide on the part of Ukraine [and] [...] a finding that [Russia] has acted contrary to its [duties] under the [...] Convention’).

²²⁹ See e.g. ‘Declaration of Intervention of New Zealand’, *Allegations of Genocide* (n 226), 7–9; ‘Declaration of Intervention of the UK’, *Allegations of Genocide* (n 226), 8–9, 12–3, 16–7; ‘Declaration of Intervention of Germany’, *Allegations of Genocide* (n 226), 8–13; ‘Declaration of Intervention of the US’, *Allegations of Genocide* (n 226), 12–3, 15; ‘Declaration of Intervention of Sweden’, *Allegations of Genocide* (n 226), 8–14; ‘Declaration of Intervention of France’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 12 September 2022), 7–9; ‘Declaration of Intervention of Italy’, *Allegations of Genocide* (Ukraine v Russia) (Declaration of Intervention) (ICJ, General List No 182, 12 September 2022), 8–12; ‘Declaration of Intervention of Poland’, *Allegations of Genocide* (n 226), 9–14; ‘Declaration of Intervention of Denmark’, *Allegations of Genocide* (n 226), 4–7; ‘Declaration of Intervention of Ireland’, *Allegations of Genocide* (n 226), 6; ‘Declaration of Intervention of Finland’, *Allegations of Genocide* (n 226), 6–8; ‘Declaration of Intervention of Spain’, *Allegations of Genocide* (n 226), 4–6; ‘Declaration of Intervention of Australia’, *Allegations of Genocide* (n 226), 11–6; ‘Declaration of Intervention of Austria’, *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 4 October 2022), 5–9; ‘Joint Declaration of Intervention of Canada & the Netherlands’, *Allegations of Genocide* (n 226), 7.

²³⁰ See e.g. ‘Declaration of Intervention of New Zealand’, *Allegations of Genocide* (n 226), 10; ‘Declaration of Intervention of the UK’, *Allegations of Genocide* (n 226), 17–8; ‘Declaration of Intervention of Sweden’, *Allegations of Genocide* (n 226), 13, 16–7; ‘Declaration of Intervention of France’, *Allegations of Genocide* (n 229), 9–11; ‘Declaration of Intervention of Ireland’, *Allegations of Genocide* (n 226), 5; ‘Declaration of Intervention of Australia’, *Allegations of Genocide* (n 226), 17–8.

²³¹ See e.g. ‘Declaration of Intervention of New Zealand’, *Allegations of Genocide* (n 226), 9; ‘Declaration of Intervention of the UK’, *Allegations of Genocide* (n 226), 14, 15, 19–20; ‘Declaration of Intervention of Sweden’, *Allegations of Genocide* (n 226), 13, 15–6; ‘Declaration of Intervention of France’, *Allegations of Genocide* (n 229), 6–7; ‘Declaration of Intervention of Italy’, *Allegations of Genocide* (n 229), 14–16; ‘Declaration of Intervention of Poland’, *Allegations of Genocide* (n 226), 16–8; ‘Declaration of Intervention of Denmark’, *Allegations of Genocide* (n 226), 8–9; ‘Declaration of Intervention of Finland’, *Allegations of Genocide* (n 226), 5; ‘Declaration of Intervention of Spain’, *Allegations of Genocide* (n 226), 7; ‘Declaration of Intervention of Australia’, *Allegations of Genocide* (n 226), 19–20; ‘Declaration of Intervention of Austria’, *Allegations of Genocide* (n 229), 9; ‘Joint Declaration of Intervention of Canada & the Netherlands’, *Allegations of Genocide* (n 226), 8.

²³² See e.g. ‘Declaration of Intervention of New Zealand’, *Allegations of Genocide* (n 226), 10; ‘Declaration of Intervention of the UK’, *Allegations of Genocide* (n 226), 21–3; ‘Declaration of Intervention of the US’, *Allegations of Genocide* (n 226), 15; ‘Declaration of Intervention of Poland’, *Allegations of Genocide* (n 226), 16–8; ‘Declaration of Intervention of Denmark’, *Allegations of Genocide* (n 226), 8; ‘Declaration of Intervention of

Other recent examples of interventions for common interests involved cases on genocide. In 2023, Canada, Denmark, France, Germany, the Netherlands, the UK, and Maldives filed declarations of intervention under Article 63 in the *Application of the Genocide Convention* case.²³³ All the intervenors submitted views on the Convention's construction that strengthen the Gambia's claim that Myanmar breached its conventional duties.²³⁴ In 2024, as mentioned above, Nicaragua filed an application to intervene 'as a party' in the *Application of the Genocide Convention in Gaza* case.²³⁵ It asserted that as the duties under the Convention are owed *erga omnes partes*, it 'will necessarily be affected by the Court's decision'.²³⁶ Thus, it seeks to intervene to 'protect [its] rights' and to 'invoke Israel's responsibility under the [...] Convention'.²³⁷

C. Observations: Utility & Difficulty

1. Utility

Scholars like Tanaka and Almeida submit that interventions also offer an alternative response to breaches of duties owed *erga omnes*.²³⁸ As previously noted, inter-state dispute resolution tends to be 'strictly bilateral' with 'little room' for 'interests transcending those of the parties'.²³⁹ Interventions, like advisory proceedings, address these limitations. They allow

Finland', *Allegations of Genocide* (n 226), 5; 'Declaration of Intervention of Australia', *Allegations of Genocide* (n 226), 20–1; 'Joint Declaration of Intervention of Canada & the Netherlands', *Allegations of Genocide* (n 226), 10.

²³³ 'Joint Declaration of Intervention of Canada et al', *Application of the Genocide Convention* (The Gambia v Myanmar) (Intervention) (ICH, General List No 178, 15 November 2023), 2 ('It is [...] important for the Court to consider the evidentiary value of certain documents in its construction [...] of the Genocide Convention, bearing in mind the *erga omnes partes* nature of the [duties] under this Convention'); 'Declaration of Intervention of Maldives', *Application of the Genocide Convention* (The Gambia v Myanmar) (Intervention) (ICH, General List No 178, 15 November 2023), 4, 8.

²³⁴ 'Joint Declaration of Intervention of Canada et al', *Application of the Genocide Convention* (n 233), 6–19; 'Declaration of Intervention of Maldives', *Application of the Genocide Convention* (n 233), 7–18. Compare 'Application', *Application of the Genocide Convention* (The Gambia v Myanmar) (ICJ, General List No 178, 11 November 2019), 18.

²³⁵ See 'Application to Intervene of Nicaragua', *Application of the Genocide Convention in Gaza* (n 193), 10. Note McIntyre, 'Nicaragua's Article 62 Intervention' (n 194) ('Nicaragua's intervention is a surprise because they have not invoked Article 63 but rather [...] Article 62').

²³⁶ 'Application to Intervene of Nicaragua', *Application of the Genocide Convention in Gaza* (n 193), 8.

²³⁷ Ibid, 10.

²³⁸ Tanaka, 'Consequences of Obligations Erga Omnes' (n 13), 28; Almeida, 'Intervention & Amicus Curiae' (n 180), 165 citing von Bogdandy & Venzke, *Public Law Theory of International Adjudication* (n 149), 15. McIntyre, 'Crawford's Multilateralism' (n 184), 285, 288 citing *Whaling in the Antarctic (Declaration of Intervention of New Zealand)* [2013] (n 186) (Trindade, separate opinion), 37 ('Interventions [...] propitiate the sound administration of justice [...] not only of all states concerned but of the international community').

²³⁹ Benzing, 'Community Interests in the Procedure of Courts & Tribunals' (n 15), 374; Chinkin, *Third Parties* (n 20), 147–8; Almeida, 'Enhancing ICJ Procedures' (n 94), 244; Hofbauer, 'Public Interests & Advisory Opinions' (n 93), 236; Chinkin, 'Third Party Intervention' (n 175), 503 citing *Continental Shelf (Application to Intervene by Italy)* [1984] (n 189) (Mbaye, separate opinion), 35; (Oda, dissenting), 90.

the proceedings to be ‘multilateralised’.²⁴⁰ They permit states to present their views on matters of common interests,²⁴¹ provide a ‘mechanism for states to influence the [law’s] development’,²⁴² and avoid ‘repetitive litigation’ and ‘multiplicity of cases’.²⁴³ They also allow the Court to gain ‘wider perspective’ of the dispute ‘than that presented by the original parties’,²⁴⁴ enabling it to resolve the dispute with ‘reference to third party concerns’.²⁴⁵

Yet, interventions are not a complete substitute for implementation. For one, interventions are only ‘incidental’ to the proceedings.²⁴⁶ They require the existence of a principal proceeding that a state initiated against another. As they are not ‘autonomous’, if ‘the principal proceeding end in a decision that the Court has no jurisdiction, or that the claim is inadmissible, or if [it is] discontinued’ then, ‘the intervention [...] likewise lapses’.²⁴⁷ Moreover, interventions only allow states to present their views on the multilateral treaties’ construction for special interventions,²⁴⁸ or ‘the nature and scope of [its] rights or interests’ for interventions ‘as a non-party’.²⁴⁹ Unlike proceedings against wrongful states, interventions, save perhaps for intervention ‘as a party’,²⁵⁰ like advisory proceedings,²⁵¹ do not involve ‘specific claims by the [intervening] state’ against the wrongful state nor the invocation of its responsibility.²⁵²

2. Complications & Difficulty

Interventions have generally been relatively rare.²⁵³ Before the *Application of the Genocide Convention in Gaza*, ‘general’ interventions had only been made in eleven cases of which three

²⁴⁰ Benzing, ‘Community Interests in the Procedure of Courts & Tribunals’ (n 15), 398 citing Yen Kong, ‘Third Party Rights & Legal Interests in the WTO Settlement’ (n 15), 761.

²⁴¹ Longobardo, ‘Standing of Indirectly Injured States’ (n 15), 6; Chinkin, ‘Third Party Intervention’ (n 175), 229.

²⁴² McIntyre, ‘Procedural Values’ (n 103), 22 citing Miron & Chinkin, ‘Article 62’ (n 179), 1572; Kolb, *ICJ* (n 28), 700.

²⁴³ *Sovereignty over Pulau Ligitan & Pulau Sipadan (Application to Intervene by Philippines)* [2001] (n 191) (Weeramantry, separate opinion), 643.

²⁴⁴ Chinkin, ‘Third Party Intervention’ (n 175), 500.

²⁴⁵ Chinkin, *Third Parties* (n 20), 148.

²⁴⁶ *Haya de la Torre* [1951] (n 187), 76; *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 134.

²⁴⁷ Kolb, *ICJ* (n 28), 698 (‘A true intervention [...] does not constitute the start of a fresh principal case [...] It does not, in principle, enlarge the subject of the principal dispute but [only] defines the framework and context’)

²⁴⁸ *Ibid*, 700, 731; Barrie, ‘Third-party State Intervention’ (n 195), 12.

²⁴⁹ Miron & Chinkin, ‘Article 62’ (n 179), 1719.

²⁵⁰ Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1048.

²⁵¹ *Kosovo* [2010] (n 24), 417; Frowein & Oellers-Frahm, ‘Article 65’ (n 24), 1788; Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 843. See Hernandez, *ICJ & Judicial Function* (n 22), 74.

²⁵² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 106), 116; Crawford James, *International Law Commission’s Articles on State Responsibility* (Cambridge University Press 2002), 257.

²⁵³ Barrie, ‘Third-party State Intervention’ (n 195), 3.

were granted.²⁵⁴ As for ‘special’ ones, there had only been four before *Allegations of Genocide*.²⁵⁵ Barrie, Kolb, and Milo suggest that this may be because the Court and states consider interventions as ‘undesirable’.²⁵⁶ They complicate the proceedings, ‘add months or [...] years to the [...] case’,²⁵⁷ and ‘drag [it] out’.²⁵⁸ Thus, the ‘court’s predominant concern’, and arguably that of states, ‘has been to avoid delay’ and ‘not [be concerned] with any [...] gains to be made by hearing and deciding upon multiple related claims at once’.²⁵⁹ Interventions also arguably lead to the parties’ inability ‘to control [the dispute’s] course and eventual outcome’ as it is ‘widened beyond [the parties’] direct concerns’.²⁶⁰ As ‘party autonomy’ remains a priority for the Court and states, this ‘entails restricting intervention’.²⁶¹ Furthermore, third states’ presence ‘in a bilateral dispute may disrupt the balance between the parties’.²⁶² In some instances, interventions may affect the parties’ equality and the fair administration of justice.²⁶³ Indeed, this may be the case where several states intervene ‘as non-parties’ but ‘pursue what may in effect be a joint case’ with one of the parties.²⁶⁴

States also seem hesitant to ‘involve themselves in disputes before the ICJ to which they were not parties’.²⁶⁵ This is especially true for ‘special’ interventions. Almeida suggests that

²⁵⁴ Bonafé Beatrice, ‘Interests of a Legal Nature Justifying Intervention before the ICJ’ (2012) 25 *Leiden Journal of International Law* 739, 739–40; Kolb, *ICJ* (n 28), 703.

²⁵⁵ Miron & Chinkin, ‘Article 63’ (n 179), 1745; Almeida, ‘Enhancing ICJ Procedures’ (n 94), 248.

²⁵⁶ Barrie, ‘Third-party State Intervention’ (n 195), 3; Kolb, *ICJ* (n 28), 698 (‘The Court for a long time subscribed to a jurisprudence that inhibited intervention’); Thirlway, *ICJ* (n 28), 184 (‘Parties are anxious to retain control of their dispute’); Milo Caterina, ‘What is Good for the Administration of Justice? Practice on Third-Party Participation’ (2023) 100 *Questions of International Law* 19, 26 (‘Interventions] may [...] make the original parties’ [...] strategy burdensome’).

²⁵⁷ McGarry Brian, ‘Mass Intervention?: The Joint Statement of 41 States on Ukraine v Russia’ (EJIL: Talk!, 30 May 2022) <<https://www.ejiltalk.org/mass-intervention-the-joint-statement-of-41-states-on-ukraine-v-russia/>>.

²⁵⁸ McIntyre, ‘Nicaragua’s Article 62 Intervention’ (n 194).

²⁵⁹ McIntyre, ‘Procedural Values’ (n 103), 20.

²⁶⁰ Chinkin, ‘Third Party Intervention’ (n 175); Thirlway, *ICJ* (n 28), 184.

²⁶¹ Chinkin, ‘Third Party Intervention’ (n 175), 501; McGarry, ‘Third States in Inter-State Litigation’ (n 222), 274.

²⁶² Miron & Chinkin, ‘Article 63’ (n 179), 1771.

²⁶³ *Allegations of Genocide* [2023] (n 225) (Xue dissenting), 7 (‘The Court [...] should not lose sight of the imbalance between the parties and the impact of the interventions on the [...] proceedings’); *Whaling in the Antarctic (Declaration of Intervention of New Zealand)* [2013] (n 186) (Owada, declaration), 11 citing ‘Written Observations of Japan’, *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Merits) (ICJ, General List No 148, 31 May 2013), 2.

²⁶⁴ *Allegations of Genocide* [2023] (n 225) (Xue dissenting), 7 (‘The ‘relief’ sought by the [intervening] states, in the first place, is not the proper object of intervention [...] Some of those issues [...] can only be raised by the parties’).

²⁶⁵ Barrie, ‘Third-party State Intervention’ (n 195), 5 citing Merrills JG, *International Dispute Settlement* (Cambridge University Press 2002), 132; Rosenne Shabtai, *Intervention in the International Court of Justice* (BRILL 1993), 190.

the intervention's consequences, which make aspects of the decision binding upon intervening states, deter them from intervening.²⁶⁶ Thirlway submits the same—'states [prefer] to keep their options open'.²⁶⁷ If they do not intervene, 'they are free to contend that the Court's interpretation of the convention is not correct' as '[it] will [...] not be binding on them'.²⁶⁸

'General' interventions pose another problem as the Court's case law remains inconsistent as to what counts as a 'proper interest' and how it must be 'likely affected by the decision'.²⁶⁹ This makes 'general' interventions 'notoriously difficult' and perhaps leads to states' reluctance to intervene.²⁷⁰ In *Continental Shelf*, Malta sought to intervene to 'submit [its] views' on the 'legal principles and rules' on delimitation.²⁷¹ The Court deemed the intervention inadmissible as the interest must be concrete and the 'mere preoccupation with rules' is not 'a proper [...] [basis] for ["general"] intervention'.²⁷² In the other *Continental Shelf* case, Italy claimed that the case pertained to 'zones [...] over which [it] [claims] [...] rights'.²⁷³ The Court also rejected this as it would necessitate 'a finding [...] on disputes between Italy and [...] the parties' without a jurisdictional link.²⁷⁴ In any case, the Court ruled that Italy's rights 'would be safeguarded' by the Statute's Article 59.²⁷⁵ In contrast, it admitted Nicaragua's application in *Land, Island,*

²⁶⁶ Almeida, 'Enhancing ICJ Procedures' (n 94), 250.

²⁶⁷ Thirlway, *ICJ* (n 28), 178. See Chinkin, *Third Parties* (n 20), 198.

²⁶⁸ Thirlway, *ICJ* (n 28), 178. Note this appears to be changing. In *Allegations of Genocide*, most intervenors explicitly accepted that the '[judgements]' construction [of the] Convention [...] will be equally binding upon' them (Bonafé, 'Ukraine v Russia case before the ICJ' (n 210), 28. See e.g. 'Declaration of Intervention of New Zealand', *Allegations of Genocide* (n 226), 4; 'Declaration of Intervention of the UK', *Allegations of Genocide* (n 226), 6; 'Declaration of Intervention of the US', *Allegations of Genocide* (n 226), 7; 'Declaration of Intervention of Sweden', *Allegations of Genocide* (n 226), 7; 'Declaration of Intervention of Poland', *Allegations of Genocide* (n 226), 7; 'Declaration of Intervention of Denmark', *Allegations of Genocide* (n 226), 3; 'Declaration of Intervention of Finland', *Allegations of Genocide* (n 226), 4; 'Declaration of Intervention of Spain', *Allegations of Genocide* (n 226), 3; 'Declaration of Intervention of Australia', *Allegations of Genocide* (n 226), 4; 'Declaration of Intervention of Portugal', *Allegations of Genocide* (Ukraine v Russia) (Intervention) (ICJ, General List No 182, 7 October 2022), 6; 'Joint Declaration of Intervention of Canada & the Netherlands', *Allegations of Genocide* (n 226), 3).

²⁶⁹ McIntyre, 'Procedural Values' (n 103), 3, 11; Miron & Chinkin, 'Article 62' (n 179), 1688; Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1035. Note that this is less of a problem for 'special' interventions as the 'core requirement of Article 63 [...] is the third state's membership in [...] convention. The 'interest in [its] construction [...] is technically also an "interest of a legal nature"' (McGarry, 'Standing to Intervention' (n 213), 8)

²⁷⁰ Boisson de Chazournes, 'Opinions & Common Interests' (n 12), 114; Almeida, 'Intervention & Amicus Curiae' (n 180), 168.

²⁷¹ *Continental Shelf (Application to Intervene by Malta)* [1981] (n 189), 8–9, 10–1.

²⁷² Ibid, 8–9, 11.

²⁷³ *Continental Shelf (Application to Intervene by Italy)* [1984] (n 189), 10–1,

²⁷⁴ Ibid, 19. See Thirlway, *ICJ* (n 28), 183 ('The intervention of Malta in Libya/Tunisia failed for lack of specificity of the interest asserted, and the intervention of Italy in Libya/Malta failed for excessive specificity [...] in effect [what it claimed] [...] could have been made the basis of a separate case'); Palchetti, 'Intervention & Beyond' (n 200), 150.

²⁷⁵ *Continental Shelf (Application to Intervene by Italy)* [1984] (n 189), 15. *Contra* ibid (Schwebel, dissenting), 134 ('If that [were the case], then Article 62 would be pointless: there would never be a case to which Article 62

& *Maritime Frontier* stating that Nicaragua's object, 'to inform the Court of [its rights'] nature' which are 'in issue in the dispute', is a 'proper one'.²⁷⁶ As there were overlapping claims on the Gulf of Fonseca, Nicaragua 'convincingly demonstrated' that 'its interest "may" be affected' by the Court's decision.²⁷⁷ It adopted the same reasoning when it admitted Equatorial Guinea's intervention in *Land & Maritime*.²⁷⁸ In *Jurisdictional Immunities*, the Court accepted as proper the object of Greece's intervention which was 'to inform the Court of its [...] rights and interests'.²⁷⁹ It also deemed that Greece 'may be affected' if it 'declared Greek judgements [to be] enforceable in Italy'.²⁸⁰ Yet, the Court went the other direction in Costa Rica's application in *Territorial & Maritime*.²⁸¹ It ruled that Costa Rica had to show that its interest 'needs protection not provided by the relative effect of decisions [...] under Article 59'.²⁸²

The case law also casts doubt on whether states may resort to 'general' interventions in cases concerning duties owed *erga omnes*.²⁸³ To begin with, the Court seems to necessitate a 'legal interest' that needs 'protection [...] not provided by [*res judicata*'s] relative effect'.²⁸⁴ With this restrictive approach, it remains to be seen, as Bonafé observes, if this 'covers [...]

should or could apply, since, by reason of Article 59, a third state's legal interest never can be affected by a decision in a case').

²⁷⁶ *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 130.

²⁷⁷ *Ibid*, 117. See Chinkin, *Third Parties* (n 20), 277 ('It remains difficult to distinguish the Chamber's reasoning in this successful claim to intervene from that of the Court in Italy's failed request in Libya/Malta').

²⁷⁸ *Land & Maritime Boundary (Application to Intervene by Equatorial Guinea)* [1999] (n 202), 1034. See Thirlway (ed), *ICJ Law & Procedure vol I* (n 33), 1712 ('Without developing its reasoning, the Court accepted that [...] Equatorial Guinea had an interest of a legal nature that might be affected by the decision in the case between Cameroon and Nigeria').

²⁷⁹ *Jurisdictional Immunities of the State (Application to Intervene by Greece)* [2011] (n 209), 495; 'Verbatim Record 2011/19', *Jurisdictional Immunities (Germany v Italy) (Intervention)* (ICJ, General List No 143, 14 September 2011), 11 ('To help to determine the current legal position [...] and to contribute to the [...] development of international law'). See Miron & Chinkin, 'Article 62' (n 179), 1714 ('Without much explanation, the Court determined that [...] that Greece had [a legal interest] in the main proceedings'); Bonafé, 'Interests of a Legal Nature & Intervention' (n 254), 750.

²⁸⁰ *Jurisdictional Immunities of the State (Application to Intervene by Greece)* [2011] (n 209), 496; (Trindade, separate opinion), 528 ('An interest in the enforceability in a foreign state of judgments of a state's own judiciary appears to fall squarely within the concept of an interest of a legal nature'). *Contra* (Gaja, declaration), 531 ('Italy is free [...] to grant or refuse enforcement for reasons of its own choice. Greece cannot be said to have any interest of a legal nature in seeing the Greek judgments enforced in Italy'); Bonafé, 'Interests of a Legal Nature & Intervention' (n 254), 751.

²⁸¹ Miron & Chinkin, 'Article 62' (n 179), 1715 ('The [judgement] marks a return to the [...] formalistic approach [that] Article 59 provides [...] protection of the interests of third states'); Reghizzi, 'Non-Party Intervention' (n 181), 183.

²⁸² *Territorial & Maritime Dispute (Application to Intervene by Costa Rica)* [2011] (n 203), 372. Note the Court deemed Honduras' application inadmissible as its boundary with Nicaragua has been settled. Thus it does not have an interest that 'may be affected by the decision' (*Territorial & Maritime Dispute (Application to Intervene by Honduras)* [2011] (n 191), 444 noting *Territorial & Maritime Dispute (Nicaragua v Honduras)* (Judgement) [2007] ICJ 659).

²⁸³ McGarry, 'Mass Intervention' (n 257) ('The Court has not clarified [if] an interest in [duties owed] *erga omnes* [is a legal interest] that may be affected by [its] decision').

²⁸⁴ *Territorial & Maritime Dispute (Application to Intervene by Costa Rica)* [2011] (n 203), 372.

third [states'] interests' in duties owed *erga omnes*.²⁸⁵ Furthermore, it is yet to be determined if states' "legal interest" in the observance of duties owed *erga omnes* 'is the same [...] legal interest that justifies an intervention under Article 62'.²⁸⁶ While Article 62, 'does not define [the] degree of "interest" [required for] [general] interventions',²⁸⁷ the Court appears to necessitate that the interest be 'concrete' and 'individual'.²⁸⁸ Indeed, it remains to be established, as McIntyre points out, if 'an interest in the law and in [its] condition' qualifies as a 'legal interest' for the 'general' interventions.²⁸⁹ This, as Benzig suggests, casts doubt on the admissibility of 'interventions [for] public interest'.²⁹⁰

²⁸⁵ Bonafé, 'Interests of a Legal Nature & Intervention' (n 254), 755 ('The interest that a state may have in the protection of *erga omnes* obligations differs from the general interest in the application of principles and rules of international law'). See Urs, 'Question of Standing before the ICJ' (n 94), 19 ('No distinction between the interest of the state instituting the proceedings and the interests of states seeking to intervene under Article 62')

²⁸⁶ McIntyre, 'Procedural Values' (n 103), 29. See Kolb, *ICJ* (n 28), 709 ('Each state [has] a legal interest in seeing that [duties owed] *erga omnes* [...] are complied with. A [legal interest] therefore also exists for the intervening state'); Gaja Giorgio, 'Protection of General Interests in the International Community' (2011) 364 *Recueil des Cours de l'Académie de Droit International* 9, 119 ('[The] "interest of a legal nature" [...] required [by] Article 62 [...] cannot be higher than the one that justifies bringing a claim before the Court'); Urs, 'Question of Standing before the ICJ' (n 94), 525; McIntyre, 'Crawford's Multilateralism' (n 184), 290 ('Third states are arguably 'equally affected' by their breach [and have] the same interest as the applicant [...] where standing in the original action is based on public interest.') citing Palchetti, 'Intervention & Beyond' (n 200), 177. Eggett Craig & Thin Sarah, 'Third-Party Intervention before the ICJ' in Bendel Justine & Suedi Yusra (eds), *Public Interest Litigation in International Law* (Routledge 2023), 85 ('Intervention may be allowed on the same basis as an invocation claim based on [a duty owed] *erga omnes*'); 'Application to Intervene of Australia', *Request for Examination of Nuclear Test* (n 218), 11, ('Where the relevant [duty is owed] *erga omnes*, [...] every state has [a legal interest] which may be affected by the decision', and is entitled to seek permission to intervene under [...] Article 62'); 'Application to Intervene of Nicaragua', *Application of the Genocide Convention in Gaza* (n 193), 8 ('Nicaragua's interests of a legal nature will [...] be affected by the Court's decision [...] because of the *erga omnes* character of the norms at issue in this case'). But see McGarry, 'Standing to Intervention' (n 213), 16 citing *Territorial & Maritime Dispute (Application to Intervene by Honduras)* [2011] (n 191) (Keith, declaration), 462; 17 ('[Duties] owed *erga omnes* and *erga omnes partes* are questionable grounds on which to base an "interest of a legal nature" for [...] third-state intervention'); McGarry, 'Third States in Inter-State Litigation' (n 222), 279 ('The commonly held interest [...] while [...] sufficient for the institution of a new case [...] may fail to meet [the] "interest of a legal nature" under Article 62').

²⁸⁷ McGarry, 'Standing to Intervention' (n 213), 12 ('Article 62 does not frame the requisite interest beyond its legal character and does not articulate [if it] must be unique to the state') citing 'Oral Arguments of Malta', *Continental Shelf (Tunisia/Libya)* (ICJ, Vol IV Pleadings, Oral Arguments, Documents 282, 19–23 March & 14 April 1981), 319–54.

²⁸⁸ See *Continental Shelf (Application to Intervene by Malta)* [1981] (n 189), 11; *Land, Island, & Maritime Frontier (Application to Intervene by Nicaragua)* [1990] (n 187), 130.

²⁸⁹ McIntyre, 'Procedural Values' (n 103), 12 citing Fitzmaurice, 'Law & Procedure of the ICJ: 1951–4' (n 179), 126. McGarry Brian, 'Decoding Nicaragua's Historic Request to Intervene in South Africa v Israel' (EJIL: Talk!, 21 February 2024) <<https://www.ejiltalk.org/decoding-nicaraguas-historic-request-to-intervene-in-south-africa-v-israel/>> ('The standing to institute new proceedings, and the statutory requirements for intervention, remain juridically distinct concepts'). But see *Whaling in the Antarctic (Declaration of Intervention of New Zealand)* [2013] (n 186) (Trindade, separate opinion), 33 ff. Eggett & Thin, 'Third-Party Intervention before the ICJ' (n 286), 86–7 ('It seems reasonable to posit that third party intervention is a logical extension of the Court's dictum in *Barcelona Traction* [...] If a state would have otherwise been able to bring the case against the alleged state in breach, surely this would also put them in a position of having sufficient interest to intervene in the same case if brought by a different state')

²⁹⁰ Benzig, 'Community Interests in the Procedure of Courts & Tribunals' (n 15), 399 ('[But] as a matter of

III. IMPOSITION OF TARGETED UNILATERAL MEASURES

The previous sections examined the responses via judicial proceedings that states not ‘directly affected’ by breaches of duties owed *erga omnes* have taken without attracting the issue of competence to invoke responsibility. Now, the chapter turns its attention to unilateral measures. As observed in *Part II*, the past three decades have seen an increase in the use of targeted unilateral measures—those imposed upon individuals or entities ‘responsible for, have supported, or have contributed’ to the wrongful state’s conduct.²⁹¹ Indeed, these measures arguably have become an alternative to ‘general’, ‘broad’, or ‘comprehensive’ unilateral measures—those ‘aimed at the [targeted state’s] whole economy’,²⁹² in the form of ‘embargos, boycotts, [and] quotas’,²⁹³ and to sectoral unilateral measures—those levied against a state’s specific economic sectors.²⁹⁴ Targeted unilateral measures, in theory, ‘minimise [their] adverse effects’ on the general population as they directly target individuals and entities that are responsible for or have contributed to a state’s wrongful act.²⁹⁵ Nevertheless, as will be shown below, these measures are not without issues. As they are directly imposed on individuals or entities, they may not ‘fit within the scope of the [implementation of] state responsibility’.²⁹⁶ These measures’ lawfulness depends on whether the imposing state owes duties directly to the targeted individual or entity and if it breaches these duties. If so, it commits a wrongful act.²⁹⁷

legal policy, the requirements for [invoking] community interest and those for intervention should develop in the same manner’)

²⁹¹ Hofer, ‘US Sanctions against Russia’ (n 16), 78.

²⁹² Prezas Ioannis, ‘From Targeted States to Affected Populations: Exploring Accountability for the Negative Impact of Comprehensive Unilateral Sanctions on Human Rights’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 386; Cleveland Sarah, ‘Human Rights Sanctions & International Trade: Theory of Compatibility’ (2002) 5(1) *Journal of International Economic Law* 133, 142.

²⁹³ Watson James, ‘World Trade Organisation & Unilateral Sanctions: Prohibited or Possible?’ in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 187; Goldman Zachary & Lindblom Alina, ‘The US Position & Practice with regards to Unilateral & Extraterritorial Sanctions’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 137.

²⁹⁴ Moret Erica, ‘Unilateral & Extraterritorial Sanctions in Crisis’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 22; Eckert Sue, ‘Evolution & Effectiveness of UN Targeted Sanctions’ in van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 53; Cleveland, ‘Human Rights Sanctions & International Trade’ (n 292), 138–41.

²⁹⁵ Council of the EU, ‘Guidelines on Implementation & Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU CFSP’ (4 May 2018) EU Doc 5664/18, ¶14; Craven Matthew, ‘Humanitarianism & the Quest for Smarter Sanctions’ (2022) 13 *European Journal of International Law* 43, 47; White Nigel, ‘Sanctions Against Non-State Actors’ in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 129; Biersteker Thomas & Hudáková Zuzana, ‘UN Targeted Sanctions: Historical Development & Current Challenges’ in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 109; Gordon Joy, ‘Smart Sanctions Revisited’ (2011) 25 *Ethics & International Affairs* 315, 318.

²⁹⁶ Hofer, ‘US Sanctions against Russia’ (n 16), 78, 103.

²⁹⁷ Ibid, 89; Douhan, ‘Unilateral Coercive Measures: Notion, Types, & Qualification’ (2021) (n 18), 15.

As they do not involve the suspension of duties solely owed to the wrongful state, they cannot be deemed countermeasures.²⁹⁸

A. Concept & Framework of Legality

1. Distinguished from 'General' and 'Sectoral' Measures

'General' and 'sectoral' unilateral measures that enforce a wrongful state's responsibility, as discussed in *Chapter 2* and *Part II*, may be retorsions or countermeasures.²⁹⁹ It may be that the imposing state, in levying the measure, does not breach any duty. Thus, the measure is a retorsion.³⁰⁰ However, it may also be that the measure involves an *a priori* breach of a duty that the imposing state owes to the target state.³⁰¹ Indeed, as observed in *Part II*, these measures usually affect duties under multilateral agreements like the GATT.³⁰² If this is the case, the measure may still be justified as a countermeasure.³⁰³ If the conditions for their taking are met, including the observance of duties imposed by peremptory norms,³⁰⁴ respect for fundamental rights,³⁰⁵ and proportionality,³⁰⁶ the measures' wrongfulness is precluded.³⁰⁷

The assessment of targeted measures' legality differs from general and sectoral measures. To begin with, as scholars like Hofer point out, it remains to be seen if these may be considered enforcement measures.³⁰⁸ Recall that implementation consists of a demand on the wrongful

²⁹⁸ ILC, 'Summary Records of the 52nd Session' (2000) (n 19), 266, 271; Hofer, 'Unilateral Sanctions & Responsibility' (n 19), 190–1; Subedi, 'Status of Unilateral Sanctions' (n 5), 49. *Contra* Dawidowicz, 'Public Law Enforcement' (n 19), 392.

²⁹⁹ Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 675; Hillgruber, 'Third States & Countermeasures' (n 9), 265; Hutchinson D, 'Solidarity & Breaches of Multilateral Treaties' (1988) 59 *British Yearbook of International Law* 151, 157.

³⁰⁰ ILC, 'Report on the Work of the 53rd Session' (2001) (n 106), 128; Focarelli Carlo, *International Law as Social Construct: Struggle for Global Justice* (Oxford University Press 2012), 484; Tzanakopoulos Antonios, 'Right to be Free from Economic Coercion' (2015) 4 *Cambridge Journal of International & Comparative Law* 616, 626.

³⁰¹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 106), 130 citing *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 55.

³⁰² See Hofer, 'Unilateral Sanctions & Responsibility' (n 19), 195. Bogdanova Iryna, *Unilateral Sanctions in International Law & the Enforcement of Human Rights: Impact of the Principle of Common Concern of Humankind* (BRILL 2022), 137; Mitchell Andrew, 'Sanctions & World Trade Organisation' in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 283; Watson, 'WTO & Unilateral Sanctions' (n 293), 189.

³⁰³ ILC, 'Report on the Work of the 53rd Session' (2001) (n 106), 75–6, 128–9.

³⁰⁴ *Ibid*, 131–3

³⁰⁵ *Ibid*.

³⁰⁶ *Ibid*, 134; *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa (Naulilaa)* (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1028; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 448.

³⁰⁷ ILC, 'Report on the Work of the 53rd Session' (2001) (n 106), 75–6; Crawford, *State Responsibility* (n 299), 685; *Naulilaa* (n 306), 1025; *Gabčíkovo-Nagymaros* [1997] (n 301), 55.

³⁰⁸ Hofer, 'US Sanctions against Russia' (n 16), 78.

state for it to observe or perform its duties.³⁰⁹ ‘General’ and ‘sectoral’ targeted measures fulfil this function.³¹⁰ They are imposed against the wrongful state to secure its observance of its duties.³¹¹ In contrast, targeted measures are levied against individuals or entities responsible for, have supported, or have contributed to the wrongful state’s conduct.³¹² They do not seek to compel the wrongful state to observe its duties. Rather, they are levied to put pressure on individuals and entities,³¹³ or limit their ability to continue their actions.³¹⁴ They are better considered as the imposing state’s exercise of its prescriptive jurisdiction beyond its territory,³¹⁵

³⁰⁹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 106), 117; Crawford James, ‘Multilateral Rights & Obligations in International Law’ (2006) 319 *Recueil des Cours de l’Académie de Droit International* 325, 449.

³¹⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 106), 128. See Crawford James, ‘Overview of Part Three of the Articles on State Responsibility’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 932 (‘A further mechanism for the implementation’).

³¹¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 106), 116; Crawford, *State Responsibility* (n 299), 675; Hillgruber, ‘Third States & Countermeasures’ (n 9), 265.

³¹² Hofer, ‘US Sanctions against Russia’ (n 16), 78; Moiseienko Anton, ‘Due Process & Targeted Sanctions’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 405.

³¹³ European Parliament Directorate General for External Policies of the Union, ‘Targeted Sanctions against Individuals on Grounds of Grave Human Rights Violations—Impact, Trends, & Prospects at EU level’ (April 2018), 9; Beaucillon Charlotte, ‘Unilateral & Extraterritorial Sanctions: Definitions, State of Practice, & Contemporary Challenges’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 4; Bogdanova, *Unilateral Sanctions & Human Rights* (n 302), 121; Drezner Daniel, ‘Sanctions Sometimes Smart: Targeted Sanctions in Theory & Practice’ (2011) 13 *International Studies Review* 96, 99.

³¹⁴ Goldman & Lindblom, ‘US & Unilateral & Extraterritorial Sanctions’ (n 293), 137; Smeets Maarten, ‘Economic Sanctions & the WTO’ in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 280

³¹⁵ Beaucillon, ‘Unilateral & Extraterritorial Sanctions’ (n 313), 5–6. Note that measures against individuals and entities in the target state must be distinguished from measures to secure compliance from actors within the imposing state or third states (Kerbat Yann, ‘Unilateral/Extraterritorial Sanctions as a Challenge to the Theory of Jurisdiction’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 166). The former involves a state’s exercise of its prescriptive jurisdiction against targeted states, individuals, or entities (Ruys Tom, ‘Sanctions, Retorsions, & Countermeasures: Concepts & Legal Framework’ in Van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 28) The latter refers to restrictions on actors from engaging with the targets (Subedi, ‘Status of Unilateral Sanctions’ (n 5), 47) to enforce the measures (Beaucillon Charlotte, ‘Unilateral State Sanctions & the Extraterritorial Effects of National Legislation’ in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 120). They may be ‘primary’ measures or those that apply ‘to individuals or entities located in, or originating from, the jurisdiction of the [imposing state]’ (Moret, ‘Unilateral & Extraterritorial Sanctions in Crisis’ (n 294), 22) or ‘secondary’ or those that ‘constrain persons located in or bearing the nationality of a third state, to abide by [the measures] although they are not subject to the jurisdiction of the [imposing] state’ (Beaucillon, ‘Unilateral & Extraterritorial Sanctions’ (n 313), 6; Schmidt Julia, ‘Legality of Unilateral Extra-Territorial Sanctions under International Law’ (2022) 27 *Journal of Conflict & Security Law* 53, 60). ‘Secondary’ measures present problems as the imposing state also ‘seeks to impose [a duty] on third states and their nationals to abide by the [measures] it has decided’ (Beaucillon, ‘Unilateral State Sanctions & the Extraterritorial Effects of National Legislation’ (n 315), 105). For some, this amounts to an overreach of jurisdiction (Ruys, ‘Sanctions, Retorsions, & Countermeasures’ (n 315), 29; Douhan Alena, ‘Secondary Sanctions, Civil, & Criminal Penalties for Circumvention of Sanctions Regimes & Overcompliance with Sanctions’ (15 July 2021) UN Doc A/HRC/51/33, 4; Jazairy Idriss, ‘Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights’ (5 July 2019) UN Doc A/HRC/42/46, 14) that ‘impinge on the rights of [third] states to ‘regulate their own citizens and companies’ (Meyer Jeffrey, ‘Second Thoughts on Secondary Sanctions’ (2009) 30 *University of Pennsylvania Journal of International Law* 905, 932–3; Ruys Tom & Ryngaert Cedric, ‘Secondary Sanctions: A Weapon out of Control? Legality of, & European Responses to, US Secondary Sanctions’ (2020) *British Yearbook of International Law* 1, 4). Indeed, some states

intended ‘to influence behaviour or conduct abroad’,³¹⁶ and imposed under its laws and policies.³¹⁷ For this reason, if the imposing state, in levying targeted measures, breaches duties owed directly to the targeted individuals and entities, it commits a wrongful act.³¹⁸ Furthermore, the targeted measures’ wrongfulness cannot be justified as countermeasures,³¹⁹ as these are limited to state-to-state relations.³²⁰

2. *Lawfulness in relation to Specific Norms*

Norms under investment and human rights laws are the primary rules that pose a problem for targeted measures. These are the duties owed to individuals and entities that the measures often breach. It is not forgotten that targeted measures have also been imposed against individuals and entities that enjoy protection under international law like public officials and central banks. These protections include the laws on immunity from the imposing state’s jurisdiction or execution,³²¹ and laws on inviolability of state property.³²² Yet, as Ruys argues,

view secondary measures as unlawful under international law (*See Necessity of Ending the Economic, Commercial, & Financial Embargo by the USA against Cuba* Res 75/289 UNGA (23 June 2021) UN Doc A/RES/75/289) including some Western states and their allies (*See* UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic Compulsion: SG Report’ (2 July 2002) UN Doc A/57/179, 2 (Japan); UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (16 October 2002) UN Doc A/57/PV.31, 13 (Australia), 13 (Canada); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (31 July 2019) UN Doc A/74/264, 5 (EU)). Some like EU member states, have enacted ‘blocking regulations’ that protect ‘against the effects of the extra-territorial application of legislation adopted by a third country’ (Council of the EC, ‘Council Regulation (EC) 2271/96’ (22 November 1996) OJ L 309).

³¹⁶ Kerbat, ‘Extraterritorial Sanctions & Jurisdiction’ (n 315), 166.

³¹⁷ Ruys, ‘Sanctions, Retorsions, & Countermeasures’ (n 315), 23.

³¹⁸ Hofer, ‘US Sanctions against Russia’ (n 16), 89; Subedi, ‘Status of Unilateral Sanctions’ (n 5), 49.

³¹⁹ Hofer, ‘US Sanctions against Russia’ (n 16), 78, 103; Douhan, ‘Unilateral Coercive Measures: Notion, Types, & Qualification’ (2021) (n 18), 15. *Contra* Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 191 *citing* Dawidowicz, ‘Public Law Enforcement’ (n 19), 392.

³²⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 106), 130; ILC, ‘Summary Records of the 52nd Session’ (2000) (n 19), 266, 271; ILC, ‘Summary Records of the 45th Session’ (1993) I YbILC 1, 145; Hofer, ‘Unilateral Sanctions & Responsibility’ (n 19), 190–1.

³²¹ *See* Dupont Pierre-Emmanuel, ‘Countermeasures & Collective Security: EU Sanctions Against Iran’ (2012) 17(3) *Journal of Conflict & Security Law* 301, 314; Castellarin E, ‘Le Gel des Avoirs d’une Banque Centrale Étrangère comme Réaction Décentralisée à un Fait Internationalement Illicite: Rétorsion ou Contre-mesure?’ (2013) 25 *Hague Yearbook of International Law* 173, 179–80; Thouvenin Jean-Marc & Grandaubert Victor, ‘Material Scope of State Immunity from Execution’ in Angelet Nicolas & Ferro Luca (eds), *Cambridge Handbook of Immunities & International Law* (Cambridge University Press 2019), 38–9. *Note* that while unilateral measures may be considered ‘constraints’, they do not necessarily trigger the rules on immunity (Ruys Tom, ‘Immunity, Inviolability, & Countermeasures’ in Angelet Nicolas & Ferro Luca (eds), *Cambridge Handbook of Immunities & International Law* (Cambridge University Press 2019), 676–7). The rule is arguably limited to the immunity from the assertion of jurisdiction and execution of judgments which are judicial functions (*ibid*, 707; Ronzitti Natalino, ‘Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective’ in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (BRILL 2016), 22 *citing* *Jurisdictional Immunities of the State* (Germany v Italy; Greece intervening) (Judgment) [2012] ICJ 99, 98) However, the imposition of unilateral measures is often considered a legislative or executive function (Ronzitti, ‘Sanctions as Instruments of Coercive Diplomacy’ (n 321), 22; Bogdanova, *Unilateral Sanctions & Human Rights* (n 302), 125–6).

³²² *See* Dupont, ‘EU Sanctions on Iran’ (n 321), 314; Castellarin, ‘Rétorsion ou Contre-mesure?’ (n 321), 179;

these protections do not grant individuals and entities rights that correlate to the imposing state's duties.³²³ They are still owed to the state. Thus, the same framework used for general and sectoral unilateral measures may be applied. If the measure's imposition does not involve a breach of the levying state's duties, it is a retorsion. Otherwise, it may be justified as a countermeasure.³²⁴

As for investment law, targeted measures may also breach duties under bilateral and multilateral investment agreements on foreign investments, non-impairment of foreign investors' activities, and fair and equitable treatment.³²⁵ Note however, as authors like Paparinskis, Buttler, and Criddle observe, that there are different views on the structure of the relations that these norms create. Under one view, investor rights are merely 'derivative'.³²⁶ That is, investment norms give rise to rights owed to the state and not to investors. If this is the case, then targeted measures may still be examined under the framework applied to general and sectoral unilateral measures. They may be retorsions if there is no valid agreement between the imposing and the targeted states;³²⁷ the imposing state could rely on some exception under the relevant agreement;³²⁸ or it can justify the measures by recourse to the impossibility of

Longobardo Marco, 'State Immunity & Judicial Countermeasures' (2021) 32 *European Journal of International Law* 457, 471. Note that while inviolability has a 'broader scope than immunity' (Ruys, 'Immunity, Inviolability, & Countermeasures' (n 321), 689), this protection does not extend to every property owned by the state or held by its officials (Jennings Robert & Watts Arthur (eds), *Oppenheim's International Law: Volume I Peace* (9th edn, Oxford University Press 2008), 363; Bogdanova, *Unilateral Sanctions & Human Rights* (n 302), 132). It may apply to diplomatic or consular property, that of visiting armed forces, or that of 'agencies covered by special agreements' (Ruys, 'Immunity, Inviolability, & Countermeasures' (n 321), 701). In the absence of specific treaties, they do not extend to every other state property (ibid, 701, 708). Thus, targeted measures do not necessarily result in the imposing state's breach of its duties under the laws on immunity and inviolability.

³²³ Ruys, 'Immunity, Inviolability, & Countermeasures' (n 321), 705 ('Must not be mistaken for individual rights'); Hofer, 'Unilateral Sanctions & Responsibility' (n 19), 191.

³²⁴ See on inviolability: Criddle Evan, 'Humanitarian Financial Intervention' (2013) 24 *European Journal of International Law* 583, 596–7; Hofer, 'US Sanctions against Russia' (n 16), 91. On immunity: Ronzitti, 'Sanctions as Instruments of Coercive Diplomacy' (n 321), 22; Longobardo, 'State Immunity & Judicial Countermeasures' (n 322), 467; Moser Patricia, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations' (2012) 4 *Goettingen Journal of International Law* 809, 809. But see Bogdanova, *Unilateral Sanctions & Human Rights* (n 302), 126; Fox Hazel, 'State Immunity & Torture' (2006) 2 *European Human Rights Law Review* 142, 16.

³²⁵ Robert-Cuendet Sabrina, 'Unilateral & Extraterritorial Sanctions & International Investment Law' in Beaucillon Charlotte (ed), *Research Handbook on UN Sanctions* (Elgar 2021), 205, 209–10, 211; Butler Nicolette, 'Effect of Unilateral Sanctions on Foreign Investors & the Foreign Investment Regime' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 166; Atteritano Andrea & Deli Maria Beatrice, 'Overview of International Sanctions' Impact on Treaties & Contracts' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 210.

³²⁶ Paparinskis Martins, 'Investment Arbitration & the Law of Countermeasures' (2008) 79(1) *British Yearbook of International Law* 264, 335–6; *ADM & Tate v Mexico* (Award) (2007) ARB/(AF)/04/5, ¶176.

³²⁷ Butler, 'Unilateral Sanctions & Foreign Investment Regime' (n 325), 163.

³²⁸ Ibid, 175; Bothe Michael, 'Compatibility & Legitimacy of Sanctions Regimes' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 36.

performance or fundamental change of circumstances.³²⁹ Yet, another view posits that investors' rights 'accrue directly from international treaties'.³³⁰ Under this view, states owe duties directly to individuals and entities.³³¹ Thus, if the targeted measures infringe upon investors' rights, then the imposing state commits a wrongful act. Furthermore, the measures cannot be considered countermeasures as they do not involve the suspension of duties owed to another state.³³²

As to human rights, the relations these norms create, as scholars like Crawford submit, do not solely fall within the realm of state-to-state relations.³³³ It is true that human rights duties are owed by states to others. States pledge to others to respect individuals' rights within their jurisdiction.³³⁴ Yet, states also owe duties directly to individuals.³³⁵ Due to this 'double nature' of human rights duties, a state that imposes targeted measures may not only breach duties owed to other states including the wrongful one, but also to the targeted individuals to whom separate duties are owed.³³⁶ Furthermore, as countermeasures are limited to state-to-state relations,

³²⁹ Atteritano & Deli Maria, 'Sanctions' Impact on Treaties & Contracts' (n 325), 213, 215 citing *Racke GmbH & Co v Hauptzollamt Mainz* (1998) (ECJ, C-162/96, 16 June 1998)

³³⁰ Criddle, 'Humanitarian Financial Intervention' (n 324), 598 citing *Corn Products Int'l Inc v Mexico* (Decision on Responsibility) (2008) ARB/(AF)/ 04/1, ¶¶161–179.

³³¹ Paparinskis, 'Investment Arbitration & Countermeasures' (n 326), 288 citing Douglas Z, 'Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *British Yearbook of International Law* 151, 184–193; 293. See Dugard John, 'Fifth Report on Diplomatic Protection' (4 March 2004) UN Doc A/CN.4/538, ¶43.

³³² Criddle, 'Humanitarian Financial Intervention' (n 324), 598; Paparinskis, 'Investment Arbitration & Countermeasures' (n 326), 268; Hofer, 'US Sanctions against Russia' (n 16), 89–90.

³³³ ILC, 'Summary Records of the 52nd Session' (2000) (n 19), 271 cited in Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 324. Note that 2001 Draft Article 50 provides that countermeasures must 'not affect [...] [duties] for the protection of fundamental human rights' (ILC, 'Report on the Work of the 53rd Session' (2001) (n 106), 132 citing *Naulilaa* (n 306), 1026). Arguably, the phrase 'shall not affect' means the infringement of rights and not the consequential effects on individuals (Crawford James, 'Third Report on State Responsibility' (2000) II(2) YbILC 12, 88, 96; Arangio-Ruiz Gaetano, 'Fourth Report on State Responsibility' (1992) II(1) YbILC 6, 35; Dawidowicz, *Third Party Countermeasures* (n 333), 337). Stress must also be made on term 'fundamental' which is understood to mean 'non-derogable' (ibid, 329 citing ILC, 'Summary Records of the 52nd Session' (2000) (n 19), 397; Crawford, 'Third Report on State Responsibility' (2000) (n 333), 84; ILC, 'Summary Records of the 53rd Session' (2001) I YbILC 1, 116–7). This may mean that the measures must not infringe on the rights to life, liberty, and security (ILC, 'Summary Records of the 45th Session' (1993) (n 320), 145; Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 333), 3). Rights like those property and movement may fall outside the scope of this limitation.

³³⁴ ILC, 'Summary Records of the 52nd Session' (2000) (n 19), 271 (Simma); Fitzmaurice Gerald, 'Second Report on the Law of Treaties' (1957) II YbILC 16, 54; Simma, 'Bilateralism to Community Interest' (n 94), 337, 365, 370; Sicilianos Linos-Alexander, 'Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility' (2002) 13(5) *European Journal of International Law* 1127, 1135.

³³⁵ ILC, 'Summary Records of the 52nd Session' (2000) (n 19), 271 (Simma); Crawford, 'Third Report on State Responsibility' (2000) (n 333), 84, 90; Happold Matthew, 'Economic Sanctions & International Law' in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 8. Note Kahn Elizabeth, 'Beyond Claim-Rights: Social Structure, Collectivization, & Human Rights' (2021) 52 *Journal of Social Philosophy* 162, 162, 164; Morss John, 'Legal Relations of Collectives: Belated Insights from Hohfeld' (2009) 22 *Leiden Journal of International Law* 289, 299.

³³⁶ ILC, 'Summary Records of the 52nd Session' (2000) (n 19), 271 (Simma); Hofer, 'Unilateral Sanctions & Responsibility' (n 19), 190.

targeted measures fall outside its framework.³³⁷ Thus, targeted measures may only be lawful if they do not violate individuals' rights.

Yet, whether states owe duties to the targeted individuals is another matter.³³⁸ Some like Jazairy suggest that the application of human rights is no longer confined to the territory or jurisdiction of states.³³⁹ They are extraterritorial and cover 'individuals abroad'.³⁴⁰ Under this view, states also have a duty not to infringe on the individuals' rights even those outside its territory or control.³⁴¹ Thus, states also breach their duties when they impose measures against these individuals. Yet, this view has not met universal acceptance. Others, including the ICJ, submit that although human rights duties may be deemed extraterritorial,³⁴² they 'remain [...] compartmentalised by reference to [...] arenas of control'.³⁴³ That is, 'they are only applicable

³³⁷ ILC, 'Summary Records of the 52nd Session' (2000) (n 19), 266 ('Countermeasure[s] [may only be] taken against a state and not a human being'), 271 ('[Only] state-to-state [duties] could be the subject of countermeasures'); ILC, 'Summary Records of the 45th Session' (1993) (n 320), 145 ('Countermeasures should remain [...] a matter between states and have minimal effects on private individuals'); Hofer, 'Unilateral Sanctions & Responsibility' (n 19), 190–1.

³³⁸ Jazairy Idriss, 'Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (29 Aug 2017) UN Doc A/72/370, 13; Joyner Daniel, 'International Legal Limits on the Ability of States to Lawfully Impose Economic/Financial Sanctions' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (BRILL 2016), 201.

³³⁹ Jazairy, 'Negative Impact of Unilateral Coercive Measures on Human Rights' (2017) (n 338), 15 ('Human rights [law may] impose on states [...] [duties] not only when they adopt measures applicable on their own territory, but also extraterritorial [duties]'), 11 ('Such position would be consonant with the [customary rule] which prohibits a state from allowing its territory to be used to cause damage on the territory of another state').

³⁴⁰ Ibid, 15; Jazairy Idriss, 'Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (30 August 2018) UN Doc A/HRC/39/54, 18

³⁴¹ See broadly referring to human rights: Jazairy Idriss, 'Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (10 August 2015) UN Doc A/HRC/30/45, 4; Joyner, 'Limits on Economic/Financial Sanctions' (n 338), 201 citing Melzer N, *Targeted Killings in International Law* (Oxford University Press 2008), 138. On economic, social, and cultural rights: Jazairy, 'Negative Impact of Unilateral Coercive Measures on Human Rights' (2017) (n 338), 16 ('Even if the sanctioning state exercised no formal jurisdiction or control over the population concerned'); Jazairy, 'Negative Impact of Unilateral Coercive Measures on Human Rights' (2018) (n 340), 18; Douhan, 'Secondary Sanctions, Civil, & Criminal Penalties for Circumvention of Sanctions Regimes & Overcompliance with Sanctions' (2021) (n 315), 16 ('[ICESCR duties] are expressed without any restriction linked to territory or jurisdiction').

³⁴² See on human rights in general: *Wall* [2004] (n 26), 179–80 ('When they exercise jurisdiction outside their national territory'); HRCComm, 'General Comment 31: Nature of the General Legal Obligation Imposed on States Parties' (2004) UN Doc C/21/Rev1/Add13, ¶10; Milaninia Nema, 'Limits of Economic Sanctions under the Paradigm of International Humanitarian Law' in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, & Consequences* (Asser Press 2015), 99. Prezas, 'From Targeted States to Affected Populations' (n 292). 391. See regarding economic, social, cultural rights: *Wall* [2004] (n 26), 136 ('This Covenant guarantees rights which are essentially territorial'); Akande Dapo, Akhavan Payam, & Bjorge Erik, 'Economic Sanctions, International Law, & Crimes Against Humanity' (2021) 115 *American Journal of International Law* 493, 505 ('The ICESCR is by its nature territorial in scope') citing *Wall* [2004] (n 26) (Higgins, separate opinion), 213; Prezas, 'From Targeted States to Affected Populations' (n 292), 392.

³⁴³ Craven, 'Humanitarianism & the Quest for Smarter Sanctions' (n 295), 55 citing Meron Theodor, 'Extraterritoriality of Human Rights Treaties' (1995) 89 *American Journal of International Law* 78, 78.

within the [state's] territory and in areas where [it] exercises jurisdiction'.³⁴⁴ In the absence of specific rules to the contrary, states do not owe duties to individuals outside their jurisdiction. Thus, states do not necessarily commit a wrongful act when imposing measures against these individuals.³⁴⁵

Now, for individuals within the imposing states' jurisdiction, the state must ensure that it complies with its applicable duties. In this regard, scholars point out that individual measures imposed without judicial functions,³⁴⁶ fair trial,³⁴⁷ access to remedies or review,³⁴⁸ or compensation,³⁴⁹ may infringe on a person's right to due process.³⁵⁰ Of course, an argument may be made that the right may not apply to targeted measures as these are best seen as 'preventive administrative measures' that result from 'executive or administrative processes'.³⁵¹ However, bearing in mind that some measures have a 'degree of permanence',³⁵² certain safeguards must be made to ensure that individual rights are protected. Indeed, some states have provided procedures to 'mitigate [the measures'] adverse consequences' and ensure that the right to due process is safeguarded.³⁵³ These include procedures for the review of

³⁴⁴ Tzanakopoulos Antonios, 'Mechanisms to Assess & Mitigate Adverse Human Rights Impact of Unilateral Sanctions' (Workshop on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Geneva) (23 May 2014), 2; Happold, 'Economic Sanctions & International Law' (n 335), 8; *Wall* [2004] (n 26), 179–80 ('The [ICCPR] is applicable [to] acts done by a state in the exercise of its jurisdiction outside its own territory [...] The [ICESCR] contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial')

³⁴⁵ Dawidowicz, *Third Party Countermeasures* (n 333), 338 ('The state taking [unilateral measures] would not normally exercise any jurisdiction in the territory of the target state'); Tzanakopoulos, 'Human Rights Impact of Unilateral Sanctions' (n 344), 2 ('The [imposing] state [...] is under no [duty] to [provide] human rights protection within the jurisdiction of the target state'); Akande, Akhavan, & Bjorge, 'Economic Sanctions' (n 342), 505.

³⁴⁶ Moiseienko, 'Unilateral Targeted Sanctions' (n 312), 406.

³⁴⁷ White, 'Sanctions against Non-State Actors' (n 295), 139; Douhan Alena, 'Unilateral Sanctions in the Cyberworld: Tendencies & Challenges' (17 August 2022) UN Doc A/77/296, 17; Douhan Alena, 'Targets of Unilateral Coercive Measures: Notion, Categories, & Vulnerable Groups' (13 September 2021) UN Doc A/76/174/Rev.1, 10.

³⁴⁸ Happold, 'Economic Sanctions & International Law' (n 335), 1; Fitzgerald Peter, 'Smarter "Smart" Sanctions' (2007) 26 *Penn State International Law Review* 37, 48; Focarelli, *International Law as Social Construct* (n 300), 485.

³⁴⁹ Lugato M, 'Sanctions & Individual Rights' in Ronzitti Natalino (ed), *Coercive Diplomacy, Sanctions, & International Law* (Nijhoff 2016), 173 noting *Sepahan v Council* (Judgement) (2014) (ECJ, T-384/11, 25 Nov 2014).

³⁵⁰ Happold, 'Economic Sanctions & International Law' (n 335), 12 ('The issue [...] is their compatibility with procedural rights'); Douhan Alena, 'Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (21 July 2020) UN Doc A/75/209, 16.

³⁵¹ White Nigel, 'Shades of Grey: Autonomous Sanctions in the International Legal Order' in Subedi Surya (ed), *Unilateral Sanctions in International Law* (Hart 2021), 83; White, 'Sanctions against Non-State Actors' (n 295), 147.

³⁵² White, 'Autonomous Sanctions in the International Legal Order' (n 351), 83.

³⁵³ Dawidowicz, *Third Party Countermeasures* (n 333), 317.

measures, annulment of imposition, and compensation for damages.³⁵⁴

For other rights such as those on property,³⁵⁵ freedom of movement,³⁵⁶ and privacy,³⁵⁷ it must be stressed that these are ‘qualified rights’ and ‘restrictions on their exercise may be justified if [said restrictions] are proportionate and undertaken for an appropriate purpose’.³⁵⁸ If the imposing state can justify the measure’s imposition by appealing to exceptions, it commits no wrongful act. These show that individual measures, contrary to the claims of some,³⁵⁹ are not *per se* wrongful because they may affect duties owed to individuals. The wrongfulness, as far as the applicable human rights are concerned, cannot be determined wholesale and in the abstract. Rather, they must be determined on a case-to-case basis.

B. Observations: State Practice & *Opinio Juris*

1. State Practice

The practice of imposing targeted unilateral measures traces its origin to the UN’s collective measures under Chapter VII.³⁶⁰ Until the late 1990s, UN measures levied in response

³⁵⁴ See Beaucillon, ‘The European Union’s Position & Practice with regard to Unilateral & Extraterritorial Sanctions’ (n 313), 128; Simonen Katariina, ‘Economic Sanctions Leading to Human Rights Violations: Constructing Legal Argument’ in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, & Consequences* (Asser Press 2015), 189; Prezas, ‘From Targeted States to Affected Populations’ (n 292), 394; Moiseienko, ‘Unilateral Targeted Sanctions’ (n 312), 421–2.

³⁵⁵ Simonen, ‘Economic Sanctions Leading to Human Rights Violations’ (n 354), 188.

³⁵⁶ Happold, ‘Economic Sanctions & International Law’ (n 335), 98.

³⁵⁷ Bothe, ‘Compatibility & Legitimacy of Sanctions Regimes’ (n 329), 38; Happold, ‘Economic Sanctions & International Law’ (n 335), 97 citing HRC, *Comm No 1472/2006*, 94th sess, UN Doc CCPR/C/94/D/1472/2006 (29 December 2008) (*Sayadi & Vinck v Belgium*), ¶10.12.

³⁵⁸ Simonen, ‘Economic Sanctions Leading to Human Rights Violations’ (n 354), 188; Happold Matthew, ‘Targeted Sanctions & Human Rights’ in Eden Paul & Happold Matthew (eds), *Economic Sanctions & International Law* (Hart 2016), 95 citing *Bank Melli Iran v Council of the European Union* (2009) (ECJ, C-390/08, 14 October 2009), ¶70 (‘Fundamental rights are not absolute, and that their exercise may be subject to restrictions’); 99 (‘The substantive rights at issue are qualified rights’); Lugato, ‘Sanctions & Individual Rights’ (n 349), 183; de Waart Paul, ‘Economic Sanctions Infringing Human Rights: Is There a Limit?’ in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law* (Springer 2015), 133; Bothe, ‘Compatibility & Legitimacy of Sanctions Regimes’ (n 328), 38, 41. See *European Commission & others v Yassin Abdullah Kadi* (2013) (ECJ, C-584/10 P, C-593/10 P, & C-595/10 P, 18 July 2013), ¶101 (‘Limitations on the exercise of the rights [are allowed] subject to the conditions that the limitation [...] respects the essence of the fundamental right in question and, subject to the principle of proportionality, that it is necessary and genuinely meets objectives of general interest’).

³⁵⁹ See e.g. Jazairy, ‘Negative Impact of Unilateral Coercive Measures on Human Rights’ (2015) (n 341), 6 (‘Unilateral coercive measure imposed on a country necessarily runs counter to [human rights]’); Mohamad Rhamat, ‘Unilateral Sanctions in International Law: A Quest for Legality’ in Marossi Ali & Bassett Marisa (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, & Consequences* (Asser Press 2015), 80 (‘The imposition of unilateral [...] sanctions by States deprives the peoples of targeted state of basic human rights’). But see Barber Rebecca, ‘An Exploration of the General Assembly’s Troubled Relationship with Unilateral Sanctions’ (2021) 70 *International & Comparative Law Quarterly* 343, 368 (‘It cannot be ignored that the reports of the [...] Special Rapporteur [Jazairy] [...] contain sweeping statements regarding the illegality of unilateral coercive measures’).

³⁶⁰ Ashley Louisa, ‘Status of Unilateral Countermeasures in International Law’ in Subedi Surya (ed),

to threats to and breaches of the peace, including breaches of duties owed *erga omnes*, were ‘comprehensive’—embargos, boycotts, and quotas.³⁶¹ Yet, these measures’ adverse effects on the targeted states’ population and ‘on third states with trading links with the targeted state’ soon became apparent.³⁶² Instead of targeting those responsible for or have contributed to the breach or threat to peace,³⁶³ the measures impacted states’ ‘whole economy [and] financial system’.³⁶⁴ These prompted a re-examination of the UN’s measures,³⁶⁵ particularly in the Interlaken and Bonn-Berlin processes,³⁶⁶ that resulted in the ‘normative shift’ away from ‘general’ collective measures to targeted ones.³⁶⁷ Since 2003, most UN measures have been ‘targeted in some form’.³⁶⁸ Indeed, this was the case for the travel bans and asset freezes against

Unilateral Sanctions in International Law (Hart 2021), 234; Jazairy, ‘Negative Impact of Unilateral Coercive Measures on Human Rights’ (2015) (n 341), 8; Focarelli, *International Law as Social Construct* (n 300), 483. *But see* European Parliament Directorate General for External Policies of the Union, ‘Targeted Sanctions against Individuals’ (n 313), 8 (‘Despite targeted sanctions having first appeared in the context of the [UN], their origin is European’).

³⁶¹ Watson, ‘WTO & Unilateral Sanctions’ (n 293), 187; Beaucillon, ‘Unilateral & Extraterritorial Sanctions’ (n 313), 4 *citing* Hawkins Darren & Lloyd Joshua, ‘Questioning Comprehensive Sanctions: Birth of a Norm’ (2003) 2 *Journal of Human rights* 443, 445. Craven, ‘Humanitarianism & the Quest for Smarter Sanctions’ (n 295), 44. *See e.g.* measures imposed on the Yugoslavia: Res 757 UNSC (30 May 1992) UN Doc S/RES/757; Res 787 UNSC (16 November 1992) UN Doc S/RES/787; measures levied on Iraq: Res 661 UNSC (6 August 1990) UN Doc S/RES/661; Res 670 UNSC (25 September 1990) S/RES/670.

³⁶² Focarelli, *International Law as Social Construct* (n 300), 483.

³⁶³ White, ‘Autonomous Sanctions in the International Legal Order’ (n 351), 75.

³⁶⁴ Prezas, ‘From Targeted States to Affected Populations’ (n 292), 386. *Note* that the measures against Iraq caused a ‘sharp deterioration of the socio-economic welfare of the general population’ (Craven, ‘Humanitarianism & the Quest for Smarter Sanctions’ (n 295), 45). These degraded the civilian infrastructure leading to a ‘decline in food production and water quality, rise in preventable diseases, and increased incidence of chronic malnutrition and infant mortality’ (*ibid citing* UNSC, ‘Report of the Second Panel on the Current Humanitarian Situation in Iraq’ (30 March 1999) UN Doc S/1999/346. Gordon, ‘Smart Sanctions Revisited’ (n 295), 317).

³⁶⁵ *Note* that to mitigate the impact of these measures, the UN began allowing for humanitarian exemptions (Hufbauer Gary & Jung Euijin, ‘Economic Sanctions in the Twenty-First Century’ in van Bergejik Peter (ed), *Research Handbook on Economic Sanctions* (Elgar 2021), 28; Craven, ‘Humanitarianism & the Quest for Smarter Sanctions’ (n 295), 49). For instance, as to Iraq, the SC permitted the delivery of medical supplies, basic foodstuffs (Res 666 UNSC (13 September 1990) S/RES/666), and provisions for essential civilian needs like agricultural supplies and parts for civilian infrastructure (Res 687 UNSC (3 April 1991) UN Doc S/RES/687). The measures against Yugoslavia also contained exemptions for ‘medical or humanitarian purposes and foodstuffs’ (Res 757 (n 361)).

³⁶⁶ Biersteker & Hudáková, ‘Historical Development & Current Challenges’ (n 295), 108; Bogdanova, *Unilateral Sanctions & Human Rights* (n 302), 33.

³⁶⁷ Eckert, ‘Evolution & Effectiveness of UN Targeted Sanctions’ (n 294), 59; Prezas, ‘From Targeted States to Affected Populations’ (n 292), 385. *See* White, ‘Sanctions against Non-State Actors’ (n 295), 123 *citing* UNSG, ‘We The Peoples: The Role of the United Nations in the 21st Century’ (27 March 2000) UN Doc A/54/2000, 79; UNSC, ‘Verbatim Record, 4128th Meeting’ (17 April 2000) S/PV/4128, 4.

³⁶⁸ Biersteker & Hudáková, ‘Historical Development & Current Challenges’ (n 295), 109; Broodryk Amelia & du Plessis Anton, ‘African Perceptions of UN Sanctions’ in Van den Herik Larissa (ed), *Research Handbook on UN Sanctions* (Elgar 2017), 467; Focarelli, *International Law as Social Construct* (n 300), 483; Happold, ‘Targeted Sanctions & Human Rights’ (n 358), 91; Drezner, ‘Sanctions Sometimes Smart’ (n 313), 101. *Note* that in theory, ‘targeted’ measures allow for the collective measures’ ‘finer calibration’ and ‘precisely’ focus on states’ economic sectors limiting their capacity to perpetrate the conduct deemed a breach or threat to peace (Timofeev

individuals responsible for the genocide in Sudan (2004–),³⁶⁹ and travel bans and asset freezes against those responsible for the torture in Libya (2011).³⁷⁰

States have adopted the trend of levying unilateral measures. As may be observed in *Part II*, while states continue to levy ‘sectoral’ unilateral measures, they have also increasingly made use of targeted ones.³⁷¹ For instance, as seen in *Chapter 5B*, some states, in response to Russia’s use of force against Ukraine (2014–), levied measures against certain individuals and entities in the form of asset freezes, financial limitations, and travel restrictions.³⁷² The same is true, as

Ivan, ‘Unilateral & Extraterritorial Sanctions Policy: the Russian Dimension’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 92; Smeets, ‘Economic Sanctions & the WTO’ (n 314), 280). The measures are no longer ‘blunt instruments’ that harm ‘people who are not their primary targets’ (Biersteker & Hudáková, ‘Historical Development & Current Challenges’ (n 295), 108). Rather, they ‘mitigate the impact’ on the population causing less ‘injurious humanitarian consequences’ (Tzanakopoulos, ‘Human Rights Impact of Unilateral Sanctions’ (n 344), 4; Bogdanova, *Unilateral Sanctions & Human Rights* (n 302), 32 citing Tostensen Arne & Beate Bull, ‘Are Smart Sanctions Feasible?’ (2002) 54 *World Politics* 373, 373–4). Yet, some submit that ‘there is no systematic evidence that smart sanctions yield better policy results’ (Drezner, ‘Sanctions Sometimes Smart’ (n 313), 97), and that little is ‘known about the efficacy of targeted sanctions in comparison to comprehensive’ ones (European Parliament Directorate General for External Policies of the Union, ‘Targeted Sanctions against Individuals’ (n 313), 19. See Moret, ‘Unilateral & Extraterritorial Sanctions in Crisis’ (n 294), 28–9 noting Galtung Johan, ‘On the Effects of International Economic Sanctions’ (1967) 19 *World Politics* 378).

³⁶⁹ Res 1591 UNSC (29 March 2005) UN Doc S/RES/1591.

³⁷⁰ Res 1970 UNSC (26 February 2011) UN Doc S/RES/1970.

³⁷¹ Ashley, ‘Unilateral Countermeasures in International Law’ (n 360), 234; Jazairy, ‘Negative Impact of Unilateral Coercive Measures on Human Rights’ (2015) (n 341), 8; Focarelli, *International Law as Social Construct* (n 300), 483.

³⁷² See e.g. measures levied in 2014: Executive Order 13660, *Blocking Property of Certain Persons Contributing to the Situation in Ukraine* (2014) (US); Executive Order 13661, *Blocking Property of Persons Contributing to the Situation in Ukraine* (2014) (US); Executive Order 13662, *Blocking Property of Persons Contributing to the Situation in Ukraine* (2014) (US); Executive Order 13685, *Blocking Property of Certain Persons & Prohibiting Certain Transactions with Respect to Crimea* (2014) (US); Executive Order 13849, *Implementation of Certain Sanctions Set Forth in the Countering America’s Adversaries Through Sanctions Act* (2018) (US); Council of the EU, ‘Council Decision 2014/145/CFSP’ (17 March 2014) L 78/16; High Representative of the European Union, ‘Declaration on the alignment of certain third countries with the Council Decision 2014/145/CFSP’ (11 April 2014) 8937/1/14 REV1; UK Foreign Office, ‘UK Sanctions relating to Russia’ (15 April 2019) <<https://www.gov.uk/government/collections/uk-sanctions-on-russia>>; SOR/2014-60, *Special Economic Measures (Russia) Regulations* (2014); F2015C00408, *Autonomous Sanctions (Designated Persons, Entities, & Declared Persons—Ukraine)* (2014) (AUS); Ministry of Foreign Affairs of Japan, ‘Statement by the Minister for Foreign Affairs of Japan on the Sanctions against Russia over the situation in Ukraine’ (29 April 2014) <https://www.mofa.go.jp/press/release/press4e_000281.html>; Swiss Federal Council, ‘Situation in Ukraine: Federal Council decides on further measures to prevent the circumvention of international sanctions’ (27 August 2014) <<https://www.news.admin.ch/message/index.html?lang=en&msg-id=54221>>. See e.g. measures levied in 2022: Executive Order 14065, *Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts in Ukraine* (2022) (US); Council of the EU, ‘Council Decision 2022/329/CFSP’ (25 February 2022) LI 42/95; UK Foreign Office, ‘Foreign Secretary imposes UK’s most punishing sanctions on Russia’ (24 February 2022) <<https://www.gov.uk/government/news/foreign-secretary-imposes-uks-most-punishing-sanctions-to-inflict-maximum-and-lasting-pain-on-russia>>; SOR/2022-30, *Regulations Amending the Special Economic Measures (Ukraine) Regulations* (2022) (CAN); F2022L00193, *Autonomous Sanctions (Designated Persons, Entities, & Declared Persons—Ukraine)* (2022) (AUS); Swiss Federal Council, ‘Switzerland adopts EU sanctions against Russia’ (28 February 2022) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87386.html>>; Ministry of Foreign Affairs of Japan, ‘Sanction Measures following Russia’s Recognition of the “Independence” of the “Donetsk

seen in *Chapters 6A* and *6B*, for some human rights norms. In response to the torture and forced labour in Myanmar (2001–), EU states, the US, the UK, and Canada levied travel restrictions and asset freezes against officials responsible for the ‘brutal repression and serious [...] rights violations’ in Myanmar.³⁷³ Responding to the torture in Belarus (2004–), the EU, US, and UK levied travel restrictions,³⁷⁴ and asset freezes against individuals responsible for the abuses.³⁷⁵ Due to the torture in Libya (2011), EU states and the US froze some Libyan officials’ assets.³⁷⁶ For the torture in Syria (2011–), EU states, the US, Canada, Arab League members, and Japan levied travel bans against certain individuals.³⁷⁷ These states, along with Australia and Turkey, also imposed asset freezes against some individuals and entities.³⁷⁸ The same is true for the

People’s Republic” and the “Luhansk People’s Republic” (24 February 2022) <https://www.mofa.go.jp/press/release/press4e_003085.html>; Ministry of Foreign Affairs of Japan, ‘Sanction Measures following Russia’s military actions in Ukraine’ (25 February 2022) <https://www.mofa.go.jp/press/release/press6e_000371.html>; Singapore Ministry of Foreign Affairs, ‘Sanctions & Restrictions against Russia’ (5 March 2022) <<https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2022/03/20220305-sanctions>>; Government of New Zealand, ‘First sanctions against Russia’ (18 March 2022) <<https://www.beehive.govt.nz/release/first-tranche-sanctions-under-russia-sanctions-act-enacted>>.

³⁷³ Council of the EU, ‘Council Decision 2021/711/CFSP’ (29 April 2021) L 147/17; Council of the EU, ‘Council Decision 2021/1000/CFSP’ (21 June 2021) LI 219/57. See Executive Order 14014 *Blocking Property With Respect to the Situation in Burma* (2021) (US); SOR/2021-18, *Regulations Amending the Special Economic Measures (Burma) Regulations* (2021) (CAN); SOR/2021-106, *Regulations Amending the Special Economic Measures (Burma) Regulations* (2021) (CAN); 2021 No 496, *Myanmar Sanctions Regulations* (2021) (UK).

³⁷⁴ Council of the EU, ‘Common Position 2004/661/CFSP’ (24 September 2004) L 301/67; Council of the EU, ‘Common Position 2006/276/CFSP’ (10 April 2006) L 101/5; Executive Order 14038, *Blocking Property of Persons Contributing to the Situation in Belarus* (2021) (US)

³⁷⁵ Council of the EU, ‘Common Position 2010/639/CFSP’ (25 October 2020) L 280/18. See Council of the EU, ‘Council Decision 2012/642/CFSP’ (15 October 2012) L 285/1; Council of the EU, ‘Council Decision 2016/280/CFSP’ (25 February 2016) L 52/30; Council of the EC, ‘Council Decision 94/165/CFSP’ (15 March 1994) L 075; PL 108-347, *Belarus Democracy Act of 2004* (2004) (US); PL 112-82, *Belarus Democracy & Human Rights Act* (2012) (US); Executive Order 13405, *Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus* (2006) (US); Executive Order 14038 (US); 2013 No 164, *The Belarus (Asset-Freezing) Regulations 2013* (2013) (UK); 2019 No 600, *Belarus (Sanctions) (EU Exit) Regulations 2019* (2019) (UK); 2020 No 590, *Sanctions (EU Exit) (Miscellaneous Amendments) (No 2) Regulations 2020* (2020) (UK); 2021 No 1146, *Belarus (Sanctions) (EU Exit) Amendment (No 2) Regulations 2021* (2021) (UK)

³⁷⁶ Executive Order 13566, *Blocking Property & Prohibiting Certain Transactions Related to Libya* (2011) (US); Council of the EU, ‘Council Decision 2011/137/CFSP’ (3 March 2011) L 58/53.

³⁷⁷ Council of the EU, ‘Council Decision 2011/273/CFSP’ (9 May 2011) L 121/1; Council of the EU, ‘Council Decision 2011/782/CFSP’ (1 December 2011) L 319/56; Executive Order 13606, *Blocking Property & Suspending Entry into the US of Certain Persons With Respect to Grave Human Rights Abuses by Iran & Syria* (2011) (US); League of Arab States, ‘Res 7442’ (27 November 2011); Ministry of Foreign Affairs of Japan, ‘Addition of Lists for the Measures to Freeze the Assets of individuals and entities in Syria’ (27 Nov 2012) <https://www.mofa.go.jp/announce/announce/2012/11/1127_01.html>.

³⁷⁸ Council of the EU, ‘Council Decision 2011/273/CFSP’ (n 377); Council of the EU, ‘Council Decision 2011/782/CFSP’ (n 377); Council of the EU, ‘Council Decision 2011/302/CFSP’ (24 May 2022) L 136/91; Executive Order 13572, *Blocking Property of Certain Persons with Respect to Human Rights Abuses in Syria* (2011) (US); Executive Order 13573, *Blocking Property of Senior Officials of Syria* (2011) (US); Executive Order 13606 (US); Executive Order 13608, *Prohibiting Certain Transactions With and Suspending Entry Into the US of Foreign Sanctions Evaders With Respect to Iran and Syria* (2011) (US); 2019 No 792, *Syria (Sanctions) (EU Exit) Regulations 2019* (2019) (UK); League of Arab States, ‘Res 7442’ (n 377); SOR/2011-166, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2011) (CAN); SOR/2012-166, *Regulations Amending the*

torture in Venezuela (2014–), for which the US, Lima Group members, EU states, and the UK, imposed travel bans,³⁷⁹ and asset freezes against the responsible persons.³⁸⁰ In response to the racial discrimination and forced labour against Uighurs in China (2014–), the US, EU, UK, and Canada levied travel restrictions and asset freezes against those responsible for or have contributed to the abuses against the Uighurs.³⁸¹ Finally, due to the genocide and racial discrimination against the Rohingya in Myanmar (2016–), EU states and Australia levied travel restrictions against certain individuals in Myanmar,³⁸² and along with the UK and US, froze the assets of some individuals and entities.³⁸³

That said, the practice appears to be predominantly Western. Of the eight instances examined in which states levied targeted unilateral measures in response to breaches of duties owed *erga omnes*, only in three cases did non-Western states impose these measures—Russia for its use of force against Ukraine (2014–), Syria for torture (2011–), and Venezuela for torture (2014–). As in the case of ‘general’ and ‘sectoral’ measures,³⁸⁴ only a small minority of states

Special Economic Measures (Syria) Regulations (2012) (CAN); SOR/2017-62, *Regulations Amending the Special Economic Measures (Syria) Regulations* (2017) (CAN); SOR/2019-61, *Regulations Amending Certain Regulations Made Under the Special Economic Measures Act* (2019) (CAN); F2018C00133, *Autonomous Sanctions (Designated Persons & Entities & Declared Persons—Syria)* (2018); Ministry of Foreign Affairs of Japan, ‘Addition of Lists for the Measures to entities in Syria’ (n 377); —, ‘Turkey imposes Sanctions on Syria’ (The Guardian, 30 November 2011) <<https://www.guardian.co.uk/world/2011/nov/30/turkey-imposes-sanctions-on-syria>>.

³⁷⁹ Executive Order 13692, *Blocking Property & Suspending Entry of Certain Persons Contributing to the Situation in Venezuela* (2015) (US); Council of the EU, ‘Council Decision 2017/2074/CFSP’ (14 November 2017) L 295/60; 2019 No 135, *Venezuela (Sanctions) (EU Exit) Regulations* (2019) (UK); Government of Canada, ‘Lima Declaration’ (8 August 2017) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/latin_america-amerique_latine/2017-08-08-lima_group-groupe_lima.aspx>.

³⁸⁰ Executive Order 13692 (US); Executive Order 13827, *Taking Additional Steps to Address the Situation in Venezuela* (2018) (US); Council of the EU, ‘Council Decision 2017/2074/CFSP’ (n 379); *Venezuela (Sanctions) (EU Exit) Regulations* (UK); SOR/2017-20, *Special Economic Measures (Venezuela) Regulations* (2017) (CAN); SOR/2019-61 (CAN); SOR/2019-106, *Regulations Amending the Special Economic Measures (Venezuela) Regulations* (2019) (CAN); SOR/2019-263, *Regulations Amending the Special Economic Measures (Venezuela) Regulations* (2019) (CAN); AS 2018 1217, *Verordnung über Massnahmen gegenüber Venezuela* (2018) (SUI); Ministerio de Relaciones Exteriores de Peru, ‘Declaración del Grupo de Lima’ (4 January 2019) <<https://www.gob.pe/institucion/rree/noticias/24270-declaracion-del-grupo-de-lima>>.

³⁸¹ PL 116-145, *Uyghur Human Rights Policy Act* (2020) (US); PL 114-328, *Global Magnitsky Human Rights Accountability Act* (2016) (US); Council of the EU, ‘Council Decision (CFSP) 2020/1999’ (7 December 2020) LI 410/13; Council of the EU, ‘Council Regulation (EU) 2020/1998’ (7 December 2020) OJ L 410/1; Council of the EU, ‘Council Decision 2021/481/CFSP’ (22 March 2021) LI 99/25; 2020 No 680, *Global Human Rights Sanctions Regulations* (2020) (UK); SOR/2021-49, *Special Economic Measures (China) Regulations* (2021) (CAN).

³⁸² Council of the EU, ‘Council Decision 2018/655/CFSP’ (26 April 2018) L 108/29; F2018L01409, *Autonomous Sanctions (Designated & Declared Persons – Myanmar) List* (2018) (AUS).

³⁸³ Council of the EU, ‘Council Decision 2018/655/CFSP’ (n 382); *Myanmar Sanctions Regulations 2021* (UK); —, ‘US Restrictions on Relations with Burma’ (Congressional Research Service, 2020), 5–11; Executive Order 13619, *Blocking Property of Burma & Prohibiting Certain Transactions* (2012) (US); SOR/2018-135, *Regulations Amending the Special Economic Measures (Burma) Regulations* (2018) (CAN); SOR/2019-61 (CAN).

³⁸⁴ See Hofer, ‘Unilateral Sanctions & Responsibility’ (n 19), 193; White, ‘Autonomous Sanctions in the International Legal Order’ (n 351) 70; Tams, ‘Guardians of Community Interests’ (n 3), 391.

have adopted the practice and is arguably limited to a group of states that does not include states of ‘different political, economic, and legal systems’.³⁸⁵

2. *Opinio Juris*

States’ *opinio juris* on targeted measures is also divergent. Some states, mostly Western ones, have expressed support for these measures. For instance, the US repeatedly claimed that it may ‘utilise its trade and commercial policy as tools’ for the ‘respect for human rights’ and prevention of ‘threats to the international community’.³⁸⁶ These measures include targeted measures which are designed to ‘promote respect for human rights [...] globally’.³⁸⁷ Indeed, the US stated that it will ‘prioritise’ these measures as they ‘produce a tangible and significant impact on corrupt actors’ and ensure ‘prompt changes in behaviour or disrupt the activities of malign actors’.³⁸⁸ For its part, the EU stated that it will levy measures, including targeted ones, to ‘bring about a change in policy or activity by the target [states]’.³⁸⁹ It also expressed a

³⁸⁵ See *North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands) (Judgment) [1969] ICJ 3 (Lachs, dissenting), 229; *Mondev International Ltd v US* (Award) (2002) (ICSID Additional Facility, 11 October 2002), ¶117.

³⁸⁶ *Digest of United States Practice in International Law* (2019) (US), 185–6. See UNGA, Third Committee, ‘Summary Record of the 70th Session, 52nd Meeting’ (31 October 2019) UN Doc A/C.3/70/SR.52, 5. See also UNGA, ‘Verbatim Record, 60th Session, 68th Meeting’ (22 December 2005) UN Doc A/60/PV.68, 8; UNGA, ‘Verbatim Record, 62nd Session, 78th Meeting’ (19 December 2007) UN Doc A/62/PV.78, 11; A/C.3/64/SR.42, 8; UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (1 December 2011) UN Doc A/C.2/66/SR.37, 3; UNGA, Third Committee, ‘Summary Record of the 66th Session, 44th Meeting’ (15 November 2011) UN Doc A/C.3/66/SR.44, 9; UNGA, Third Committee, ‘Summary Record of the 67th Session, 44th Meeting’ (26 November 2012) UN Doc A/C.3/67/SR.44, 2; UNGA, Third Committee, ‘Summary Record of the 68th Session, 49th Meeting’ (21 November 2013) UN Doc A/C.3/68/SR.49, 9; UNGA, Third Committee, ‘Summary Record of the 69th Session, 52nd Meeting’ (24 November 2014) UN Doc A/C.3/69/SR.52, 6; UNGA, Second Committee, ‘Verbatim Record, 70th Session, 52nd Meeting’ (20 November 2015) UN Doc A/C.2/70/SR.52, 5. See also Dupont Pierre-Emmanuel, ‘Unilateral Sanctions as Unilateral Coercive Measures: Discussing Coercion at the UN Level’ in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 378.

³⁸⁷ 87(62) Federal Register 12226, 2022 *Global Magnitsky Human Rights Accountability Act Annual Report* (2023) (US), 19344; US Department of Treasury, ‘Office of Foreign Assets Control’ (2023) <<https://ofac.treasury.gov/about-ofac>>; US Secretary of State, ‘Global Magnitsky Human Rights Accountability Act Implementation’ (US Department of State, 21 December 2017).

³⁸⁸ *Global Magnitsky Act Annual Report* (US), 19345.

³⁸⁹ Council of the EU, ‘Guidelines on Implementation & Evaluation of Restrictive Measures’ (n 295), ¶4. See UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (9 August 2017) UN Doc A/72/307, 9; UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 315), 20; UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (30 August 2021) UN Doc A/76/310, 17, 19. See also UNGA, Second Committee, ‘Summary Record of the 62nd Session, 28th Meeting’ (16 November 2007) UN Doc A/C.2/62/SR.28, 5 (Portugal on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 64th Session, 41st Meeting’ (9 December 2009) UN Doc A/C.2/64/SR.41, 4 (Sweden on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (2011) (n 386), 4 (Poland on behalf of the EU); UNGA, Second Committee, ‘Summary Record of the 68th Session, 28th Meeting’ (16 November 2013) UN Doc A/C.2/68/SR.28, 3 (Lithuania on behalf of the EU); UNGA, Second Committee, ‘Verbatim Record, 70th Session, 31st Meeting’ (28 September 2015) UN Doc A/C.2/70/SR.31, 4 (Luxembourg on behalf of the EU). Note Gestri M, ‘Sanctions Imposed by the European Union: Legal & Institutional Aspects’ in Ronzitti Natalino (ed), *Coercive*

preference for these measures as they are ‘more effective’ and ‘minimise adverse [effects on] those not responsible for such policies and actions’.³⁹⁰ The same is true for the UK which expressed the need for legislation, for ‘new legal powers [that] will enable [it] to [...] impose autonomous [...] sanctions [including travel bans, asset freezes, and financial restrictions] in coordination with [its] allies and partners’;³⁹¹ Canada which stated that the ‘imposition of sanctions against [...] non-state actors is a key tool [for the enforcement of] international norms’;³⁹² and Australia which claimed that these measures, ‘[imposed in response to] situations of international concern [...] minimise [...] the impact on the general populations of the affected countries’.³⁹³ These states have also enacted specific laws that permit them to impose targeted measures. In 2016, the US enacted the Global Magnitsky Human Rights Accountability Act that permits it to levy measures against those ‘responsible for serious human rights violations’.³⁹⁴ Others like the EU,³⁹⁵ UK,³⁹⁶ Canada,³⁹⁷ and Australia,³⁹⁸ have also

Diplomacy, Sanctions, & International Law (Nijhoff 2016), 99 (‘EU can be regarded as a trailblazer by the advocates [...] countermeasures in reaction to *erga omnes* [duties]’).

³⁹⁰ Council of the EU, ‘Guidelines on Implementation & Evaluation of Restrictive Measures’ (n 295).

³⁹¹ Cm 9403, *Consultation on the UK’s Legal Framework for Imposing & Implementing Sanctions* (2017) (UK), 7.

³⁹² Government of Canada, ‘Canadian Sanctions Legislation’ (9 January 2023) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/legislation-lois.aspx?lang=eng>; Canada Ministry of Foreign Affairs, ‘Government Response to the Seventh Report of the Standing Committee on Foreign Affairs and International Developmental’ (17 July 2017), 2.

³⁹³ No 28, 2011, *Autonomous Sanctions Act* (2011) (AUS) (Explanatory Memorandum). See UNGA, ‘Verbatim Record, 57th Session, 31st Meeting’ (2002) (n 315), 13.

³⁹⁴ Biersteker & Hudáková, ‘Historical Development & Current Challenges’ (n 295), 109 (‘The vast majority of US sanctions introduced since 2000, have been targeted in some form’); Tzanakopoulos Antonios, ‘State Responsibility for “Targeted Sanctions”’ (2019) 113 *American Journal of International Law (Unbound)* 135, 135. See *Global Magnitsky Act* (US); PL 112-208, *Magnitsky Act* (2012) (US).

³⁹⁵ Happold, ‘Targeted Sanctions & Human Rights’ (n 358), 91 (‘All current [EU] sanctions regimes are, or at least claim to be, targeted’). See Council of the EU, ‘Council Decision (CFSP) 2020/1999’ (n 381); Council of the EU, ‘Council Regulation (EU) 2020/1998’ (n 381).

³⁹⁶ See *Consultation on the UK’s Legal Framework for Imposing & Implementing Sanctions* (UK), 6–7 (‘[The restrictive measures include] travel bans [...] asset freezes [...] [and] financial, and trade restrictions’). See also 2018 c 13, *Sanctions and Anti-Money Laundering Act* (2018) (UK), §3; *Global Human Rights Sanctions Regulations* (UK).

³⁹⁷ See SC 1992 c 17, *Special Economic Measures Act* (1992) (CAN), §4.1 (‘By order, cause to be seized or restrained [...] any property situated in Canada that is owned or that is held or controlled, directly or indirectly by [...] a foreign state; any person in that foreign state, or (iii) a national of that foreign state who does not ordinarily reside in Canada’); SC 2017 c 21, *Justice for Victims of Corrupt Foreign Officials Act* (2017) (CAN) (‘[The] Act [...] provides for [...] restrictive measures [against] foreign nationals responsible for gross violations of [...] human rights’), §4.1 (‘[The Governor in Council may] make any orders or regulations with respect to the restriction or prohibition of any of the activities [...] in relation to a foreign national that [it] considers necessary; and [...] cause to be seized or restrained [...] any property situated in Canada that is owned — or that is held or controlled, directly or indirectly — by the foreign national’).

³⁹⁸ See *Autonomous Sanctions Act* (AUS) (Explanatory Memorandum) (‘They are highly targeted measures, applied only to the specific governments, individuals or entities [...] or to the specific goods and services [...] that are responsible for, or have a nexus to, the situation of international concern. They are applied [...] to minimise, to

enacted similar laws.

Yet, most states continue to broadly condemn unilateral measures including targeted ones.³⁹⁹ Recall from *Part II* that states, in GA resolutions, denounced unilateral measures for being coercive, for not being ‘authorised by the relevant organs of the UN’, and called on states to ‘eliminate their use’.⁴⁰⁰ States also rejected these measures due to their ‘negative effects on human rights’.⁴⁰¹ States within institutional arrangements did the same. States, in several declarations, condemned unilateral measures for their coercive nature, extraterritorial effects, negative impact on human rights,⁴⁰² and for not being the product of ‘multilateralism’.⁴⁰³ For similar reasons—coercion,⁴⁰⁴ states’ exercise of extra-territorial jurisdiction,⁴⁰⁵ the measures’

the extent possible, the impact on the general populations of the affected countries’); No 128, 2021, *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions)* (2021) (AUS), §§3, 10

³⁹⁹ See also Hofer, ‘Unilateral Sanctions & Responsibility’ (n 19), 194; Subedi, ‘Status of Unilateral Sanctions’ (n 5), 38.

⁴⁰⁰ See *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 56/179 UNGA (21 December 2001) UN Doc A/RES/56/179; Res 76/191 UNGA (17 December 2021) UN Doc A/RES/76/191. See also *Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political & Economic Compulsion* Res 57/5 UNGA (16 September 2002) UN Doc A/RES/57/5.

⁴⁰¹ See *Human Rights & Unilateral Coercive Measures* Res 56/148 UNGA (19 December 2001) UN Doc A/RES/56/148; Res 77/214 UNGA (15 December 2022) UN Doc A/RES/77/214.

⁴⁰² See Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (16 July 2009) NAM2009/FD/Doc.1, 9, 91; Conference of Heads of the NAM, ‘Final Document of the 14th Summit’ (16 September 2006) UN Doc A/61/472-S/2006/780, 234.7; Conference of Heads of the NAM, ‘Final Document of the 16th Summit’ (31 August 2012) NAM2012/Doc.1/Rev.2, 133; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (18 September 2016) NAM/2016/CoB/DOC.1/Corr.1, 17, 145

⁴⁰³ See Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (n 402), 11; Conference of Heads of the NAM, ‘Final Document of the 16th Summit’ (n 402), 5; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (n 402), 17, 145. See also G77 Foreign Ministers, ‘Declaration Adopted at the 26th Meeting’ (19 September 2002), ¶42; G77 & China Foreign Ministers, ‘Declaration adopted at the 27th Annual Meeting’ (25 September 2003), ¶36; G77 & China Foreign Ministers, ‘Declaration adopted at the 28th Annual Meeting’ (30 September 2004), ¶55; G77 & China Foreign Ministers, ‘Declaration adopted at the 43rd Annual Meeting’ (27 September 2019), ¶¶228–9.

⁴⁰⁴ See e.g. Ministry of Foreign Affairs of Russia, ‘Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law’ (25 June 2016) <https://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698>; UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (12 August 2005) UN Doc A/60/226, 4 (Bulgaria), 7 (Guatemala), 7 (Honduras), 7 (Cuba), 8 (Jamaica), 12 (Syria); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (6 August 2007) UN Doc A/62/210, 5 (Belarus), 5 (Benin), 6 (Cuba), 8 (Ukraine); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (14 July 2011) UN Doc A/66/138, 6 (Brunei), 6 (Colombia), 7 (Cuba), 7 (Egypt), 11 (Myanmar), 12 (Oman), 14 (Ukraine); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (29 July 2013) UN Doc A/68/218, 9 (Lao), 10 (Philippines), 10 (Nicaragua), 13 (Syria); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (16 July 2015) UN Doc A/70/152, 6 (Brunei), 6 (Cambodia), 7 (Central African Republic); 7 (Congo), 7 (Cuba), 10 (Ecuador), 11 (Madagascar), 12 (Sri Lanka), 15 (Tunisia); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2017) (n 389), 2 (Iran), 6 (Cuba), 10 (Guatemala), 11 (Russia); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 315), 5 (Burundi), 5 (Cambodia), 6 (Cuba), 10 (Ghana), 11 (Nigeria), 12 (Russia), 13 (Sudan).

⁴⁰⁵ See e.g. UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic

negative effects on human rights,⁴⁰⁶ and unilateralism,⁴⁰⁷ states also condemned unilateral measures in their individual statements.

It is crucial to note that states, in expressing these views, made no distinction among general, sectoral, and individual measures. This suggests that these states view these measures similarly. Indeed, Iran made this clear in its 2013 statement on behalf of the NAM when it stated that ‘the NAM rejects the adoption and implementation of [...] or unilateral [restrictive] measures [...] including [...] other intimidating measures and arbitrary travel restrictions’ as these violate the ‘UN Charter [and] international law’.⁴⁰⁸ Some states like Russia and China took one step further and levied retaliatory measures in response to the targeted measures levied against their

Compulsion: SG Report’ (2002) (n 315), 1 (Iran), 2 (Argentina), 2 (Ecuador); 2 (Japan); 3 (Mali), 3 (Namibia), 3 (Qatar), 6 (Libya); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 315), 20 (EU).

⁴⁰⁶ See e.g. Ministry of External Affairs of India, ‘Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People's Republic of China’ (18 April 2016) <https://mea.gov.in/bilateral-documents.htm?dtl/26628/Joint_Communicu_of_the_14th_Meeting_of_the_Foreign_Ministers_of_the_Russian_Federation_the_Republic_of_India_and_the_Peoples_Republic_of_China>; HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (15 August 2010) UN Doc A/HRC/15/43, 2 (Algeria), 3 (Belarus), 4 (Jamaica), 5 (Qatar), 6 (Russia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (5 August 2011) UN Doc A/66/272, 3 (Argentina), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 11 (Ecuador), 13 (Guyana), 14 (Iraq), 14 (Kuwait); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (29 July 2012) UN Doc A/67/181, 3 (Andorra), 4 (Belarus), 5 (Bosnia & Herzegovina), 7 (Cuba), 8 (Iran), 10 (Kuwait), 12 (Syria), 13 (Trinidad & Tobago); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (27 June 2014) UN Doc A/69/97, 3 (Iran), 4 (Lebanon), 5 (Mauritius).

⁴⁰⁷ See e.g. Ministry of Foreign Affairs of Russia, ‘Concept of the Foreign Policy of the Russian Federation’ (18 February 2013) <https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6BZ29>; UNGA, ‘Verbatim Record, 70th Session, 13th Meeting’ (28 September 2015) UN Doc A/70/PV.13, 19, (China), 26 (Russia); See e.g. UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (15 October 2001) UN Doc A/56/473, 3 (Gambia); UNGA, ‘Elimination of Coercive Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2002) (n 315), 3 (Mali); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (11 September 2003) UN Doc A/58/301, 4 (Costa Rica); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2005) (n 404), 9 (Senegal), 9 (Panama); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2007) (n 404), 7 (Egypt); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2011) (n 404), 7 (Egypt), 8 (Gabon), 10 (Mauritius); 11 (Mexico); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2013) (n 404), 5 (Brazil), 9 (Montenegro), 11 (Qatar), 16 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2015) (n 404), 12 (Paraguay); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2017) (n 389), 11 (Lesotho); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2019) (n 315), 11 (Russia); 13 (South Africa), 19 (Turkey); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (2021) (n 389), 7 (Iran), 14 (South Africa). See also HRC, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2010) (n 406), 4 (Burkina Faso), 4 (Costa Rica); 6 (Russia); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2011) (n 406), 7 (Burkina Faso); UNGA, ‘Human Rights & Unilateral Coercive Measures: SG Report’ (2012) (n 406), 11 (Mexico); 12 (Trinidad & Tobago).

⁴⁰⁸ Iran, ‘Statement on behalf of the NAM’ (Workshop on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Geneva) (5 April 2013), 1.

nationals.⁴⁰⁹ Arguably, these demonstrate their belief that individual measures, even if these measures mitigate their adverse effects on civilian populations,⁴¹⁰ remain unlawful.

CHAPTER CONCLUSION

This chapter examined the alternative responses, as opposed to measures of implementation, that states which have not been ‘directly affected’ by breaches of duties owed *erga omnes* actually took. It first analysed the responses made through judicial proceedings without attracting the issue of competence to invoke responsibility. One option for states is to request advisory opinions through international organisations. While advisory proceedings are not a form of dispute settlement, they allow for the exercise of judicial function akin to public interest litigation. They also provide a greater sense of ‘legitimacy’ over the proceedings concerning common interests as they are based on cooperative and collective actions. However, the use of advisory proceedings to respond to breaches of duties owed *erga omnes* raises several issues including their appropriateness in resolving highly political disputes and the possibility of circumventing states’ consent to adjudication.

Another option for states is to intervene in contentious cases. Like advisory proceedings, interventions, save for intervention ‘as a party’, do not involve the invocation of another’s responsibility. However, interventions, whether ‘general’ or ‘special’, allow the proceedings to be ‘multilateralised’ and permit states to participate in the proceedings on matters of common interests. Yet, interventions also present several issues. They may prolong the proceedings and disrupt the balance between the parties. Moreover, states, until recently, have also been hesitant to involve themselves in disputes to which they were not parties. For ‘special’ interventions, this may be because the intervenors may be bound by some aspects of the decision. As for ‘general’ interventions, there remains a marked difficulty in applying for interventions given the ICJ’s inconsistent case law.

This chapter also examined the use of targeted unilateral measures—those imposed upon individuals or entities responsible for, have supported, or have contributed to a state’s breach of its duties thereby putting pressure on them or limiting their ability to continue their actions. Arguably, these measures have less adverse effects on the general population. Yet, as these

⁴⁰⁹ See Hufbauer & Jung, ‘Economic Sanctions in the 21st Century’ (n 365), 34; Hofer, ‘US Sanctions against Russia’ (n 16), 79; Lau Stuart, ‘China Slaps Retaliatory Sanctions on EU Officials’ (Politico, 22 March 2021) <<https://www.politico.eu/article/china-slaps-retaliatory-sanctions>>.

⁴¹⁰ Barber, ‘GA & Unilateral Sanctions’ (n 359), 368 (‘The concern that unilateral coercive measures negatively impact human rights in the targeted States is by far the most pervasive criticism’).

measures are directed towards individuals and entities and not the wrongful state, they may not fall within the purview of enforcement of state responsibility. If the imposing state breaches its duties owed to targeted individuals and entities, it commits a wrongful act. The measures cannot be justified as countermeasures as they do not involve the suspension of duties owed to a wrongful state. Moreover, as in the case of general and sectoral measures, states' views concerning targeted measures largely differ. While some states, predominantly Western ones, have adopted the practice of levying targeted measures and have expressed their support for these measures, most continue to impugn these measures' legality.■

CHAPTER 10: RE-EXAMINING THE PREMISES OF THE RULES ON THE COMPETENCE OF 'STATES OTHER THAN AN INJURED STATE' TO IMPLEMENT DUTIES ARISING FROM COLLECTIVE NORMS

Part II observed that it remains to be seen if states have accepted rules on implementation by 'states other than an injured state' under the 2001 Draft Articles. *Chapter 9* also noted that states have resorted to alternative responses to breaches of duties owed *erga omnes* that are not measures of implementation. This chapter submits that the rules' uncertain status is due in part to the 2001 Draft Articles' premises. Arguably, these may not reflect the international legal order's reality thereby presenting a theoretical problem. This thesis does not claim that states would accept the competence of 'states other than an injured state', including the resort to countermeasures, if this is addressed. Yet, addressing this issue may work towards their further development and greater acceptance.

As discussed in *Part I*, the ILC, like much of literature,¹ deemed the synallagmatic view incapable of providing a suitable basis for the codification and [...] development of the law of state responsibility'.² It also saw the need to distinguish between 'directly' and 'indirectly affected states in relation to the consequences of wrongful acts and the competence to implement responsibility'.³ Thus, for 'states other than an injured state', it adopted the non-synallagmatic approach that grants these states an interest, not a right, in the performance of duties owed *erga omnes*.⁴ This forms the basis for their prerogative to implement these duties.⁵

There are at least two ways in which the relations under the non-synallagmatic view may be structured. In its communitarian conception, discussed in *Chapter 2*, duties owed *erga omnes* are deemed owed not to states but to the 'international community'.⁶ As members of this community, states possess an interest in the duties' performance even if they have not been

¹ See e.g. Simma Bruno, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 231; Crawford James, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 224–5; Gaja Giorgio, 'Protection of General Interests in the International Community' (2011) 364 *Recueil des Cours de l'Académie de Droit International* 9, 21; Sachariew Kamen, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" & Its Legal Status' (1988) 35 *Netherlands International Law Review* 273, 278; Byers Michael, 'Conceptualising the Relationship between Jus Cogens & Erga Omnes Rules' (1997) 66 *Nordic Journal of International Law* 211, 231.

² Crawford James, 'Third Report on State Responsibility' (2000) II(2) YbILC 12, 33; Crawford James, 'Multilateral Rights & Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325, 442

³ Crawford, 'Multilateral Rights & Obligations' (n 2), 343

⁴ ILC, 'Report on the Work of the 53rd Session' (2001) II(2) YbILC 20, 117–9, 126–8.

⁵ *Ibid.*, 127.

⁶ *Ibid.*; Crawford, 'Third Report on State Responsibility' (2000) (n 2), 34.

‘directly affected’.⁷ If the duty is breached, states may implement the wrongful state’s responsibility on the community’s behalf.⁸ The other way, although less common in literature, is based on the international order’s ‘public law’ construction. This relies on the concept of *actio popularis* or ‘public interest standing’ found in some municipal jurisdictions and affords states the individual capacity to act to protect the public interest.⁹

It is important to note that these conceptions are based on particular views of the international legal system. Accordingly, their premises need to be examined to determine whether they reflect the legal order’s reality.¹⁰ As a normative system, international law is a product of processes that cannot be separated from their context.¹¹ If rules exist to ‘serve social needs’,¹² then they must be responsive to the demands of the group that they serve.¹³ As a body of rules, it is deeply influenced by the structures of the legal order that it seeks to govern.¹⁴ Thus, it would not be too far to claim that the rules develop only insofar as the order’s structures can accommodate them.¹⁵ Admittedly, this examination does not involve a question of law. It does not concern the determination, interpretation, or application of an international rule.¹⁶

⁷ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 4), 127; Crawford, ‘Multilateral Rights & Obligations’ (n 2), 446; Simma, ‘Bilateralism to Community Interest’ (n 1), 298 (‘[By] being a member of [the] community [...] a [...] state acquires a legal interest in the protection of such norm’).

⁸ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 4), 126; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 1), 227.

⁹ See e.g. Voeffray Francois, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 52, 233; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 1), 237; Ahmadov Farid, *Right of Actio Popularis before International Courts & Tribunals* (Brill Nijhoff 2018), 71; Trindade Antônio, *International Law for Humankind: Towards a New Jus Gentium* (Nijhoff 2013), 321.

¹⁰ Slaughter Anne-Marie, ‘International Law & International Relations Theory: A Prospectus’ in Benvenisti Eyal & Hirsch Moshe (eds), *The Impact of International Law on International Cooperation* (Cambridge University Press 2004), 17; Weil Prosper, ‘Towards Relative Normativity in International Law?’ (1983) 77(3) *American Journal of International Law* 413, 413, 442; Villalpando Santiago, ‘Legal Dimension of the International Community: How Community Interests are Protected in International Law’ (2010) 21 *European Journal of International Law* 387, 390; Nardin Terry, ‘International Pluralism & Rule of Law’ (2000) 26 *Review of International Studies* 95, 104. Abi-Saab Georges, ‘Whither the International Community’ (1998) 9 *European Journal of International Law* 248, 256 (‘Verification of the presumption underlying [an] approach’) Friedmann Wolfgang, *Changing Structure of International Law* (Columbia University Press 1964), 3 (‘Every legal system must reflect the principles of the social order that it seeks to regulate’).

¹¹ Higgins Rosalyn, *Problems & Process: International Law & How We Use It* (Clarendon 1995), 3; Koskeniemi Martti, *From Apology to Utopia: The Structure of the International Legal Argument* (Cambridge University Press 2007), 11; Hakimi Monica, ‘The Work of International Law’ (2017) 58(1) *Harvard International Law Journal* 1, 5.

¹² *Southwest Africa* (Ethiopia & Liberia v South Africa) (Judgment) [1966] ICJ 6, 34.

¹³ Friedmann, *Changing Structure* (n 10), 3. See Jouannet Emmanuelle, ‘Universalism & Imperialism: True-False Paradox of International Law?’ (2007) 18 *European Journal of International Law* 379, 387.

¹⁴ Crawford, ‘Multilateral Rights & Obligations’ (n 2), 345. See Weil, ‘Towards Relative Normativity’ (n 10), 413.

¹⁵ Weil, ‘Towards Relative Normativity’ (n 10), 442; Grotius Hugo, *De jure belli ac pacis*, vol book II, Kelsey Francis (tr) (Clarendon 1625) cited in Villalpando Santiago, *L’émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 13–4.

¹⁶ Kolb Robert, *The International Court of Justice* (Hart 2013), 1062.

Nevertheless, it deals with a question *concerning* international law in that it examines the rationale of the premises of one of its rules.

This chapter re-examines the communitarian view that posits the existence of a ‘community’ of states that may hold rights and to whom duties may be owed.¹⁷ The view also suggests that this ‘community’ is one on whose behalf states may unilaterally act to implement duties owed *erga omnes*.¹⁸ Yet, whether this community exists remains to be seen. Arguably, what is present is an ‘ill-defined community’ characterised by division and lack of solidarity.¹⁹ This chapter also examines the view based on the international order’s public law construction. It observes that there remains uncertainty as to whether the concept of *actio popularis* may be transposed to the international legal system. The notion does not only depend on the ‘convergence’ of states’ interests.²⁰ It also needs legal structures that may not exist.²¹

I. NON-SYNALLAGMATIC VIEW & THE INTERNATIONAL COMMUNITY

This section revisits the non-synallagmatic approach based on the communitarian view of the international order. It recalls how this approach differs from the synallagmatic view in structuring the legal relations arising from collective norms. It also parses out the approach’s premises—a ‘community’ to whom duties may be owed and on whose behalf states may act. Next, it discusses the ‘sociological’ narrative upon which the communitarian view is based. This describes the emergence of a ‘community’ through the recognition of collective goods. Lastly, it examines if the narrative finds support in the legal order’s reality as observed in *Part II*. It submits that it does not. Rather, the present order is better characterised as pluralistic and dominated by self-interests.

A. Communitarian Approach & its Premises

As discussed in *Chapter 2*, under the synallagmatic approach, norms create subjective legal

¹⁷ Annacker Claudia, 'Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 138; Spinedi Marina, 'From One Codification to Another: Bilateralism & Multilateralism in the Codification of the Law of Treaties & the Law of State Responsibility' (2002) 13(5) *European Journal of International Law* 1099, 1123; Toufayan Mark, 'Reacting to Serious Breaches of Obligations arising under Peremptory Norms of General International Law' (2004) 42 *Canadian Yearbook of International Law* 197, 228.

¹⁸ Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 1), 227; Cassese Antonio, *International Law* (Oxford University Press 2005), 16; Kingsbury Benedict & Donaldson Megan, 'From Bilateralism to Publicness in International Law' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 80; Vauris-Chaumette Anne-Laure, 'International Community as a Whole' in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 1024.

¹⁹ See *Arrest Warrant* (DRC v Belgium) (Judgment) [2002] ICJ 3 (Guillaume, separate opinion), 44.

²⁰ See Voeffray, *L'actio popularis* (n 9), 50.

²¹ See Focarelli Carlo, *International Law as Social Construct: Struggle for Global Justice* (Oxford University Press 2012), 54; Weil, 'Towards Relative Normativity' (n 10), 413; Thin Sarah, 'Community Interest & the International Public Legal Order' (2021) 68 *Netherlands International Law Review* 35, 43.

relations where there is an ‘exact correlation’ between rights and duties.²² The duty imposed on one corresponds to another’s right.²³ In contrast, the non-synallagmatic view posits that duties owed *erga omnes* ‘underlie a different conception’ of legal relations.²⁴ It submits that these duties ‘modify the [...] [legal system’s] enforcement procedures’ such that breaches of duties owed *erga omnes* are no longer ‘individualised’.²⁵ Rather, the relations are objective and the duties are ‘no longer fulfilled or breached towards individual states’,²⁶ and nor do they correspond to individual rights held by states.²⁷

Under the communitarian approach—one that the ILC and several states support,²⁸ duties owed *erga omnes* are performed or observed for ‘the community and not to states’.²⁹ Indeed, the ILC submits that states do not owe duties to individual states but to a ‘group of states or the international community as a whole’.³⁰ If a duty owed *erga omnes* is breached, it is the

²² Hohfeld Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning & Other Legal Essays*, Cook Walter (ed) (Yale University Press 1919), 7; Anzilotti Dionisio, ‘La responsabilité internationale des états à raison des dommages soufferts par des étrangers’ (1906) 13 *Revue générale de droit international public* 5, 13; Ago Roberto, ‘Second Report on State Responsibility’ (1970) II(1) YbILC 177, 192. See *Right of Passage over the Indian Territory* (Portugal v India) (Merits) [1960] ICJ 6, 63; *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90 (Weeramantry, dissenting opinion), 209; *Application of the Genocide Convention* (Gambia v Myanmar) (Provisional Measures) [2019] (ICJ, 11 November 2019), ¶52; *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022) (Kreß, declaration), 272; *Prosecutor v Furundžija* (Judgment) (ICTY, Trial Chamber, 95-17/1, 10 December 1998), ¶151.

²³ Hohfeld, *Fundamental Legal Conceptions* (n 22), 7, 36–8.

²⁴ Spinedi, ‘From One Codification to Another’ (n 17), 1123.

²⁵ Coffman Peter, ‘Obligations Erga Omnes & the Absent Third State’ (1996) 39 *German Yearbook of International Law* 285, 296; Crawford, ‘Multilateral Rights & Obligations’ (n 2), 446.

²⁶ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 136, 147; Johnstone Rachael, ‘Invoking Responsibility for Environmental Injury in the Arctic Ocean’ (2014) 6 *Yearbook of Polar Law* 3, 13; Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 133.

²⁷ Crawford, ‘Third Report on State Responsibility’ (2000) (n 2), 99; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 147; Sachariew, ‘Identifying the “Injured State”’ (n 1), 279; Tanzi Atila, ‘Is Damage a Distinct Condition for the Existence of a Wrongful Act?’ in Spinedi Marina & Simma Bruno (eds), *UN Codification of State Responsibility* (Oceana 1987), 17 cited in Barboza Julio, ‘Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?’ in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martnus Nijhoff 2005), 21

²⁸ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 4), 126–7. See e.g. UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 16th Meeting’ (25 October 2000) UN Doc A/C.6/55/SR.16 2 (New Zealand), 2; (Australia), 7; UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 11th Meeting’ (29 October 2001) UN Doc A/C.6/56/SR.11, 6 (Finland), 9 (Belgium); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (1 Nov 2001) UN Doc A/C.6/56/SR.14, 5 (Greece); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 15th Meeting’ (26 November 2001) UN Doc A/C.6/56/SR.15, 8 (Croatia). Note ILC, ‘State Responsibility: Comments & Observations of Governments 53rd Session’ (19 March 2001) UN Doc A/CN.4/515, 81 (United Kingdom)

²⁹ Crawford, ‘Third Report on State Responsibility’ (2000) (n 2), 34; Linderfalk Ulf, ‘International Legal Hierarchy Revisited—Status of Obligations Erga Omnes’ (2011) 80 *Nordic Journal of International Law* 1, 11; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 136; Tams, *Enforcing Obligations Erga Omnes* (n 26), 174 citing Ago Roberto, ‘Obligations Erga Omnes & Community’ in Weiler Joseph, et al. (eds), *International Crimes of State: Critical Analysis of the ILC’s Draft Article 19* (1989), 237. Cassese, *International Law* (n 18), 16.

³⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 4), 126; Crawford, ‘Third Report on State Responsibility’ (2000) (n 2), 34; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 152. See Vaurs-Chaumette, ‘International Community as a Whole’ (n 18), 1024.

community, not states, that is injured as it is the duty's beneficiary.³¹ In implementing responsibility, 'states other than an injured state' do not rely on their subjective rights which they do not possess.³² Instead, their capacity to implement is based on their legal interests, 'presumably not rights but something entitled to protection',³³ as a member of the community.³⁴ It is this interest in the 'integrity of the [collective norm] and in the common value protected by norm' that entitles states to demand the duty's observance or performance.³⁵ Thus, if the duty is breached, all states may implement the wrongful state's responsibility.³⁶

As scholars like Dupuy, Annacker, and Spinedi point out, the approach requires the existence of an 'international community'.³⁷ Indeed, Villalpando observes that the view that such a community has emerged drove the rules on state responsibility's evolution in this area.³⁸ Yet, according to Kolb and Hernandez, the concept of a 'community' suffers from 'latent indeterminacy and imprecision'.³⁹ It has been invoked '*ad nauseam* in international law' and 'in almost every context' spanning organisations' resolutions, scholarly work, and political statements.⁴⁰ However, the communitarian approach, for scholars like Cassese and Crawford,

³¹ Crawford, 'Multilateral Rights & Obligations' (n 2), 434.

³² Crawford, 'Third Report on State Responsibility' (2000) (n 2), 99; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 147; Sachariew, 'Identifying the "Injured State"' (n 1), 279.

³³ Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol I (Oxford University Press 2013), 76; Crawford, 'Multilateral Rights & Obligations' (n 2), 434.

³⁴ ILC, 'Report on the Work of the 53rd Session' (2001) (n 4), 127; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 1), 227; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 146–7.

³⁵ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 147; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 1), 227; Crawford, 'Multilateral Rights & Obligations' (n 2), 229, 434, 444; Simma, 'Bilateralism to Community Interest' (n 1), 298–9.

³⁶ ILC, 'Report on the Work of the 53rd Session' (2001) (n 4), 126–7; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 1), 228–9, 239 citing Institut de Droit International, 'Resolution: Obligations Erga Omnes in International Law' (2005), art 1(a); Gaja, 'Protection of General Interests' (n 1), 97; Spinedi, 'From One Codification to Another' (n 17), 1123.

³⁷ Dupuy Pierre-Marie, 'Deficiencies of State Responsibility relating to Breaches of "Obligations owed to the International Community as a Whole"' in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 210 ('The 2001 [Draft Articles] [...] relied on the dream of an "international community"'); Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 138; Spinedi, 'From One Codification to Another' (n 17), 1123; Toufayan, 'Reacting to Serious Breaches of Obligations' (n 17), 228. See Focarelli, *International Law as Social Construct* (n 21), 151.

³⁸ Villalpando, *La communauté internationale* (n 15), 185.

³⁹ Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014), 205; Kolb Robert, *Theory of International Law* (Hart 2016), 274 ('The existence of the international community depends on the definition of terms [...] [and on] the exact threshold at which one is prepared to speak of a community'); Crawford James, 'Responsibility to the International Community as a Whole' (2001) 8 *Indiana Journal of Global Legal Studies* 303, 306 ('The "international community as a whole" is an abstraction. There is no legal entity by that name'), 315 ('[It is] a wide and disparate group'). See also Klabbers Jan, 'What Role for International Organisations in the Promotion of Community Interests?' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2018), 92.

⁴⁰ Hernandez, *ICJ & Judicial Function* (n 39), 194; Kolb, *Theory of International Law* (n 39), 260–2; Ellis David, 'On the Possibility of an "International Community"' (2009) 11 *International Studies Review* 1, 1; Jouannet Emmanuelle, 'La communauté internationale vue par les juristes' (2006) 6 *Annuaire français des relations internationales* 3, 3.

posits a particular kind of community—one that may be the recipient of rights and allow states to act on its behalf.⁴¹

For some, this community must be one that can hold rights and to whom duties may be owed. As Annacker submits, if duties owed *erga omnes* are owed to it, ‘then it is this community that [has] the [...] capacity to demand [the duty’s] performance’.⁴² For Ago, this implies a personality that is ‘distinct’ from its members.⁴³ Without this personality, it cannot be a party to a legal relation that the approach requires.⁴⁴ Several states seem to have accepted this claim.⁴⁵ Likewise, it has also been endorsed by scholars who claim a ‘trend towards the [community’s] incipient personification’.⁴⁶ Yet, as discussed below, this may not be accurate given *Part II*’s observations. The community may well exist in a ‘potential order’ but ‘does not correspond’ to the present one.⁴⁷

⁴¹ Cassese, *International Law* (n 18), 16; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 1), 227; Orakhelashvili Alexander, *Peremptory Norms in International Law* (Oxford University Press 2006), 245. Compare Crawford James, ‘Rights of Peoples: “Peoples” or “Governments”?’ (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 136, 136 (‘When international law attributes rights to [...] social and political collectivities, it does so *sub modo*—[...] it does so subject to the rule that [there is an] actor [that acts] on [their] behalf’).

⁴² Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 138; Spinedi, ‘From One Codification to Another’ (n 17), 1123. See Ago, ‘Obligations Erga Omnes’ (n 29), 238 cited in De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 81–2.

⁴³ Ago, ‘Obligations Erga Omnes’ (n 29), 238; Hernandez, *ICJ & Judicial Function* (n 39), 221 citing Tams, *Enforcing Obligations Erga Omnes* (n 26), 3. But see the views of scholars who favour the ‘public law approach’ discussed in *Section II*: Crawford James, ‘Fourth Report on State Responsibility’ (2000) II YbILC 3, 10 (‘The use of the phrase [‘international community’] is not [...] intended to imply that there is a legal person’); Crawford, ‘Responsibility to the International Community’ (n 39), 311 (‘The idea of an obligation owed to the international community cannot be conceived in a simple sense as an obligation to an entity’), 322 (‘International law embodies interests which are closely analogous to public law interests in other legal system’); Vauris-Chaumette, ‘International Community as a Whole’ (n 18), 1023 (‘The international community does not exist as a subject of international law. It is a legal fiction comprising all states [...] it is states collectively who are the holders of the injured interest’); Thin, ‘Community Interest & International Public Order’ (n 21), 46 (‘The international community [...] is not a collection of legal actors, but an idea. It is a legal fiction to which we impute interests [in] the same way as we impute interests to the socio-legal construct of “the public”’).

⁴⁴ Mosler Hermann, ‘Die Erweiterung des Kreises der Völkerrechtssubjekte’ (1962) 22 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 1, 20 cited in Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 138.

⁴⁵ See UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (31 October 2001) UN Doc A/C.6/56/SR.12, 4 (South Africa), 7 (Bahrain); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 13th Meeting’ (31 October 2001) UN Doc A/C.6/56/SR.13, 10 (Cyprus); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 16th Meeting’ (15 November 2001) UN Doc A/C.6/56/SR.16, 6 (Guatemala).

⁴⁶ See e.g. Chinkin Christine, *Third Parties in International Law* (Oxford University Press 1993), 5; Gaja, ‘Protection of General Interests’ (n 1), 27; Toufayan, ‘Reacting to Serious Breaches of Obligations’ (n 17), 228, 230; Lachs Manfred, ‘Quelques réflexions sur la communauté internationale’ in Virally Michel (ed), *Le droit international au service de la paix, de la justice et du développement* (Pedone 1991), 355 (‘It is difficult [...] in our day to deny the existence of a “juridical international community”’).

⁴⁷ de Visscher Charles, ‘Positivisme et “jus cogens”’ (1971) 71 *Revue générale de droit international public*

In the alternative, authors like Cassese, Kingsbury, Donaldson, and Vaurs-Chamette suggest that if the ‘community [is] the [right’s] holder’, then ‘its members’ must be its agents.⁴⁸ A state that implements a duty owed *erga omnes* acts ‘on behalf and for the benefit’ of the ‘community’.⁴⁹ The ILC appears to subscribe to this view by saying that states act ‘not in [their] individual capacity by reason of having suffered injury but [...] as a member’ of the community to which ‘the [duty] is owed’.⁵⁰ It also seems that several states have supported this view.⁵¹ Yet, whether states can act for others under the current legal system remains to be seen.⁵² As Wellens points out, this presumes an organic solidarity and cohesion among states.⁵³ However, the observations in *Part II* revisited further below do not appear to support this claim—states are ‘often divided by antagonistic interests’.⁵⁴

B. Views concerning the ‘International Community’: Communitarian, Realist, & Rational

I. Communitarian View

The notion of an ‘international community’ often lacks ‘ontological roots’ and is ‘an infinitely malleable concept’.⁵⁵ Like most concepts of international law, it is based on a

7, 8 (‘Un ordre en puissance dans l'esprit des hommes; dans les réalités de la vie internationale, elle en est encore a se chercher, elle ne correspond pas: un ordre effectivement établi’).

⁴⁸ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 156. See e.g. Cassese, *International Law* (n 18), 16; Kingsbury & Donaldson, ‘From Bilateralism to Publicness’ (n 18), 80; Vaurs-Chamette, ‘International Community as a Whole’ (n 18), 1024.

⁴⁹ Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 1), 227; Cassese, *International Law* (n 18), 16; Picone Paolo, ‘Distinction between Jus Cogens & Obligations Erga Omnes’ in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 415; Iovane Massimo & Rossi Pierfrancesco, ‘International Fundamental Values & Obligations Erga Omnes’ in Iovane Massimo, *et al.* (eds), *Protection of General Interests in Contemporary International Law* (2021), 58 citing Picone Paolo, ‘Obblighi reciproci e erga omnes nel campo della protezione internazionale dell'ambiente marino dall'inquinamento’ in Starace Vincenzo (ed), *Diritto internazionale e protezione dell'ambiente marino* (Giuffrè 1983), 1. Sicilianos Linos-Alexander, ‘Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13(5) *European Journal of International Law* 1127, 1140.

⁵⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 4), 126.

⁵¹ See e.g. UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 45), 4 (South Africa), 7 (Bahrain); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 13th Meeting’ (2001) (n 45), 10 (Cyprus); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 16th Meeting’ (2001) (n 45), 6 (Guatemala).

⁵² See Hernandez, *ICJ & Judicial Function* (n 39), 206 (‘The question of who is entitled to represent that community remains nebulous’); Crawford, ‘Responsibility to the International Community’ (n 39), 344 (‘But in a decentralised system, there is no all-purpose representative, no *parens patriae* who can act securely on the collective behalf’).

⁵³ Wellens Karel, ‘Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections’ in Wolfrum Rüdger (ed), *Solidarity* (Springer 2010), 28; Villalpando, *La communauté internationale* (n 15), 25, 231; Barboza, ‘Legal Injury’ (n 27), 21.

⁵⁴ Voefratty, *L'actio popularis* (n 9), 227 (‘Divisée par des intérêts souvent antagonistes, la communauté paraît manquer d’unité pour être la destinataire de droits; et elle encore plus mal outillée pour les faire valoir et les défendre’).

⁵⁵ Klabbers, ‘Role for International Organisations’ (n 39), 92. See Kolb, *Theory of International Law* (n 39),

particular view of its structure.⁵⁶ In turn, this view is influenced by the ‘ideals and interests’ of whoever invokes it.⁵⁷ The non-synallagmatic approach’s concept of a ‘community’ seems largely based on the ‘communitarian’ approach to international relations.⁵⁸ Under this view, espoused by scholars such as Bull, Friedman, and Abi-Saab, the relations among states developed through changes in patterns of interactions—from coexistence, then coordination, and finally cooperation.⁵⁹ The last characterises the mode where states have recognised shared interests in public goods.⁶⁰ This acknowledgement is said to have transformed the relations among states forming a ‘community’, characterised by solidarity, that creates norms for the protection of collective interests.⁶¹ The discussion below, while not intended to be comprehensive, provides an overview of this narrative which will be useful when the premises of the view are examined in *Subsection C*.

The concept of ‘coexistence’, used to describe ‘classical’ international law,⁶² is the stage where states are only concerned with their interests.⁶³ Their concerns’ extent revolved around

260–1; Kennedy David, 'Disciplines of International Law & Policy' (1999) 12 *Leiden Journal of International Law* 9, 126; Focarelli, *International Law as Social Construct* (n 21), 146.

⁵⁶ Villalpando, ‘Community Interests’ (n 10), 388.

⁵⁷ Villalpando, *La communauté internationale* (n 15), 17; Hernandez, *ICJ & Judicial Function* (n 39), 205.

⁵⁸ See Villalpando, *La communauté internationale* (n 15), 185; Villalpando, ‘Community Interests’ (n 10), 394 ff citing Friedmann, *Changing Structure* (n 10), 60–62, 367.

⁵⁹ Bull Hedley, *The Anarchical Society* (2nd edn, Columbia University Press 1995), 13, 15–9; Friedmann, *Changing Structure* (n 10), 60, 63, 367; Abi-Saab, ‘International Community’ (n 10), 250; Simma, ‘Bilateralism to Community Interest’ (n 1), 245; Villalpando, *La communauté internationale* (n 15), 21 citing Tönnies Ferdinand, *Communauté et société: catégories fondamentales de la sociologie pure* (Retz 1977), 51–120, Durkheim Émile, *De la division du travail social* (Presse Universitaires de France 1893), 35–78; Weber Max, *Economie et société: Les catégories de la sociologie* (Pocket 1995), 78. Paulus Andreas & Weiler Joseph, ‘Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?’ (1997) 8 *European Journal of International Law* 546, 554; Craven Matthew, ‘For the ‘Common Good’: Rights & Interests in the Law of State Responsibility’ in Fitzmaurice Malgosia & Sarooshi Dan (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart 2004), 119. But see Focarelli, *International Law as Social Construct* (n 21), 150.

⁶⁰ Abi-Saab, ‘International Community’ (n 10), 251; Friedmann, *Changing Structure* (n 10), 90; Villalpando, ‘Community Interests’ (n 10), 392 citing Samuelson Paul, ‘Pure Theory of Public Expenditure’ (1954) 36(4) *Review of Economics and Statistics* 387.

⁶¹ Friedmann, *Changing Structure* (n 10), 62; Simma, ‘Bilateralism to Community Interest’ (n 1), 234, 327; Allot Philip, ‘Making the New International Law: Law of the Sea as Law of the Future’ (1985) 11 *International Journal* 442, 448; Wellens, ‘Revisiting Solidarity’ (n 53), 16; Besson Samantha, ‘Community Interests in International Law: Whose Interests are They & How Should We Best Identify Them?’ in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2017), 39. See Leben Charles, ‘Changing Structure of International Law Revisited By Way of Introduction’ (1997) 8(3) *European Journal of International Law* 399, 400.

⁶² Friedmann, *Changing Structure* (n 10), 60, 88; Allot Philip, *Eunomia: New Order for a New World* (Oxford University Press 1990), 324

⁶³ Allot Philip, ‘Concept of International Law’ (1999) 10 *European Journal of International Law* 31, 35; Abi-Saab, ‘International Community’ (n 10), 251; Schwarzenberger Georg, *Frontiers of International Law* (Stevens & Sons 1962), 41. See Nolte Georg, ‘From Anzilotti to Ago: Classical International Law of State Responsibility & Traditional Primacy of a Bilateral Conception of Inter-state Relations’ (2002) 13(5) *European Journal of International Law* 1083, 1085.

exercising sovereign rights,⁶⁴ protecting their territory,⁶⁵ preventing harm,⁶⁶ and obtaining redress should their rights be infringed.⁶⁷ This resulted in a minimal system for orderly relations,⁶⁸ aimed at avoiding conflicts in the absence of a centralised authority.⁶⁹ It recognised states' freedom within their domains.⁷⁰ Yet, for the system's stability, it equally restrained states from interfering in areas where others have the sole competence to act.⁷¹ If a common interest at all existed, it was merely the general interest in the legal order's maintenance and states' adherence to existing norms.⁷²

'Coordination' is characterised by increased interactions among states. States within the international system cannot be truly 'hermetic' and interactions are inevitable.⁷³ More interactions lead to the realisation that the states' interests, apart from the general interest in maintaining the systems' stability, may exist in parallel or coincide with others'.⁷⁴ This results in joint 'efforts to see [interests] realised' including the formation of norms to protect or attain these interests.⁷⁵ Of course, parallel concerns do not exist in all cases. There may be instances in which states' interests clash. Yet, this differentiates coordination from coexistence. The

⁶⁴ Schwarzenberger, *Frontiers of International Law* (n 63), 41.

⁶⁵ Friedmann, *Changing Structure* (n 10), 5.

⁶⁶ Villalpando, 'Community Interests' (n 10), 390.

⁶⁷ Brilmayer Lea & Tesfalidet Isaias Yemane, 'Third State Obligations & the Enforcement of International Law' (2011) 44(1) *New York University Journal of International Law & Policy* 1, 8.

⁶⁸ Allot, *Eunomia* (n 62), 324; Abi-Saab, 'International Community' (n 10), 254; Krieger Heike, 'Populist Governments & International Law' (2019) 30(3) *European Journal of International Law* 971, 978.

⁶⁹ Abi-Saab, 'International Community' (n 10), 250–1; Krieger Heike, 'Rights & Obligations of Third Parties in Armed Conflicts' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2018), 450; Kolb, *Theory of International Law* (n 39), 81.

⁷⁰ Abi-Saab, 'International Community' (n 10), 251; Schwarzenberger, *Frontiers of International Law* (n 63), 41.

⁷¹ Abi-Saab, 'International Community' (n 10), 251, 254; Friedmann, *Changing Structure* (n 10), 60, 89; Simma, 'Bilateralism to Community Interest' (n 1), 229; Lauterpacht Hersch, *International Law & Human Rights* (Stevens & Sons 1950), 61; Villalpando, 'Community Interests' (n 10), 390. See *Island of Las Palmas/Mianguas* (Netherlands/USA) (Arbitral Award) (1928) 2 RIAA 829, 838.

⁷² Weil, 'Towards Relative Normativity' (n 10), 418–9 citing Ago Roberto, 'Pluralism & the Origins of the International Community' (1977) 3 *Italian Yearbook of International Law* 3, 3 ff. De Hoogh, *Obligations Erga Omnes & International Crimes* (n 42), 26 citing Riphagen Willem, 'Fourth Report on State Responsibility' (1983) II(1) YbILC 1, 21. See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ 2 (Shahabudeen, dissent), 392.

⁷³ Abi-Saab, 'International Community' (n 10), 255.

⁷⁴ Bull, *Anarchical Society* (n 59), 9; Friedmann, *Changing Structure* (n 10), 6. See Hakimi, 'The Work of International Law' (n 11) citing Finnermore Martha & Toope Stephen, 'Alternatives to "Legalisation": Richer Views of Law and Politics' (2001) 55 *International Organisations* 743; Ruggie John Gerard, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 *International Organisations* 855, 870.

⁷⁵ Alexidze Levan, 'Legal Nature of Jus Cogens in Contemporary International law' (1981) 172 *Recueil des Cours de l'Académie de Droit International* 219, 245; Bull, *Anarchical Society* (n 59), 9; Krieger, 'Third Parties in Armed Conflicts' (n 69), 450; Blum Gabriella, 'Bilateralism, Multilateralism, & the Architecture of International Law' (2008) 49(2) *Harvard International Law Journal* 323, 354.

former maintains stability by imposing duties of abstention.⁷⁶ The latter requires compromises despite competing interests.⁷⁷ However, the objective in these interactions remains the ‘realisation of each [state’s individual] interests’.⁷⁸

Finally, ‘cooperation’ is marked by the recognition of common interests and solidarity among states.⁷⁹ Increased interactions lead to the recognition of ‘public’ or ‘common’ goods.⁸⁰ These goods are ‘non-rivalrous’ such that ‘one’s consumption of the good does not deprive others of it’ and ‘non-excludable’ as it is ‘accessible to all’.⁸¹ As their benefits are ‘indivisibly spread’,⁸² they are not just the concern of individual states.⁸³ Examples of such goods are those protected by the norms discussed in this thesis—peace and security guaranteed by the norm on force;⁸⁴ human dignity protected by norms on human and people’s rights;⁸⁵ and ecology safeguarded by the rules on the environment.⁸⁶

As discussed in *Chapter 1*, scholars like Friedman, Abi-Saab, and Simma, submit that these

⁷⁶ Abi-Saab, ‘International Community’ (n 10), 254.

⁷⁷ Alexidze, ‘Legal Nature of Jus Cogens’ (n 75), 245; Villalpando, ‘Community Interests’ (n 10), 390–1 citing Durkheim, *De la division du travail social* (n 59), 98–102; Tönnies Ferdinand & Loomis Charles Price, *Community & Society* (Courier 2002); Talcott Parsons & Shils Edward, *Toward a General Theory of Action* (Harper & Row 1951), 76–9. Kolb, *Theory of International Law* (n 39), 388 citing Schwarzenberger Georg, *Power Politics: Study of International Society* (3rd edn, World Affairs 1964).

⁷⁸ Villalpando, ‘Community Interests’ (n 10), 390.

⁷⁹ Abi-Saab, ‘International Community’ (n 10), 251–2; Stoll Peter-Tobias, ‘The International Environmental Law of Cooperation’ in Wolfrum Rüdger (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means* (Routledge 1996), 40.

⁸⁰ Villalpando, ‘Community Interests’ (n 10), 392 noting Samuelson, ‘Pure Theory of Public Expenditure’ (n 60), 387.

⁸¹ Iovane Massimo, *et al.*, ‘Some Introductory Remarks’ in Iovane Massimo, *et al.* (eds), *Protection of General Interests in Contemporary International Law* (Oxford University Press 2021), 4; Nollkaemper André, ‘International Adjudication of Global Public Goods: Substance & Procedure’ (2012) 23 *European Journal of International Law* 769, 776 citing Kaul Inge, Grunberg Isabelle, & Stern Mark (eds), *Global Public Goods* (Oxford University Press 1999), 3–4; Petersmann Ernst-Ulrich, ‘International Economic Law, “Public Reason” & Multilevel Governance of Interdependent Public Goods’ (2011) 14 *Journal of International Economic Law* 24, 33; Maskus Jerome & Reichman Keith, ‘Globalisation of Private Knowledge Goods & Privatization of Global Public Goods’ (2004) 7 *Journal of International Economic Law* 279, 284.

⁸² Villalpando, ‘Community Interests’ (n 10), 392 noting Samuelson, ‘Pure Theory of Public Expenditure’ (n 60), 387.

⁸³ Paulus Andreas, ‘Reciprocity Revisited’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 125. See Trindade, *International Law for Humankind* (n 9), 328.

⁸⁴ Nollkaemper, ‘Adjudication of Global Public Goods’ (n 81), 772; Voigt Christina, ‘Delineating the Common Interest in International Law’ in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 16.

⁸⁵ Nollkaemper, ‘Adjudication of Global Public Goods’ (n 81), 776; Iovane, *et al.*, ‘Protection of General Interests in Contemporary International Law’ (n 81), 5; Wellens Karel, ‘Solidarity as a Constitutional Principle’ in St John Macdonald Ronald & Johnston Douglas (eds), *Towards World Constitutionalism* (Nijhoff 2005), 779.

⁸⁶ Blum, ‘Architecture of International Law’ (n 75), 357; Francesco Franconi, ‘Realism, Utopia, & Future of International Environmental Law’ in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 455; Paulus, ‘Reciprocity Revisited’ (n 83), 125.

goods' recognition leads to the collective interests' realisation,⁸⁷ and the collective norms' formation.⁸⁸ It becomes apparent that these goods do not fall 'solely [with a state's] internal affairs' and 'cannot be protected [...] unilaterally'.⁸⁹ They require 'collective actions' thus transforming state interactions from one rooted in self-interests to one with a 'sense of togetherness' in the 'pursuit of goals that benefit the group'.⁹⁰ Thus, under the communitarian view, collective interests, are 'not merely an aggregation' nor the 'lowest common denominator' of self-interests.⁹¹ They possess a 'quality of commonality' beyond the 'coincidence of individual interests',⁹² and an organising value.⁹³ The norms to which they lead are imbued with 'collective consciousness' and not 'parochial interests'.⁹⁴

The collective interests' recognition and collective norms' formation, under the

⁸⁷ Abi-Saab, 'International Community' (n 10), 251; Friedmann, *Changing Structure* (n 10), 37; Benedek Wolfgang, 'Humanisation of International Law, Human Rights, & Common Interest' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 185.

⁸⁸ Simma, 'Bilateralism to Community Interest' (n 1), 233; Abi-Saab, 'International Community' (n 10), 251; Friedmann, *Changing Structure* (n 10), 60, 90; Dupuy Pierre-Marie, 'International Law: Torn between Coexistence, Cooperation, and Globalisation. General Conclusions' (1998) 9 *European Journal of International Law* 278, 282; Besson, 'Community Interests in International Law' (n 61), 41; Nolte Georg, 'International Law Commission & Community Interests' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2017), 102; Gorobets Kostiantyn, 'Solidarity as a Practical Reason: Grounding the Authority of International Law' (2022) 69 *Netherlands International Law Review* 3, 6.

⁸⁹ Matz Nele, 'Common Interest in International Law: Reflections on Normative Content' (2002) 62 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 17, 18 citing Brunnée Jutta, 'Common Interest—Echoes from an Empty Shell? Some Thoughts on Common Interest & International Environmental Law' (1989) 49 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 791, 792; Biermann Frank, 'Common Concern of Humankind: Emergence of a New Concept of Environmental Law' (1996) 34 *Archiv des Völkerrechts* 426, 430, 45. Abi-Saab, 'International Community' (n 10), 252; Simma, 'Bilateralism to Community Interest' (n 1), 233; Toufayan, 'Reacting to Serious Breaches of Obligations' (n 17), 202 citing Durkheim, *De la division du travail social* (n 59), 73.

⁹⁰ Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 220; Blum, 'Architecture of International Law' (n 75), 348; Brunnée Jutta, 'International Environmental Law & Community Interests: Procedural Aspects' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2018), 153; Uhlmann Eva, 'Community Interests, Jus Cogens, & Protection of the Global Environment: Developing Criteria for Peremptory Norms' (1998) 11 *Georgetown International Environmental Law Review* 101, 105. See Koh Harold, 'Why Do Nations Obey International Law?' (1996) 106 *Yale Law Journal* 2599, 2617.

⁹¹ Allot, 'Concept of International Law' (n 63), 36; Thin Sarah, 'In Search of Community: Towards a Definition of Community Interests' in Zyberi Gentian (ed), *Protecting Community Interests through International Law* (Intersentia 2021), 16, 40; Almeida Paula Wojcikiewicz, 'Enhancing ICJ Procedures to Promote Fundamental Values: Overcoming the Tension between Bilateralism & Community Interests' in Iovane Massimo, *et al.* (eds), *Protection of General Interests in Contemporary International Law* (Oxford University Press 2021), 241.

⁹² Thin, 'Community Interest & International Public Order' (n 21), 31; Bonafé Beatrice, 'Collective Dimension of Bilateral Litigation: Ukraine v Russia case before the ICJ' (2022) 96 *Questions of International Law* 27, 36.

⁹³ Thin, 'Community Interest & International Public Order' (n 21), 40; Benedek, *et al.* (eds), *Community Interest* (n 87), 220; Simma, 'Bilateralism to Community Interest' (n 1), 247.

⁹⁴ Villalpando, 'Community Interests' (n 10), 392 citing Durkheim, *De la division du travail social* (n 59), 98–102; Koh, 'Why Do Nations Obey?' (n 90), 261.

communitarian view, has a transformative effect that ‘reshapes’ the relations among states.⁹⁵ Simma submits that these “communalise” and “publicise” [...] relations beyond the traditional rituals’ of [...] interaction.⁹⁶ They lead to an ‘understanding that every [state] [...] must consciously and constantly conceive of its [...] interests as inextricable from the interests of the whole’.⁹⁷ They also ‘unlock the international society’s consciousness of its own universality’ that enables states to identify themselves as members of a community’.⁹⁸ For scholars like Paulus, this community given its shared interests and values and the fact that its members are ‘bound by a common set of rules’,⁹⁹ is necessarily characterised by cohesion and solidarity.¹⁰⁰ Moreover, given that it has interests in common goods that ‘transcend [states’] individual interests’,¹⁰¹ and because it creates norms for the benefit of the collective and not individual states,¹⁰² authors like Besson submit that such a community may be conceived as an entity that is distinct from its members.¹⁰³

⁹⁵ Gorobets, ‘Solidarity as a Practical Reason’ (n 88), 7 citing Simma, ‘Bilateralism to Community Interest’ (n 1), 244. See Dill Janina, ‘The Rights & Obligations of Parties to International Armed Conflict: From Bilateralism but not Toward Community Interest?’ in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2018), 437; Ahmadov, *Actio Popularis* (n 9), 31 citing *Nuclear Weapons* [1996] (n 72) (Weeramantry, dissenting), 490, 532. But see Kingsbury & Donaldson, ‘From Bilateralism to Publicness’ (n 18), 82 (‘Interests prove a very fragile foundation for an international community’).

⁹⁶ Simma, ‘Bilateralism to Community Interest’ (n 1), 234; Allot Philip, *International Law & International Revolution* (Hull University Press 1989), 8. See Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 11.

⁹⁷ Simma, ‘Bilateralism to Community Interest’ (n 1), 238 citing St John Macdonald Ronald, ‘Principle of Solidarity in Public International Law’ in Dominicé Christian, *et al.* (eds), *Etudes de droit international en l’honneur de Pierre Lalive* (Helbing & Lichtenhahn 1993), 310; Wellens, ‘Solidarity as a Constitutional Principle’ (n 85), 775. See Kingsbury & Donaldson, ‘From Bilateralism to Publicness’ (n 18), 84.

⁹⁸ Simma, ‘Bilateralism to Community Interest’ (n 1), 327 citing Allot, ‘Making the New International Law’ (n 61), 442 ff; Friedmann, *Changing Structure* (n 10), 60–2, 367; Schwarzenberger, *Frontiers of International Law* (n 63), 110. See Franck Thomas, *Fairness in International Law and Institutions* (Oxford University Press 1998), 10–2.

⁹⁹ Bull, *Anarchical Society* (n 59), 13.

¹⁰⁰ Paulus Andreas, ‘International Law & International Community’ in Armstrong David (ed), *Routledge Handbook of International Law* (Routledge 2009), 45; Wellens, ‘Revisiting Solidarity’ (n 53), 8 citing Villalpando, *La communauté internationale* (n 15), 64 ff; Dupuy Pierre-Marie, ‘La communauté internationale. Une fiction?’ in Corten Olivier & Salmon Jean (eds), *Droit du pouvoir, pouvoir du droit* (Bruylant 2007), 392. See Hernandez, *ICJ & Judicial Function* (n 39), 198. But see Hakimi Monica, ‘Constructing an International Community’ (2017) 111 *American Journal of International Law* 317, 322.

¹⁰¹ Simma, ‘Bilateralism to Community Interest’ (n 1), 244–5 cited in Kingsbury & Donaldson, ‘From Bilateralism to Publicness’ (n 18), 81; Almeida, ‘Enhancing ICJ Procedures’ (n 91), 241; Thin, ‘Community Interest & International Public Order’ (n 21), 40–1 citing Zarecor W, ‘The Public Interest & Political Theory’ (1959) 69 *Ethics* 277, 279; Mates P & Barton M, ‘Public versus Private Interest—Can the Boundaries be Legally Defined?’ (2011) 2 *Czech Yearbook of International Law* 172, 181; King Stephen, Chilton Bradley, & Roberts Gary, ‘Reflections on Defining the Public Interest’ (2010) 41 *Administration & Society* 954, 957.

¹⁰² Kingsbury & Donaldson, ‘From Bilateralism to Publicness’ (n 18), 83; Komori Teruo, ‘Introduction’ in Komori Teruo & Wellens Karel (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge 2016), 16. See Villalpando, *La communauté internationale* (n 15), 180.

¹⁰³ Besson, ‘Community Interests in International Law’ (n 61), 39 (‘Translates to a collective identity’); Simma Bruno & Paulus Andreas, ‘The “International Community”: Facing the Challenge of Globalisation’ (1998)

2. *Realist & Rational Views*

The communitarian view is only one of the approaches that characterise the international order.¹⁰⁴ There are others that explain the relations among states from different viewpoints.¹⁰⁵ The realist view, espoused by scholars such as Morgenthau and Waltz,¹⁰⁶ submits that states ‘constantly [pursue] their self-interests [...] competing for [...] resources to maximise their power at [others’] expense’.¹⁰⁷ The ‘rational’ view, supported by authors such as Goldsmith, Posner, and Guzman,¹⁰⁸ places less emphasis on power structures but also posits that states, assumed to be rational, act to maximise their interests.¹⁰⁹ While these views do not deny the common goods and interests’ existence, they do not claim that these have a transformative effect that results in a community.

As Wohlforth, Krasner, and Slaughter observe, the ‘realist’ view, while couched in several variants,¹¹⁰ has some ‘central propositions’—anarchy due to the lack of a centralised authority; individual interests that motivate the states’ actions; and the constant ‘struggle for power’.¹¹¹ Broadly, the view posits that states act to ‘further their [...] interests and that [...] power

9 *European Journal of International Law* 266, 268 (‘Higher unity [...] distinct from a society’); Craven, ‘Rights & Interests in State Responsibility’ (n 59), 114 (‘Well-defined community’); Ahmadov, *Actio Popularis* (n 9), 31 (‘Beyond mere aggregation of states’) citing Tsagourias Nicholas, ‘International Community, Recognition of States, & Political Cloning’ in Tierney Stephan & Warbrick Colin (eds), *Towards an International Legal Community?* (British Institute of International & Comparative Law 2006), 215. See Paulus, ‘International Law & International Community’ (n 100), 45; Wellens, ‘Revisiting Solidarity’ (n 53), 8.

¹⁰⁴ Nissel Alan, ‘ILC Articles on State Responsibility: Between Self-Help & Solidarity’ (2005) 38 *New York University Journal of International Law & Policy* 355, 367.

¹⁰⁵ See Simma & Paulus, ‘Challenge of Globalisation’ (n 103), 269; Koh, ‘Why Do Nations Obey?’ (n 90), 2633.

¹⁰⁶ Krasner Stephen, ‘Realist Views of International Law’ (2002) 96 *Proceedings of the ASIL Annual Meeting* 265, 266 citing Morgenthau Hans, *Politics among Nations* (5th edn, Knopf 1978); Waltz Kenneth, *Theory of International Politics* (McGraw-Hill 1979).

¹⁰⁷ Focarelli, *International Law as Social Construct* (n 21), 107; Kolb, *Theory of International Law* (n 39), 95; Hoffmann Florian, ‘International Legalism & International Politics’ in Orford Anne & Hoffmann Florian (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 967; Jütersonke Oliver, ‘Realist Approaches to International Law’ in Orford Anne (ed), *Oxford Handbook of the Theory on International Law* (Oxford University Press 2016), 328.

¹⁰⁸ See Goldsmith Jack & Posner Eric, *Limits of International Law* (Oxford University Press 2005), 7; Guzman Andrew, *How International Law Works* (Oxford University Press 2008), 17.

¹⁰⁹ Koh, ‘Why Do Nations Obey?’ (n 90), 2632 citing Keohane Robert, ‘International Relations & International Law: Two Optics’ (1996) 38 *Harvard International Law Journal* 487; Duncan Snidal, ‘Coordination Versus Prisoners’ Dilemma: Implications for International Cooperation & Regimes’ (1985) 79 *American Political Science Review* 823; Abbott Kenneth, ‘Modern International Relations Theory: A Prospectus for International Lawyers’ (1989) 14 *Yale Law Journal* 335.

¹¹⁰ Wohlforth William, ‘Realism’ in Resu-Smi Christian & Snidal Duncan (eds), *Oxford Handbook Of International Relations* (Oxford University Press 2008), 131; Krasner, ‘Realist Views of International Law’ (n 106), 266; Slaughter, ‘International Law & International Relations Theory’ (n 10), 21–2.

¹¹¹ Wohlforth, ‘Realism’ (n 110), 132; Focarelli, *International Law as Social Construct* (n 21), 107.

determines [...] behaviour'.¹¹² In an environment where concerns often conflict, more powerful states employ coercion to force weaker states to act in their interests.¹¹³ Yet, while sceptical towards cooperation,¹¹⁴ it does not deny that common goods and values exist.¹¹⁵ Although states are in a 'ceaseless struggle' to maximise their power at other states' expense, their interests may still coincide.¹¹⁶ Thus, collective norms may still exist but only where states' interests overlap.¹¹⁷ States accept these norms and comply with duties they impose when these further states' interests.¹¹⁸ In other instances, states with 'convergent interests' coerce others to accept norms that serve their interests'.¹¹⁹ The same goes for implementation which occurs 'for reasons of self-interest',¹²⁰ and is undertaken by more 'powerful' states against weaker ones.¹²¹ Thus, it does not share the communitarian view's claim that these goods generate interests that transcend individual interests.¹²² There is not one collective interest but 'many [...] identical interests having a common content'.¹²³ Contrary to the communitarian approach's claim, the coincidence of interests is not transformative. The order remains anarchical and characterised

¹¹² Goldsmith Jack & Posner Eric, 'A Theory of Customary International Law' (1999) 66 *University of Chicago Law Review* 1113, 1176; Danish Kyle, 'International Relations Theory' in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 207–8; Slaughter, 'International Law & International Relations Theory' (n 10), 22

¹¹³ Nardin, 'International Pluralism & the Rule of Law' (n 10), 97; Goldsmith & Posner, 'Theory of Custom' (n 112), 1114. See Mani VS, 'Centrifugal & Centripetal Tendencies in the International System' in St John Macdonald Ronald & Johnston Douglas (eds), *Towards World Constitutionalism* (Nijhoff 2005), 252. Anghie Antony, *Imperialism, Sovereignty & the Making of International Law* (Cambridge University Press 2004) noted in Schaumburge-Müller Sten, 'To What Extent does International Law Obstruct the Protection of Common Interests?' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 32.

¹¹⁴ Goldsmith & Posner, 'Theory of Custom' (n 112), 1176.

¹¹⁵ Mitchell Ronald, 'Compliance Theory: An Overview' in Werksman Jacob, *et al.* (eds), *Improving Compliance with International Environmental Law* (Routledge 1995), 14.

¹¹⁶ Broks Edmund, 'Protection of Interests of the International Community in the Law of State Responsibility' (PhD, University of Latvia 2014), 25 ('Cooperation [...] will take place only as far as it serves self-interest to maximize power'); Danish, 'International Relations Theory' (n 112), 208 ('States sometimes cooperate [...] but only at the behest of the most powerful states, and when the distribution of power changes, cooperation changes its form or ends')

¹¹⁷ Danish, 'International Relations Theory' (n 112), 208; Mitchell, 'Compliance Theory' (n 115), 14.

¹¹⁸ Mitchell, 'Compliance Theory' (n 115), 4. See Kolb, *Theory of International Law* (n 39), 371; Friedmann, *Changing Structure* (n 10), 52.

¹¹⁹ Goldsmith & Posner, 'Theory of Custom' (n 112), 1123. See Schaumburge-Müller, 'Protection of Common Interests' (n 113), 48 ('Common interests may upon closer scrutiny prove to be particular values dressed up in a solidarist disguise') citing Anghie, *Imperialism, Sovereignty 6 International Law* (n 113).

¹²⁰ Focarelli, *International Law as Social Construct* (n 21), 108.

¹²¹ Krasner, 'Realist Views of International Law' (n 106), 266; Hakimi Monica, 'Unfriendly Unilateralism' (2014) 55 *Harvard International Law Journal* 105, 150. See Cai Congyan, 'China's Position & Practice concerning Unilateral Sanctions' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 72.

¹²² See Friedmann, *Changing Structure* (n 10), 52.

¹²³ Villalpando, 'Community Interests & International Law' (n 10), 394; Kolb, *Theory of International Law* (n 39), 368.

by ‘power relations’ and ‘antagonistic values’.¹²⁴

In contrast, the ‘rational’ view, puts less emphasis on power relations among states. It still considers states to be self-interested by default.¹²⁵ Scholars like Guzman posit that states ‘do not concern themselves with the [others’] welfare’ but ‘seek to maximise their [...] gains’.¹²⁶ States are motivated by the benefits that they foresee to receive and select the ‘course of action’ that ‘maximises their utility’.¹²⁷ This determines if they will accept, comply with, or implement duties.¹²⁸ States accept duties if the conduct required is within their interest.¹²⁹ States also comply with their duties because they receive ‘higher payoffs’ in compliance as opposed to violation.¹³⁰ Finally, they implement these duties because their interests were harmed or because they derive some utility in doing so.¹³¹

The rational account also does not foreclose the common goods and interests’ existence. As Goldsmith and Posner point out, it may be that a state’s interest coincides with another’s.¹³² In this case, states may work together towards the realisation of their interests.¹³³ There may also be situations where achieving one state’s goal depends on others requiring them to ‘coordinate’ despite ‘conflicting preferences’.¹³⁴ Still, there may be cases where states receive less benefit if they do not work together towards parallel interests but receive greater utility if

¹²⁴ Paulus & Weiler, ‘Structure of Change’ (n 59), 557; Schaumburge-Müller, ‘Protection of Common Interests’ (n 113), 45. See Craven, ‘Rights & Interests in State Responsibility’ (n 59), 127.

¹²⁵ Goldsmith & Posner, *Limits of International Law* (n 108), 3 citing Oppenheim Lassa, *International Law: A Treatise*, vol I, Lauterpacht Hersch (ed) (Longmans, Green and Co 1937). Guzman, *How International Law Works* (n 108), 17. See *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3 (Weeramantry, dissenting), 118.

¹²⁶ Guzman, *How International Law Works* (n 108), 17. See Voeffray, *L’actio popularis* (n 9), 329 (‘[Pour] Etats, le droit international [...] [est] instrument [...] qu’ils [...] d’utiliser [...] de leurs intérêts et de leurs objectifs de politique étrangère, aussi nobles ceux-ci soient-ils’) noting de Lacharrière Guy, *La politique juridique extérieure* (Economica 1978).

¹²⁷ Hirsch Moshe, ‘Compliance with International Norms in the Age of Globalisation’ in Benvenisti Eyal & Hirsch Moshe (eds), *The Impact of International Law on International Cooperation* (Cambridge University Press 2004), 172.

¹²⁸ Guzman, *How International Law Works* (n 108), 12; Goldsmith & Posner, *Limits of International Law* (n 108), 39; Koh, ‘Why Do Nations Obey?’ (n 90), 2632.

¹²⁹ Guzman, *How International Law Works* (n 108), 121; Mitchell, ‘Compliance Theory’ (n 115), 7. See Proukaki, *Problem of Enforcement* (n 96), 13; Villalpando, *La communauté internationale* (n 15), 28.

¹³⁰ Goldsmith & Posner, ‘Theory of Custom’ (n 112), 1132; Koh, ‘Why Do Nations Obey?’ (n 90), 2621; Mitchell, ‘Compliance Theory’ (n 115), 11. See Weiss Edith Brown, ‘Rethinking Compliance with International law’ in Benvenisti Eyal & Hirsch Moshe (eds), *The Impact of International Law on International Cooperation* (2004), 143; Schacter Oscar, ‘In Defence of International Rules on the Use of Force’ (1986) 53 *University of Chicago Law Review* 113, 124.

¹³¹ Focarelli, *International Law as Social Construct* (n 21), 108.; Mitchell, ‘Compliance Theory’ (n 115), 16.

¹³² Goldsmith & Posner, ‘Theory of Custom’ (n 112), 1114.

¹³³ Ibid, 1114, 1122, 1177; Koh, ‘Why Do Nations Obey?’ (n 90), 2632.

¹³⁴ Goldsmith & Posner, ‘Theory of Custom’ (n 112), 1114; Guzman, *How International Law Works* (n 108), 26; Hirsch, ‘Compliance with International Norms in the Age of Globalisation’ (n 127), 177; Danish, ‘International Relations Theory’ (n 112), 211. See Krieger, ‘Populist Governments & International Law’ (n 68), 986.

they do thereby motivating them to ‘cooperate’.¹³⁵ However, the account does not posit the existence of interests that transcend that of individual states.¹³⁶ Rather, common interests result from the ‘many [...] identical interests having a collective content.’¹³⁷ It is the ‘aggregate’, ‘lowest common denominator’, or ‘coincidence’ of individual interests.¹³⁸ It has ‘egocentric rather than altruistic features’.¹³⁹ Finally, the rational view also does not suggest that common interests have a transformative function resulting in a ‘community’. Rather, what emerges is a heterogeneous collective that is dominated by self-interests.¹⁴⁰ It is pluralistic, not solidaristic, or what authors like Jackson call a ‘society’.¹⁴¹ Its structure preserves the states’ individual interests but also enshrines the public goods’ protection ‘among equal members and recognises that all have an [...] interest in that regard’.¹⁴²

C. Observations concerning the ‘International Community’ & Implications on Non-Synallagmatic Approach based on the Communitarian View

The views discussed above are not necessarily concrete realities.¹⁴³ Each only describes interstate relations,¹⁴⁴ interpreted through different views of international law.¹⁴⁵ Yet, whether they reflect the present order’s realities is a different matter. The communitarian view perhaps

¹³⁵ Goldsmith & Posner, ‘Theory of Custom’ (n 112), 1114, 1127; Goldsmith & Posner, *Limits of International Law* (n 108), 35 (‘Multilateral cooperation occurs when many states cooperate to overcome a collective action problem.’); Guzman, *How International Law Works* (n 108), 25 (‘Even in a world of selfish states, there will be times when states have common interests that make cooperation valuable and easy to achieve’). See Mitchell, ‘Compliance Theory’ (n 115), 7, 9; Stoll, ‘International Environmental Law of Cooperation’ (n 79), 85.

¹³⁶ See Villalpando, *La communauté internationale* (n 15), 26 (‘Les rapports de coopération [...] n’impliquent pas nécessairement que les intérêts poursuivis soient eux-mêmes collectifs’).

¹³⁷ Villalpando, ‘Community Interests’ (n 10), 394, 416; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 136–7 (‘State practice shows that the assumption of a pre-existing community interest differing in its nature from the sum of individual interests (“*volente generale*”) remains fictitious’)

¹³⁸ Dill, ‘Rights & Obligations of Parties to International Armed Conflict’ (n 95), 435; Brunnée, ‘Common Interest & International Environmental Law’ (n 89), 793 citing Klein Eckart, *Statusverträge im Völkerrecht* (Springer 1980), 53. Cassinelli C, ‘Some Reflections on the Concept of the Public Interest’ (1958) 69 *Ethics* 48, 50, 54 cited in Thin, ‘Community Interest & International Public Order’ (n 21), 40. See Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 137 (‘Given the heterogeneity of the [...] community, [the] acceptance of common interests is difficult to achieve’)

¹³⁹ Brunnée, ‘Common Interest & International Environmental Law’ (n 89), 793

¹⁴⁰ Villalpando, ‘Community Interests’ (n 10), 391; Glennon Michael, ‘Limitation of Traditional Rules & Institutions Relating to the Use of Force’ in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 80. See Hakimi, ‘Constructing an International Community’ (n 100), 329.

¹⁴¹ Jackson Robert, *Human Conduct in a World of States* (Oxford Press 2000), 105 cited in Ellis, ‘Possibility of International Community’ (n 40), 8. See Hakimi, ‘Constructing an International Community’ (n 100), 319, 326.

¹⁴² Villalpando, ‘Community Interests’ (n 10), 394, 415, 419. See Schaumburge-Müller, ‘Protection of Common Interests’ (n 113), 32; Hoffmann, ‘International Legalism & International Politics’ (n 107), 975.

¹⁴³ Nardin, ‘International Pluralism & the Rule of Law’ (n 10), 95.

¹⁴⁴ Slaughter, ‘International Law & International Relations Theory’ (n 10), 16.

¹⁴⁵ Paulus, ‘International Law & International Community’ (n 100), 46; Simma & Paulus, ‘Challenge of Globalisation’ (n 103), 269.

describes the order at the time of the 2001 Draft Articles' adoption. During this period, there may have been a recognition of common goods and values, leading to collective norms, and forming the basis for an 'international community'.¹⁴⁶ Indeed, the communitarian narrative on the collective norms' formation,¹⁴⁷ the hallmark of post-World War and Cold War literature,¹⁴⁸

¹⁴⁶ See Longobardo Marco, 'Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: the Gambia v Myanmar & Beyond' (2021) *International Community Law Review* 1, 4; Gorobets, 'Solidarity as a Practical Reason' (n 88), 7; White Nigel, 'United Nations System: Conference, Contract of Constitutional Order?' (2000) 4 *Singapore Journal of International & Comparative Law* 281, 290. See Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 137; Iovane & Rossi, 'Fundamental Values & Obligations Erga Omnes' (n 29), 49; Komori Teruo & Wellens Karel (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge 2016), 1.

¹⁴⁷ Note that the norm against the use of force was borne out of the recognition of the common interest in the maintenance of peace and security brought about by the realisation of the widespread destruction caused by conflicts (Cannizzaro Enzo, 'Common Interests of Humankind & the Regulation of the Use of Force' in Benvenisti Eyal & Nolte Georg (eds), *Community Interests Across International Law* (Oxford University Press 2018), 417; Todeschini Vito, 'Collective Security, Common Interest, & Responsibility to Protect' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 94 citing Wolfrum Rüdger, 'Article 1' in Simma Bruno, *et al.* (eds), *Charter of the UN: Commentary*, vol 1 (Oxford University Press 2012), 109). Thus, the shift from the 'unfettered power' of states to 'resort to force to implement their rights to interests' (Cannizzaro, 'Regulation of the Use of Force' (n 147), 418), to a ban on the individual threat or use of force save for self-defence and reserved the competence to authorise its use to the SC (Kelsen Hans, 'Collective Security & Collective Self-Defence under the UN Charter' (1948) 42 *American Journal of International Law* 783, 785; Schrijver Nico, 'Ban on the Use of Force in the UN Charter' in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 487). The same goes for the norms that protect human and people's rights. The shared interests in their protection became more evident as the two World Wars demonstrated the effects of the 'utter disregard for the rights' of persons and peoples' (Joseph Sarah & Castan Melissa, *International Covenant on Civil & Political Rights: Cases, Materials, & Commentary* (3rd edn, Oxford University Press 2013), 6; Alston Philip & Goodman Ryan, *International Human Rights in Context: Law, Politics, and Morals* (Oxford University Press 2013), 104). These motivated states to consider human and people's rights not as a domestic issue 'into which no other state was allowed to intrude' (Simma, 'Bilateralism to Community Interest' (n 1), 243; Alston & Goodman, *International Human Rights* (n 147), 59), but an international one (Proukaki, *Problem of Enforcement* (n 96), 14; Buergenthal Thomas, 'Evolving International Human Rights System' (2006) 100 *American Journal of International Law* 783, 787). Finally, the recognition of the effects of the unrestrained utilisation of natural resources and the transboundary character of harm led states to recognise their shared interests in protecting the environment (Birnie Patricia, Boyle Alan, & Redgewell Catherine, *International Law & the Environment* (3rd edn, Oxford University Press 2007), 2; Fitzmaurice Malgosia, 'Liability for Environmental Damage Caused to the Global Commons' (1996) 5 *Review of European, Comparative & International Environmental Law* 305, 305). Thus, the change (Sands Philippe, *et al.*, *Principles of International Environmental Law* (Cambridge University Press 2012), 21–2; Halvorssen Anita, 'Origin & Development of International Environmental Law' in Alam Shawkat, *et al.* (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013), 32), albeit a gradual one (Bodansky Daniel, *Art & Craft of International Environmental Law* (Harvard University Press 2010), 22; Sands, *et al.*, *International Environmental Law* (n 147), 3), from a 'laissez-faire system' that gave states the unrestrained freedom to exploit the environment (Birnie, Boyle, & Redgewell, *International Law & the Environment* (n 147), 2), to norms that conserve wildlife natural resources (Murase Shinya, 'Perspectives from International Economic Law on Transnational Environmental Issues' (1995) 253 *Recueil des Cours de l'Académie de Droit International* 283, 310; Kiss Alexander, 'Protection of Environmental Interests of the World Community Through International Environmental Law' in Wolfrum Rüdger (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means* (Routledge 1996), 9), restrict activities that cause harmful effects (Arsanjani Mahnouch & Reismann Michael, 'Quest for an International Liability Regime for the Protection of the Global Commons' in Wellens Karel (ed), *International Law: Theory & Practice: Essays in Honour of Eric Suy* (Nijhoff 1998), 469, 47), and mitigate the effects of climate change (Delbruck Jost, 'A More Effective International Law or a New World Law—Some Aspects of the Development of International Law in a Changing International System' (1993) 68 *Indiana Law Journal* 705, 717; Mayer Benoit, 'ILC's Guidelines on the Protection of the Atmosphere' (2019) 20 *Melbourne Journal of International Law* 453, 461).

¹⁴⁸ See e.g. Simma, 'Bilateralism to Community Interest' (n 1), 229–30; Crawford, 'Multilateral Rights &

suggests a shift towards multilateralism towards the turn of the century.¹⁴⁹ However, the international order is not static nor is it on a constant trajectory.¹⁵⁰ It is in constant flux.¹⁵¹ The order then differs from the present. As authors like Krieger and Koh point out, the past two decades suggest that the communitarian view's 'optimistic' perception has either lost momentum or never materialised.¹⁵² A comprehensive analysis of this trend is beyond the present examination's scope. But broadly speaking, there is evidence to suggest that states increasingly value 'sovereignty over multilateralism, national interests over [...] cooperation, and [national] constituencies over global populations'.¹⁵³ This may be seen in some states' foreign policy declarations that reveal their intent to act towards common interests when it suits their interests.¹⁵⁴ Likewise, it may also be observed in the pushback against collective norms—repeated breaches of the duty imposed by the norm against force;¹⁵⁵ antipathy towards rules for

Obligations' (n 2), 345–6; St John Macdonald, 'Principle of Solidarity' (n 97), 301; Abi-Saab, 'International Community' (n 10), 256; Gaja, 'Protection of General Interests' (n 1), 20; Tomuschat Christian, 'Obligations arising for States Without or Against Their Will' (1993) 241 *Recueil des Cours de l'Académie de Droit International* 195, 227; Frowein Jochen, 'Reactions by Not Directly Affected States to Breaches of Public International Law' (1994) 248 *Recueil des Cours de l'Académie de Droit International* 345, 360.

¹⁴⁹ Simma, 'Bilateralism to Community Interest' (n 1), 234; Crawford, 'Multilateral Rights & Obligations' (n 2), 345–6, 363, 478.

¹⁵⁰ Lasswell Harold & McDougal Myres, *Jurisprudence for a Free Society: Studies in Law, Science, & Policy* (Springer 1992), xxii cited in Paulus & Weiler, 'Structure of Change' (n 59), 554.

¹⁵¹ Friedmann, *Changing Structure* (n 10), 60–2, 373.

¹⁵² Krieger, 'Populist Governments & International Law' (n 68), 977; Koh, 'Why Do Nations Obey?' (n 90), 2630 ('But the euphoria faded, as reality dampened the possibilities for new global law'); Dupuy, 'Torn between Coexistence, Cooperation, and Globalisation' (n 88), 283. See Rudolphy Marcela, 'Populist Governments & International Law: Reply to Heike Krieger' (2019) 30 *European Journal of International Law* 997, 1003; Simma & Paulus, 'Challenge of Globalisation' (n 103), 276.

¹⁵³ Nussbaum Bruce, 'Peak Globalisation' (Harvard Business Review, 20 December 2010) <<https://hbr.org/2010/12/peak-globalization>>; Neuhold Hanspeter, 'Common Security: Litmus Test of International Solidarity' in Wolfrum Rüdger (ed), *Solidarity* (Springer 2010), 221; Delbruck, 'A More Effective International Law' (n 147), 705; Kolb Robert, 'Peremptory Norms as a Legal Technique rather than Substantive Super-Norms' in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 25.

¹⁵⁴ See e.g. Morrison Scott, 'Speech before the Chicago Council on Global Affairs' (23 September 2019) <<https://www.pm.gov.au/media/chicago-council-global-affairs>>; Prime Minister, 'Future Relationship between the UK & the EU' (Cm 9593, 2018), 2; Asselborn Jean, 'Foreign Policy Address' (Luxembourg Ministère des Affaires étrangères et européennes, 13 March 2019) <https://maec.gouvernement.lu/content/dam/gouv_maec/ministère/déclarations-de-politique-étrangère/2019/EN-Declaration-de-politique-étrangère-2019.pdf>; Barnier Michel, 'Speech at the Berlin Security Conference' (29 November 2017) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_5021>; Linde Ann, 'Government's Statement of Foreign Policy 2020' (Sweden Ministry for Foreign Affairs, 12 February 2020) <<https://www.government.se/speeches/2020/02/2020-statement-of-foreign-policy/>>; Ye Xiaodi, 'Rediscovering the Transition in China's National Interest' (2019) 48 *Journal of Current Chinese Affairs* 76, 78.

¹⁵⁵ See Gray Christine, *International Law & the Use of Force* (4th edn, Oxford University Press 2018), 1, 2, 7; Glennon, 'Traditional Rules & Institutions Relating to the Use of Force' (n 140), 91; Alston Philip, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* 1, 6.

the respect for human and people's rights;¹⁵⁶ and indifference towards environmental norms.¹⁵⁷

Moreover, the communitarian view is not alone in explaining the collective norms' formation. The norms on force, human and people's rights, and the environment may also be explained through the realist and rational views based on the 'coincidence' of self-interests. For instance, it could be argued that states recognised the value of avoiding conflicts and maintaining peace.¹⁵⁸ They also recognised that their interest in this public good coincides with others'.¹⁵⁹ This led them to coordinate towards the norm on force.¹⁶⁰ Yet, the coincidence of interests does not 'transform' the relations among states. There is no 'community interest' that 'transcends' states' individual interests,¹⁶¹ nor an 'international community' that is distinct from its members.¹⁶²

Crucially, while these approaches all reasonably explain the collective norms' formation, the communitarian view arguably does not accurately account for the state practices and views on these duties' implementation. The realist and rational views better account for this. States' attitude towards the implementation of duties owed *erga omnes*, based on the observations made in *Part II*, suggests the absence of the 'communalisation' of relations among states. Instead of a 'sense of community', states' behaviour towards these duties' implementation

¹⁵⁶ See Alston, 'Populist Challenge to Human Rights' (n 155), 1–2; Coomaraswamy Radhika, 'Contemporary Challenges to International Human Rights' in Sheeran Scott & Rodley Nigel (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2014), 130; Shen Jianming, 'National Sovereignty & Human Rights in a Positive Law Context' (2000) 26 *Brooklyn Journal of International Law* 417, 435; Fernandez Gemmo, 'Rise of Illiberal Democracy, Weakening of the Rule of Law, & Implementation of Human Rights in the Philippines' (2020) 36 *American University International Law Review* 181, 219–220. Note Ministry for Foreign Affairs of Venezuela, 'Note 000125' (6 September 2012) <http://www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.pdf>; UNSG, 'Burundi: Withdrawal' (28 October 2016) <<https://treaties.un.org/doc/publication/cn/2016/cn.805.2016-eng.pdf>>; Philippine Department of Foreign Affairs, 'PH Serves Notice to Withdraw from the ICC' (16 March 2018) <<https://dfa.gov.ph/dfa-news/dfa-releasesupdate/15975-ph-officially-serves-notice-to-un-of-decision-to-withdraw>>.

¹⁵⁷ Scovazzi Tullio, 'Some Remarks on International Responsibility in the Field of Environmental Protection' in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 215; Tomuschat Christian, 'Multilateralism in the Age of US Hegemony' in St John Macdonald Ronald (ed), *Towards World Constitutionalism* (Nijhoff 2005), 40. Note IWC, 'Statement on Japan's withdrawal from the IWC' (14 January 2019) <<https://iwc.int/statement-on-government-of-japan-withdrawal-from-t>>; — —, 'US Gives Notice of Withdrawal from Paris Agreement on Climate Change' (2020) 114(1) *American Journal of International Law* 132.

¹⁵⁸ Mitchell, 'Compliance Theory' (n 115), 14; Focarelli, *International Law as Social Construct* (n 21), 108.

¹⁵⁹ Villalpando, 'Community Interests' (n 10), 394.

¹⁶⁰ Goldsmith & Posner, 'Theory of Custom' (n 112), 1114; Koh, 'Why Do Nations Obey?' (n 90), 2632.

¹⁶¹ See Dill, 'Rights & Obligations of Parties to International Armed Conflict' (n 95), 435; Klein, *Statusverträge im Völkerrecht* (n 138), 53. Cassinelli, 'Concept of the Public Interest' (n 138), 50, 54.

¹⁶² See Villalpando, 'Community Interests' (n 10), 394, 415, 419; Schaumburge-Müller, 'Protection of Common Interests' (n 113), 32; Hoffmann, 'International Legalism & International Politics' (n 107), 975.

suggests the primacy of self-interests.¹⁶³ Thus, the inconsistent and non-representative state practice and the divergent *opinio juris*.¹⁶⁴

These observations suggest that the present order does not support the communitarian claim of a community to whom duties may be owed and whose behalf states may act unilaterally.¹⁶⁵ Instead, it supports the rational and realist claim of a ‘society’—pluralistic and dominated by self-interests.¹⁶⁶ The posited transformation of interstate relations has not occurred,¹⁶⁷ or remains incomplete.¹⁶⁸ As authors like Villalpando observe, states continue to operate in the modes of coexistence or coordination.¹⁶⁹ Likewise, as Cohen, Ahmodov, and Kolb point out,

¹⁶³ See Focarelli Carlo, 'International Law & Third-Party Countermeasures in the Age of Global Instant Communication' (2016) 29 *Questions of International Law* 18, 21 ('States are anything but inclined to intervene [...] to protect others, unless of course it is in their particular interest to do so'); Hofer Alexandra, 'Unilateral Sanctions as a Challenge to the Law of State Responsibility' in Beaucillon Charlotte (ed), *Research Handbook on Unilateral & Extraterritorial Sanctions* (Elgar 2021), 194 ('[The adoption of measures] is selective and tainted with double standards'); Toufayan, 'Reacting to Serious Breaches of Obligations' (n 17), 217 ('There simply did not arise any tangible, operational "sense of community" that reacted forcefully enough to the unspeakable atrocities committed'); Hofbauer Jane, 'Not Just a Participation Trophy? Advancing Public Interests through Advisory Opinions at the International Court of Justice' (2023) 22 *Law & Practice of International Courts & Tribunals* 234, 236 ('[Implementation] is still largely party-oriented and directed at the preservation of individual interests. It is largely conducted between those parties whose rights or interests have been harmed, even if it concerns matters which might be in the interest of the international community as well').

¹⁶⁴ Villalpando, *La communauté internationale* (n 15), 12 ('La pratique des réactions à l'illicite est tellement sélective et irrégulière qu'elle en devient suspecte'); Ahmodov, *Actio Popularis* (n 9), 34–5 ('This may be indicative of the lack of sense of prevalence of community interests') citing Leckie S, 'Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 *Human Rights Quarterly* 249, 249–301.

¹⁶⁵ See Villalpando, *La communauté internationale* (n 15), 25 ('Il [...] ne trouve pas une manifestation pure dans la réalité concrète'), 214; Focarelli, 'International Law & Third-Party Countermeasures' (n 163), 21 ('This optimistic and ecumenical view of the 'public good' of the entire 'international community' is a hope much more than a reality, and conceptually highly ambiguous'); Hernandez, *ICJ & Judicial Function* (n 39), 199 ('The invocation of "international community" remains purely a rhetorical technique'); Duff RA, 'State Responsibility: An Outsider's View' in Besson Samantha (ed), *Theories of International Responsibility Law* (Cambridge University Press 2022), 90–1 ('The existence of such a community is, no doubt, more aspirational than actual'); Marek Krystyna, 'Criminalising State Responsibility' (1978) 14 *Revue Belge de Droit International* 460, 481 ('The notion of the "international community"—whether or not "as a whole"—has already been examined and found wanting').

¹⁶⁶ Ellis, 'Possibility of International Community' (n 40), 9 citing Jackson, *Human Conduct in a World of States* (n 141), 105. Hoffmann, 'International Legalism & International Politics' (n 107), 975.

¹⁶⁷ Rudolphy, 'Reply to Heike Krieger' (n 152), 1004; Weil, 'Towards Relative Normativity' (n 10), 419; See Dupuy, 'Deficiencies of State Responsibility' (n 37), 214; Friedmann Wolfgang, 'National Sovereignty, International Cooperation, and the Reality of International Law' (1963) 10 *University of California Los Angeles Law Review* 739, 748 ('The implementation of many of these concerns is as yet in an embryonic stage').

¹⁶⁸ Villalpando, 'Community Interests' (n 10), 415 ('The world community is not yet ready to change the legal order which rules its activities'); Ellis, 'Possibility of International Community' (n 40), 9 (It is not altogether clear that all the necessary requirements for a true international community exist'); Simma & Paulus, 'Challenge of Globalisation' (n 103), 274 ('At present we remain [...] in the broad middle ground between the classical 'international' and a more broadly communitarian concept'); Ago, 'Obligations Erga Omnes' (n 29), 237.

¹⁶⁹ Villalpando, 'Community Interests' (n 10), 415 ('The proclamation and protection of collective interests have not implied a renunciation to the protection of other, competing, interests in international law'); Weil, 'Towards Relative Normativity' (n 10), 420, 441; Wellens, 'Solidarity as a Constitutional Principle' (n 85), 804; Johnston Douglas, 'World Constitutionalism in the Theory of International Law' in St John Macdonald Ronald & Johnston Douglas (eds), *Towards World Constitutionalism* (Nijhoff 2005), 11.

the order remains ‘segmentally differentiated’ with states ‘having profoundly divergent interests and antagonistic values’.¹⁷⁰ States are not ‘welded together by a sense of community’,¹⁷¹ but ‘lack of a sense of solidarity’.¹⁷²

These pose a ‘fundamental theoretical problem’ against the ‘communitarian’ approach.¹⁷³ They cast doubt on the claim that duties may be owed to the ‘international community’.¹⁷⁴ The term, it would seem, is a signifier without a signified. As Gaja aptly put it, to which some states agree,¹⁷⁵ the community is ‘not only invisible, it is a fiction’.¹⁷⁶ Even Crawford has admitted that there ‘appears to be no such thing’.¹⁷⁷ The transformation of the interstate relations being unfinished, the community is yet to develop, according to Kritsiotis and Annacker, into a

¹⁷⁰ Cohen Jean, ‘Sovereignty in the Context of Globalisation: A Constitutional Pluralist Perspective’ in Besson Samantha & Tasioulas John (eds), *The Philosophy of International Law* (Oxford University Press 2010), 262; Ahmadov, *Actio Popularis* (n 9), 27; Kolb, *Theory of International Law* (n 39), 271 citing Luard Evan, *International Society* (Macmillan 1990), 6–10; Schaumburge-Müller, ‘Protection of Common Interests’ (n 113), 46; Ago, ‘Pluralism & the Origins of the International Community’ (n 72), 24. See Mani, ‘Centrifugal & Centripetal Tendencies’ (n 113), 252.

¹⁷¹ See Abi-Saab, ‘International Community’ (n 10), 249 (‘Only if [the] society is welded together by a sense of community [...] can it be designated a “community”’). But see Hakimi, ‘Constructing an International Community’ (n 100), 347 (‘Conflicts [...] can be productive for a [...] community. It can help constitute and fortify the community’).

¹⁷² Kolb, *Theory of International Law* (n 39), 271; Hernandez, *ICJ & Judicial Function* (n 39), 199; Palombella G, ‘(Re-)constitution of the Public in a Global Arena’ in C Mac Amhlaigh, et al. (eds), *After public law* (Oxford University Press 2013), 286, 291, 303 cited in Thin, ‘Community Interest & International Public Order’ (n 21), 48; Allot, *International Law & International Revolution* (n 96), 10 (‘Undemocratised [and] unsocialised [...] in which so-called states act in the name of so-called national interests’).

¹⁷³ Ragazzi Maurizio, ‘International Obligations Erga Omnes: Their Moral Foundation & Criteria of Identification’ in Goodwill-Gill Guy & Talmon Stefan (eds), *Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999), 459 (‘Universality appears difficult to reconcile with the structure of international society [...] composed of independent entities [...] and therefore raises a fundamental theoretical problem’).

¹⁷⁴ Nissel, ‘Self-Help & Solidarity’ (n 104), 365 (‘The approach [based on multilateralism] is based upon an invalid premise’).

¹⁷⁵ UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 51st Session’ (1 May 1997) UN Doc A/CN.4/479/Add.1, 11; UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (8 November 1996) UN Doc A/C.6/51/SR.36, 6 (France: ‘Un-legal concept of the “international community”’); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (24 October 2000) UN Doc A/C.6/55/SR.15, 6 (India: ‘Did not necessarily equate to an international community with identified rights of its own’).

¹⁷⁶ Gaja, ‘Protection of General Interests’ (n 1), 31. See Weil Prosper, ‘Le droit international en quête de son identité’ (1992) 237 *Recueil des Cours de l’Académie de Droit International* 11, 306–12 cited in Voefray, *L’actio popularis* (n 9), 228 (‘La communauté internationale n’existerait pas; elle n’aurait pas d’existence distincte par rapport aux Etats qui la composent’); Morss John, ‘Legal Relations of Collectives: Belated Insights from Hohfeld’ (2009) 22 *Leiden Journal of International Law* 289, 304 (‘[T]he capacity of the [...] community as a whole to be a bearer of rights [and] duties is itself moot’) citing Crawford James, *Creation of States in International Law* (Oxford University Press 2006), 40; Vaurs-Chaumette, ‘International Community as a Whole’ (n 18), 1024 (‘The international community does not exist as a subject of international law [...] It is a legal fiction comprising (at least) all states’); *Legal Consequences of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1970] ICJ 16, 241 (Fitzmaurice, dissenting) (‘The so-called organised world community is not a separate juridical entity with a personality’).

¹⁷⁷ Crawford, ‘Responsibility to the International Community’ (n 39), 307.

‘separate juridical entity’ that possesses a ‘legal personality’.¹⁷⁸ As Villalpando submits, it does not constitute ‘an entity that can be individualised’, ‘express its own will’, and ‘hold the collective interest’.¹⁷⁹ Thus, it can hardly be viewed as the recipient of rights correlative to duties owed *erga omnes*.¹⁸⁰

It also appears problematic to allow states to act *uti universi* or on the community’s behalf. This requires a high level of solidarity according to Barboza, Wellens, and Krieger,¹⁸¹ and cohesion for Ellis and Villalpando,¹⁸² such that when a state acts to implement duties owed *erga omnes*, it does so for the community’s benefit.¹⁸³ However, it is difficult to reconcile this with the observation that the states’ interests, especially as to duties owed *erga omnes*’ implementation, often conflict.¹⁸⁴ With divergent interests, it is difficult to see how a state may claim to act on the community’s behalf.¹⁸⁵ It may represent its interest, perhaps several others,

¹⁷⁸ Kritsiotis Dino, ‘Imagining the International Community’ (2002) 13 *European Journal of International Law* 961, 978; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 139; Villalpando, *La communauté internationale* (n 15), 241, 248. See Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 366 (‘No collective entity with capacity to act’).

¹⁷⁹ Villalpando, *La communauté internationale* (n 15), 243 (‘[Elle] ne constitue pas “une entité que l’on puisse individualiser, qui puisse exprimer une volonté propre”; elle ne peut donc pas [...] se porter titulaire de l’intérêt collectif et des situations juridiques subjectives correspondantes.’), 249 (‘Dans la mesure où, à l’heure actuelle, la communauté internationale n’est pas un sujet qui puisse se porter titulaire de droits ou intérêts juridiques de manière autonome’).

¹⁸⁰ Ibid, 241 (‘En l’absence d’une entité collective qui se fasse porteuse de l’intérêt correspondant—il est difficile d’identifier le titulaire potentiel de la situation juridique subjective correspondant à une obligation imposée au bénéfice de la collectivité.’) Voefray, *L’actio popularis* (n 9), 227; Gaja, ‘Protection of General Interests’ (n 1), 31.

¹⁸¹ Barboza, ‘Legal Injury’ (n 27), 21 (‘United in solidarity’); Wellens Karel, ‘General Observations’ in Komori Teruo & Wellens Karel (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge 2016), 43; Krieger, ‘Third Parties in Armed Conflicts’ (n 69), 448.

¹⁸² Ellis, ‘Possibility of International Community’ (n 40), 16 (‘Collective belief about the goals to be achieved and the manner in which they are to be arrived at’); Villalpando, *La communauté internationale* (n 15), 26 (‘la communauté internationale se caractérise par un degré de cohésion particulier qui découle de la solidarité des membres du groupe social dans la sauvegarde de certains intérêts identiques collectifs’); 231 (‘reconnaissant ainsi les intérêts identiques collectifs qui déterminent la solidarité communautaire et assurant, par ce biais, une garantie universelle des biens ou valeurs collectifs’). See Ago, ‘Obligations Erga Omnes’ (n 29), 238.

¹⁸³ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 4), 127; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 1), 227 (‘On behalf and for the benefit of the international community as a whole’); Cannizzaro Enzo, ‘Role of Proportionality in the Law of International Countermeasures’ (2001) 12 *European Journal of International Law* 889, 914 (‘States are thus acting as organs of the international community’). See Vaurs-Chaumette, ‘International Community as a Whole’ (n 18), 1024 (‘It is states collectively who are the holders of the injured interest and who have the capacity to act against the author of the breach’).

¹⁸⁴ Schaumburge-Müller, ‘Protection of Common Interests’ (n 113), 29; Focarelli, ‘International Law & Third-Party Countermeasures’ (n 163), 21; Dill, ‘Rights & Obligations of Parties to International Armed Conflict’ (n 95), 432; Ellis, ‘Possibility of International Community’ (n 40), 9 (‘The diversity of cultures and national interests among states poses an especially intractable dilemma for the creation of a common identity’); Jouannet Emmanuelle, ‘French & American Perspectives on International Law’ (2006) 58 *Maine Law Review* 292, 292. See ‘Application to Intervene of Australia’, *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 23 August 1995), 10 (‘While the dispute [...] is bilateral [...] the Court would [...] be required to pronounce on the rights of all states’).

¹⁸⁵ See Hernandez, *ICJ & Judicial Function* (n 39), 206 (‘The question of who is entitled to represent that

but not the dissenting states.¹⁸⁶ Thus, for Nissel, the approach presents an issue of legitimacy.¹⁸⁷ While it posits the existence of duties owed to the community, it does not, as Bodansky and Crook point out, ‘predicate their assertion on community decisions’.¹⁸⁸ The approach, according to Simma and Paulus, ‘underestimates the necessity [for] consensus as a precondition’ for actions implementing duties owed *erga omnes*.¹⁸⁹ In other words, it allows states to act ‘as agents for an ill-defined “international community”’.¹⁹⁰ As noted in *Chapter 3*, some states already raised this concern during the 2001 Draft Articles’ formation.¹⁹¹ Similarly, the examination in *Part II* shows that most states appear to have rejected this approach and condemned the unilateral measures taken by the minority purporting to act on the community’s behalf.¹⁹²

community remains nebulous’); Voeffray, *L’actio popularis* (n 9), 306.

¹⁸⁶ See Crawford, ‘Responsibility to the International Community’ (n 39), 315 (‘But in a decentralised system, there is no all-purpose representative, no *parens patriae* who can act securely on the collective behalf’)

¹⁸⁷ Nissel, ‘Self-Help & Solidarity’ (n 104), 356, 366 (‘Neglects the tension between Articles 42 and 48—governance without government [...] the better reasoning for the ILC’s omission of a democracy discourse is its infeasibility’).

¹⁸⁸ Bodansky Daniel & Crook Robert, ‘Symposium on the ILC’s State Responsibility Articles: Introduction & Overview’ (2002) 96 *American Journal of International Law* 773, 786.

¹⁸⁹ Simma & Paulus, ‘Challenge of Globalisation’ (n 103), 267; Dupuy Pierre-Marie, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations & Codification of the Law of Responsibility’ (2002) 13(5) *European Journal of International Law* 1053, 1078 (‘Not [based] on a deliberation by the members of an organised, pre-constituted, pre-established community’).

¹⁹⁰ *Arrest Warrant* [2002] (n 19) (Guillaume, separate opinion), 44. See Focarelli, *International Law as Social Construct* (n 21), 147 (‘The problem with all visions of [a] community lies in its organic, mystical, and all-encompassing [often imperial] [...] nature and ensuing potential for justifying oppression against dissenters to secure the unity of the “social body”’); Weil, ‘Towards Relative Normativity’ (n 10), 441 (‘As the community still remains an imprecise entity, the normative power nominally vested in it is in fact entrusted to a directorate of this “community”, a *de facto* oligarchy’).

¹⁹¹ See e.g. UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 175), 6 (France), 11 (Jordan); ILC, ‘State Responsibility: Comments & Observations of Governments, 50th Session’ (1998) UN Doc A/CN.4/488, 141 (France), 144 (US); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 175), 3 (Israel); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 19th Meeting’ (30 October 2000) UN Doc A/C.6/55/SR.19, 12 (South Korea); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 45), 3 (Belarus).

¹⁹² Hofer Alexandra, ‘Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’ (2017) 16 *Chinese Journal of International Law* 1, 39; Hofer Alexandra, ‘Negotiating International Public Policy through Adoption & Contestation of Sanctions’ (2017) 50 *Revue Belge de Droit International* 440, 446 citing Jouannet, ‘Universalism & Imperialism’ (n 13), 391–2. See e.g. *Unilateral Economic Measures as a Means of Political & Economic Coercion against Developing Countries* Res 56/179 UNGA (21 December 2001) UN Doc A/RES/56/179; Res 76/191 UNGA (17 December 2021) UN Doc A/RES/76/191. See also Conference of Heads of the NAM, ‘Final Document of the 15th Summit’ (16 July 2009) NAM2009/FD/Doc.1, 11; Conference of Heads of the NAM, ‘Final Document of the 17th Summit’ (18 September 2016) NAM/2016/CoB/DOC.1/Corr.1, 17, 145; G77 Foreign Ministers, ‘Declaration Adopted at the 26th Meeting’ (19 September 2002), ¶42; G77 & China Foreign Ministers, ‘Declaration adopted at the 43rd Annual Meeting’ (27 September 2019), ¶¶228–9. See further UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (11 September 2003) UN Doc A/58/301, 4 (Costa Rica); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (12 August 2005) UN Doc A/60/226, 9 (Panama); UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion:

To conclude this section, recall that there are three options in constructing the relations that duties owed *erga omnes* create.¹⁹³ In considering these options, it is important to stress that any choice of construction should reflect not just the international legal order's needs but also its reality.¹⁹⁴ First, it could be deemed owed to and implemented by the organised international community.¹⁹⁵ As noted in *Chapter 3*, this was Ago, Riphagen, and Arangio-Ruiz's suggestion regarding countermeasures to enforce international state crimes.¹⁹⁶ Yet, as observed before, this was deemed unrealistic given the inherent limitations of the UN and its organs.¹⁹⁷ Likewise, there were also concerns over its ineffectiveness in addressing breaches of duties owed *erga omnes*.¹⁹⁸ Second, duties owed *erga omnes* may be considered owed to the international

SG Report' (14 July 2011) UN Doc A/66/138, 7 (Egypt), 8 (Gabon), 10 (Mauritius), 11 (Mexico); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (29 July 2013) UN Doc A/68/218, 5 (Brazil); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (31 July 2019) UN Doc A/74/264, 11 (Russia); 13 (South Africa), 19 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (30 August 2021) UN Doc A/76/310, 7 (Iran), 14 (South Africa). *See also* HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 August 2010) UN Doc A/HRC/15/43, 6 (Russia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (5 August 2011) UN Doc A/66/272, 7 (Burkina Faso).

¹⁹³ Ago Roberto, 'Third Report on State Responsibility' (1971) II(1) YbILC 199, 203, 211, 262; Dupuy, 'Multilateral Dimension of Obligations' (n 189), 1066. *See* Tams, *Enforcing Obligations Erga Omnes* (n 26), 101, 175.

¹⁹⁴ *See* ILC, 'Report on the Work of the 46th Session' (1994) II(2) YbILC 136, 143; Villalpando, *La communauté internationale* (n 15), 201 ('En les adaptant aux besoins de l'ordre juridique et à la réalité des relations sociales internationales').

¹⁹⁵ Dupuy, 'Multilateral Dimension of Obligations' (n 189), 1066; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 140–41, 157–61; Gaja Giorgio, 'Obligations Erga Omnes, International Crimes & Jus Cogens: A Tentative Analysis of Three Related Concepts' in Weiler Joseph, *et al.* (eds), *International Crimes of State: Critical Analysis of the ILC's Draft Article 19* (De Gruyter 1989), 273–4; de Visscher, 'Positivisme et "jus cogens"' (n 47), 8; Provost René, 'Reciprocity in Human Rights & Humanitarian Law' (1994) 65(1) *British Yearbook of International Law* 383, 384–5; Pavel Carmen, *Divided Sovereignty* (Oxford University Press 2015). *See* Abi-Saab George, "La communauté internationale" saisie par le droit' in Abi-Saab George (ed), *Le développement du droit international*, vol 1 (Bruylant 1998), 106; Ellis, 'Possibility of International Community' (n 40), 13.

¹⁹⁶ Ago Roberto, 'Eighth Report on State Responsibility' (1979) II(1) YbILC 3, 43; Riphagen Willem, 'Third Report on State Responsibility' (1982) II(1) YbILC 22, 48; Arangio-Ruiz Gaetano, 'Fifth Report on State Responsibility' (1995) II(1) YbILC 3, 38.

¹⁹⁷ Charney Jonathan, 'Third State Remedies in International Law' (1989) 10(1) *Michigan Journal of International Law* 57, 92; Kolb, *Theory of International Law* (n 39), 371; Voefray, *L'actio popularis* (n 9), 228; Stern Brigitte, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des États' (2001) 47 *Annuaire français de droit international* 3, 15. *See* UNGA, Sixth Committee, 'Summary Record of the 31st Session, 21st Meeting' (19 October 1976) UN Doc A/C.6/31/SR.21, 3 (Japan); UNGA, Sixth Committee, 'Summary Record of the 31st Session, 26th Meeting' (25 October 1976) UN Doc A/C.6/31/SR.26, 5 (France); UNGA, Sixth Committee, 'Summary Record of the 31st Session, 27th Meeting' (25 October 1976) UN Doc A/C.6/31/SR.27, 6 (Australia); UNGA, Sixth Committee, 'Summary Record of the 31st Session, 23rd Meeting' (21 October 1976) UN Doc A/C.6/31/SR.25, 4–5 (Greece); UNGA, 'Topical Summary of the Discussion of the Sixth Committee, 50th Session' (16 February 1996) UN Doc A/CN.4/472/Add.1, 25–7.

¹⁹⁸ Crawford, 'Responsibility to the International Community' (n 39), 307; Dupuy, 'Multilateral Dimension of Obligations' (n 189), 1064; Ellis, 'Possibility of International Community' (n 40), 23; Paulus Andreas, 'Whether Universal Values can Prevail over Bilateralism & Reciprocity' in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 97; Vauris-Chaumette, 'International Community as a Whole' (n 18), 1026.

community and implemented unilaterally by states acting on its behalf. However, as examined above, this may also be problematic. It remains to be seen if the international community may hold rights and if states may claim to act as its representatives. This leaves the third view. In the absence of a community to whom duties may be owed and on whose behalf states may unilaterally act, the more reasonable approach is to '[grant] each member of the group' the competence to implement acting *uti singulus*.¹⁹⁹ That is, to 'invest [every state] with a subjective right' based on the norm that '[protects] the collective interest'.²⁰⁰ The synallagmatic view, discussed in the next chapter, provides this approach.

II. NON-SYNALLAGMATIC VIEW & *ACTIO POPULARIS*

Like the communitarian approach, the public-law approach submits that duties owed *erga omnes* create objective relations. Yet, the two have different premises. The communitarian approach posits the existence of a community to which duties are owed and from which states derive their competence to implement duties owed *erga omnes*. In implementing these duties states act on behalf of the community.²⁰¹ In contrast, the public-law approach is based on the

¹⁹⁹ Barboza, 'Legal Injury' (n 27), 20; Voefray, *L'actio popularis* (n 9), 229 ('Il apparaît logique de reconnaître le statut de créancier à titre individuel aux états qui la composent. Le concept d'obligations erga omnes n'aurait guère de sens [...] si la collectivité était l'unique créancière de l'obligation'); Stern, 'La notion de préjudice juridique' (n 197), 13 ('En l'absence d'instance de personnification de la communauté [...] ce sont tous les états [...] qui assurent le respect et la garantie de l'ordre juridique [...] Cette garantie du droit objectif est assurée par la défense du droit subjectif de chaque état au respect du droit'); Hutchinson D, 'Solidarity & Breaches of Multilateral Treaties' (1988) 59 *British Yearbook of International Law* 151, 165. See De Hoogh, *Obligations Erga Omnes & International Crimes* (n 42), 83; Dupuy Pierre-Marie, 'Responsabilité et légalité' in Société française pour le droit international (ed), *La responsabilité dans le système internationale: Colloque du Mans* (Pedone 1991), 264; Delbruck, 'A More Effective International Law' (n 147), 720.

²⁰⁰ Barboza, 'Legal Injury' (n 27), 20; Villalpando, *La communauté internationale* (n 15), 242; Voefray, *L'actio popularis* (n 9), 229, 331; Stern, 'La notion de préjudice juridique' (n 197), 29; De Jesús Jose, 'Obligations Erga Omnes as Multilateral Obligations' (DPhil, University of Oxford 2012), 36; Hernandez, *ICJ & Judicial Function* (n 39), 222; Nedeski Nataša, *Shared Obligations in International Law* (Cambridge University Press 2022), 65, 81, 87; Picone, 'Jus Cogens & Obligations Erga Omnes' (n 29), 421; Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol II (Oxford University Press 2013), 1151. See *Furundžija* (n 22), ¶151; *East Timor* [1995] (n 22) (Weeramantry, dissenting), 172 209, 215; *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Provisional Measures) [1993] ICJ 325 (Lauterpacht, separate opinion), 436; *Application of the Genocide Convention* [2022] (n 22) (Kress, declaration), 4; *Application of the Genocide Convention* [2019] (n 22), ¶52. See also Ago, 'Second Report on State Responsibility' (1970) (n 22), 192; Riphagen Willem, 'Fifth Report on State Responsibility' (1984) II(1) YbILC 1, 3; Arangio-Ruiz Gaetano, 'Second Report on State Responsibility' (1989) II(1) YbILC 3, 6. See further UNGA, Sixth Committee, 'Summary Record of the 51st Session, 35th Meeting' (7 November 1996) UN Doc A/C.6/51/SR.35, 6 (Ireland); UNGA, Sixth Committee, 'Summary Record of the 53rd Session, 19th Meeting' (3 November 1998) UN Doc A/C.6/53/SR.19, 4 (Singapore); ILC, 'Comments & Observations of Governments, 50th Session' (1998) (n 191), 104 (Italy); 139 (Singapore); 141 (Switzerland), 142 (United States); UNGA, Sixth Committee, 'Summary Record of the 55th Session, 14th Meeting' (23 October 2000) UN Doc A/C.6/55/SR.14, 10 (Germany); UNGA, Sixth Committee, 'Summary Record of the 55th Session, 15th Meeting' (2000) (n 175), 8 (Netherlands); UNGA, 'Topical Summary of the Discussion of the Sixth Committee, 55th Session' (15 February 2001) UN Doc A/CN.4/513, 25; UNGA, Sixth Committee, 'Summary Record of the 56th Session, 12th Meeting' (2001) (n 45), 2 (Japan); ILC, 'Comments & Observations of Governments, 53rd Session' (2001) (n 28), 74 (Japan).

²⁰¹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 4), 126–7.

international legal system's public law construction.²⁰² Under this view, breaches of duties owed *erga omnes* infringe on the collective interests and 'affect every state [...] in its objective interest in the integrity of the "community norm"'.²⁰³ It invests upon states the competence to the 'consequences of responsibility' in their individual capacity.²⁰⁴ Whereas the communitarian view resembles 'class-action suits' under municipal law,²⁰⁵ the public-law approach is based on *actio popularis* or 'public interest standing' that grants each state the competence to 'bring actions [in response to] acts which affect public interest' and 'independently of any personal prejudice'.²⁰⁶ This section examines the public law construction's viability in implementing duties owed *erga omnes*. It first analyses the concept of public interest standing found in domestic legal systems. Then, it examines if this could be transposed to the international legal order. It submits that it cannot. *Actio popularis* requires structures present in municipal systems but not in the international legal order.

A. Concept of Public Interest Standing in Municipal Legal Systems

The concept of *actio popularis*, as Tams and Tzanakopoulos point out, has been present in 'many domestic legal systems'.²⁰⁷ Roman law to which the concept may be traced recognised each community member's capacity, in the absence of personal prejudice, to commence proceedings in certain instances to defend the public interest.²⁰⁸ *Actio popularis* 'did not constitute' a 'single institution' in Roman tradition. Rather, as Voefray and Ahmadov note, it was a 'generic term' that may be applied to several processes.²⁰⁹ Broadly these may be grouped

²⁰² See Crawford James, 'Overview of Part Three of the Articles on State Responsibility' in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 934 ('[2001 Draft Article 48 provides for] public interest standing'); Crawford, 'Multilateral Rights & Obligations' (n 2), 422; Tams Christian & Tzanakopoulos Antonios, 'Barcelona Traction: ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781, 792; Thin, 'Community Interest & International Public Order' (n 21), 36, 46. See Vaurs-Chaumette, 'International Community as a Whole' (n 18), 1023.

²⁰³ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 149; Villalpando, *La communauté internationale* (n 15), 250–1. See Bleckmann Albert, 'The Subjective Right in Public International Law' (1985) 28 *German Yearbook of International Law* 144, 146; DiManno John, 'Beyond Taxpayers' Suits: Public Interest Standing in the States' (2008) 41 *Connecticut Law Review* 639, 643.

²⁰⁴ Voefray, *L'actio popularis* (n 9), 257 ('Chacun d'entre eux a le droit de faire valoir tout ou partie des conséquences de la responsabilité'); Dabin Jean, *Le Droit subjectif* (Dalloz 1952), 22, 24; Ahmadov, *Actio Popularis* (n 9), 17, 70.

²⁰⁵ Trindade, *International Law for Humankind* (n 9), 320.

²⁰⁶ Ahmadov, *Actio Popularis* (n 9), 13; Voefray, *L'actio popularis* (n 9), 27, 50, 331; Schwelb Egon, 'Actio Popularis & International Law' (1972) 46 *Israel Yearbook on Human Rights* 46, 47. See *Southwest Africa* [1966] (n 12), 47 ('The argument amounts to a plea that the Court should allow the equivalent of an *actio popularis*, or right resident in [state] to take legal action in vindication of a public interest'); (Winiarski, dissenting), 452

²⁰⁷ Tams & Tzanakopoulos, 'Barcelona Traction' (n 202), 792.

²⁰⁸ Buckland William, *Roman Law from Augustus to Justinian* (Cambridge University Press 1932), 694; *The Digest of Justinian*, vol IV, Watson Alan (ed) (University of Pennsylvania Press 1998), 307; Hunter William, *A Systematic & Historical Exposition of Roman Law* (Maxwell 1885), 332, 1061.

²⁰⁹ Voefray, *L'actio popularis* (n 9), 23, 27

into three. The first pertained to proceedings against public authorities to ensure that they act lawfully. These include actions against officials who hold public office despite being precluded from doing so, fail to return money to the public treasury, and fail to take their oath before holding office.²¹⁰ Second, *actio popularis* was also available in the prosecution of certain offences. These include murder,²¹¹ falsification of edicts, disobedience of magistrates' orders, removal of boundary stones, and desecration of tombs.²¹² Finally, *actio popularis* may also be resorted to for activities that affect public safety and order. These include activities such as hanging hazardous objects in places where persons pass, pouring liquids from dwellings to the streets, and obstructing public roads and paths.²¹³

Several modern systems also grant any person 'standing' in the absence of direct prejudice and make the case admissible before courts.²¹⁴ Some allow persons to initiate actions to prosecute offences and abate nuisances that are deemed 'public'.²¹⁵ Under the former, any person may complain before a public prosecutor regarding the commission of an offence.²¹⁶ Under the latter, any individual may draw an official's attention to the existence of an act or object that endangers public interests.²¹⁷ Yet, these arguably are not 'proper' *actio popularis* as the proceedings are brought only before a public prosecutor or attorney-general. The latter, based on its discretion, would be the one to prosecute the action on the public's behalf before a competent tribunal.²¹⁸

There are domestic actions that may be considered 'proper' *actio popularis* as they are prosecuted by individuals in their capacity. Broadly, these actions ensure that public authorities

²¹⁰ Ibid. 24–5 citing *Fontes Iuris Romani Anteiusliniani*, vol I, Furlani Giuseppe, *et al.* (eds), (Barbera 1940), 140, 202, 208.

²¹¹ Ahmadov, *Actio Popularis* (n 9), 14. See *The Digest of Justinian*, vol I, Watson Alan (ed) (University of Pennsylvania Press 1988), 295 (9.3.5.5).

²¹² Voefray, *L'actio popularis* (n 9), 26. See *Digest of Justinian vol I* (n 211), 40 (2.1.7), 43 (2.3.1); *Digest of Justinian vol IV* (n 208), 299 (47.12.3), 306 (47.21.3).

²¹³ Ahmadov, *Actio Popularis* (n 9), 14–5. See *Digest of Justinian vol I* (n 211), 92 (3.3.42.1), 295 (9.3.5.5–6).

²¹⁴ Voefray, *L'actio popularis* (n 9), 38; *Georgetown v Alexandria Canal Co* (1838) 37 US 91 (US), 97–8.

²¹⁵ Hunter, *Roman Law* (n 208), 1061 ('They are called public because anyone [...] is allowed to follow them up') citing *Institutes of Justinian*, Moyle JB (ed) (Clarendon 1911) (4.18.1).

²¹⁶ Duff, 'State Responsibility: An Outsider's View' (n 165), 81. See *Digest of Justinian vol IV* (n 208), 309, 48.1; *Austria v AAA & BBB* (2022) GR No 205275 (PHL) ('A crime is committed against the state [and] it is prosecuted in the name of people').

²¹⁷ See *Georgetown v Alexandria Canal Co* (n 214), 97–8. *Gouriet v Union of Post Office Workers* (1978) AC 435 (GBR), 477–8 ('Public rights can only be asserted by the Attorney-General representing the public'); *Attorney-General Ex rel McWhirter v Independent Broadcasting Authority* (1973) [1973] QB 629 (GBR), 640.

²¹⁸ Duff, 'State Responsibility: An Outsider's View' (n 165), 81. Stephen James, *History of Criminal Law in England* (Macmillan 1883), 45; Riggsby Andrew, *Roman Law & Legal World of Romans* (Cambridge University Press 2010), 197.

act within the bounds of the law.²¹⁹ For instance, English legal doctrine allows persons to seek judicial review of governmental actions if they have a ‘sufficient interest’ in the subject matter.²²⁰ The test of sufficiency is expansive enough to allow anyone to bring a ‘matter to the [courts’] attention, vindicate the rule of law, and [stop] the unlawful conduct’.²²¹ It only seeks to exclude suits by ‘excluding busybodies and troublemakers’,²²² and is intended to allow the public to challenge governmental actions.²²³ Another example is Canada which permits persons to seek review of actions done ‘beyond [an organ’s] jurisdiction’ or in such a manner that the ‘procedures required by law’ were not observed.²²⁴ It only requires a person to possess a ‘genuine interest’ in the case’s subject matter.²²⁵ Where the case involves justiciable acts, courts have allowed public interest standing to correct the act.²²⁶ The same is true for the Philippines which allows *actio popularis* in cases where a government ‘branch or instrumentality’ committed an ‘abuse of discretion amounting to lack or excess of jurisdiction’.²²⁷ While Philippine legal doctrine requires a ‘personal and substantial interest’ such that a person must have a ‘direct injury’ caused by the governmental action,²²⁸ its case law has relaxed the standing requirement for citizens’ suits on matters of public concern of ‘transcendental importance’,²²⁹ and taxpayers’ suits on acts related to the treasury.²³⁰

The actions described above, both ancient and modern, share similarities. All seek to protect

²¹⁹ Ahmadov, *Actio Popularis* (n 9), 22.

²²⁰ 1982 c 54, *Senior Courts Act* (1981) (UK), §31.

²²¹ *R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed & Small Businesses Ltd* (1982) AC 617 (GBR), 644. See *R v Inspectorate of Pollution, Ex parte Greenpeace Ltd* (1994) Env LR 76 (QB) (GBR), 101–2. Note *Boyce v Paddington Borough Council* (1930) 1 Ch 109 (ENG), 114.

²²² *R v Somerset County Council, Ex parte Dixon* (1998) Env LR 111 (QB) (GBR), 121.

²²³ *Walton v Scottish Ministers* (2012) UKSC 44 (GBR), ¶94.

²²⁴ RSC 1985, c F-7, *Federal Courts Act* (1985) (CAN), s 18.1(4)(d).

²²⁵ *Finlay v Canada (Minister of Finance)* (1986) 2 SCR 607 (CAN), 631. See *Mining Watch Canada v Canada (Minister of Fisheries & Oceans)* (2007) FC 955 (CAN), ¶¶179–81, 185–6;

²²⁶ *Thorson v Canada (Attorney General)* (1975) 1 SCR 138 (CAN), 145; *McNeil v Nova Scotia (Board of Censors)* (1976) 2 SCR 265 (CAN), 217; *Borowski v Canada (Minister of Justice)* (1981) 2 SCR 575 (CAN), 596–8.

²²⁷ *Philippine Constitution* (1987) (PHL), art VIII, §1; *Marbury v Madison* (1803) 5 US (1 Cranch) 137 (USA), 177.

²²⁸ *Telecommunications & Broadcast Attorneys of the Philippines, Inc v Commission on Elections* (1998) GR No 132922 (PHL), 343; *Lawyers League for a Better Philippines v. Aquino* (1986) GR Nos 73748, 73972, & 73990, (PHL)

²²⁹ See *Bayan v Zamora* (2000) GR No 138570 (PHL); *Lim v Arroyo* (2002) GR no 151445 (PHL); *Cruz v Secretary of the DENR* (2000) GR No 135385 (PHL); *Oposa v Factoran Jr* (1993) GR No 101083 (PHL).

²³⁰ See *Araneta v Dinglasan* (1949) 84 Phil 368 (PHL); *Pascual v Secretary of Public Works* (1960) 110 Phil 331 (PHL); *David v Arroyo* (2006) GR No. 171396 (PHL); *Province of North Cotabato v Peace Panel on Ancestral Domain* (2008) GR No 183591 (PHL).

public interests.²³¹ For Voeffray, this distinguishes *actio popularis* from other proceedings.²³² While other actions protect individual or special interests, *actio popularis*, as Ahmadov submits, safeguards diffuse interests like prosecuting public offences, abating acts and objects that endanger the public order, and ensuring the legality of the public officials' actions.²³³ This does not mean that the individual initiating the action has no personal interest. Yet, this also does not detract from the fact that he or she nevertheless acts in the defence of general interests.²³⁴

B. Transposability of *Actio Popularis* to the International Legal System

The public law approach's supporters submit that *actio popularis* may be transposed to the international legal system. Some like Jessup, Schwelb, and Ahmadov claim that as in domestic systems where individuals, without being affected by a collective norm's breach, may initiate proceedings to protect collective interests, states too may do so within the international order.²³⁵ Others, like Trindade, go as far as to claim that there is 'epistemologically nothing that would render its application not viable in international law'.²³⁶ Some ILC members and states have also supported this view.²³⁷

For authors like Thin, public law's 'nature and quality' makes *actio popularis* 'transferrable' to international order.²³⁸ Like domestic collective norms, international ones are not only

²³¹ Ahmadov, *Actio Popularis* (n 9), 15.

²³² Voeffray, *L'actio popularis* (n 9), 53.

²³³ Ahmadov, *Actio Popularis* (n 9), 17.

²³⁴ Voeffray, *L'actio popularis* (n 9), 27, 31.

²³⁵ Jessup Philip, *The Modern Law of Nations* (Macmillan 1948), 2; Schwelb, 'Actio Popularis & International Law' (n 206), 55; Ahmadov, *Actio Popularis* (n 9), 199–200; Wolfrum Rüdger, 'Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 1139. See Root Elihu, 'Outlook for International Law' (1916) 10 *American Journal of International Law* 2, 7–9; Jenks Wilfred, 'The General Welfare as a Legal Interest' in Wilner G (ed), *Jus et Societas: Essays in Tribute to Wolfgang Friedman* (Nijhoff 1979), 154–8. See also *Southwest Africa* (Ethiopia & Liberia v South Africa) (Preliminary Objections) [1962] ICJ 319 (Bustamante, separate opinion), 361–2; (Jessup, separate opinion), 425; *Southwest Africa* [1966] (n 12) (Wellington Koo, dissenting), 225.

²³⁶ Trindade, *International Law for Humankind* (n 9), 321; Voeffray, *L'actio popularis* (n 9), 19.

²³⁷ See e.g. ILC, 'Summary Records of the 19th Session' (1967) I YbILC 1, 226; UNGA, Sixth Committee, 'Summary Record of the 51st Session, 36th Meeting' (1996) (n 175), 18 (Spain); UNGA, 'Topical Summary of the Discussion of the Sixth Committee, 51st Session' (1997) (n 175), 1; UNGA, 'Topical Summary of the Discussion of the Sixth Committee, 55th Session' (2001) (n 200), 11, 23; UNGA, Sixth Committee, 'Summary Record of the 55th Session, 17th Meeting' (27 October 2000) UN Doc A/C.6/55/SR.17, 8 (Chile); UNGA, Sixth Committee, 'Summary Record of the 55th Session, 18th Meeting' (27 October 2000) UN Doc A/C.6/55/SR.18, 3 (Jordan).

²³⁸ Thin, 'Community Interest & International Public Order' (n 21), 41, 54; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 138–9; Rubin Alfred, 'Actio Popularis, Jus Cogens, & Erga Omnes' (2001) 35 *New England Law Review* 265, 278; Kingsbury & Donaldson, 'From Bilateralism to Publicness' (n 18), 86. See Peters Anne, 'Fragmentations & Constitutionalisation' in Orford Anne & Hoffmann Florian (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 1015; Weller Marc, 'The Struggle for an

hierarchically superior but are also universal such that they are ‘generally valid within the [international community’s] boundaries.’²³⁹ Ahmadov and Damaska further claim states’ interests in these norms ‘extend beyond [their] individual interests’—a state’s interest does not differ from others’.²⁴⁰ This commonality gives rise to every state’s ‘expectation [...] to fulfil such values’.²⁴¹ Thus, should a duty imposed by a collective norm be breached, all states are affected.²⁴² Accordingly, for scholars like Craven and Voeffray, all states may demand its observance or performance.²⁴³

Scholars like Annacker, Crawford, Voeffray, and Thin also argue that collective norms create objective legal relationships.²⁴⁴ For Thin, collective norms, in the domestic context, give rise to duties that are not fulfilled towards other individuals.²⁴⁵ Individuals comply with the duty imposed upon them irrespective of whether another has a correlative right.²⁴⁶ Furthermore, as Voeffray suggests, every person has an interest in seeing that the duties imposed upon others are observed.²⁴⁷ As a member of the public, he or she has an objective interest in a public norm’s integrity.²⁴⁸ It is based on this interest, that the individual possesses the capacity, even if not directly affected by the breach, to implement the duty imposed by the norm.²⁴⁹ The same, Annacker and Crawford submit, applies to international collective norms. They give rise to

International Constitutional Order’ in Armstrong David (ed), *Routledge Handbook of International Law* (Routledge 2009), 180; Allot, ‘Concept of International Law’ (n 63), 35.

²³⁹ Thin, ‘Community Interest & International Public Order’ (n 21), 42 citing Loughlin Martin, *Public Law & Political Theory* (Oxford University Press 1992), 159; Benvenisti Eyal, ‘The Conception of International Law as a Legal System’ (2008) 50 *German Yearbook of International Law* 393, 393.

²⁴⁰ Ahmadov, *Actio Popularis* (n 9), 27, 70, 100.

²⁴¹ Damaska Mirjan, *The Faces of Justice & State Authority: A Comparative Approach to Legal Process* (Yale University Press 1986), 73 cited in Mao Xiao, ‘Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case’ (2002) 21 *Chinese Journal of International Law* 589, 600.

²⁴² Ahmadov, *Actio Popularis* (n 9), 70 citing Taggart M, ‘Rugby, the Anti-apartheid Movement, & Administrative Law’ in Bigwood R (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (Lexis-Nexis 2006), 77; Schall Christian, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts’ (2008) 20 *Journal of Environmental Law* 417, 419.

²⁴³ Craven, ‘Rights & Interests in State Responsibility’ (n 59), 115; Voeffray, *L’actio popularis* (n 9), 211 (‘L’actio popularis y trouve sa source dans l’affirmation d’intérêts collectifs [...] que ce soit sur le plan de la communauté internationale dans son ensemble ou au sein de groupes plus restreints d’Etats’), 233, 330.

²⁴⁴ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 149; Crawford, ‘Multilateral Rights & Obligations’ (n 2), 436–7; Thin, ‘Community Interest & International Public Order’ (n 21), 42.

²⁴⁵ Thin, ‘Community Interest & International Public Order’ (n 21), 42 (‘[The] publicness of a legal system entails the objectivity of obligations and responsibility’).

²⁴⁶ Ibid.

²⁴⁷ Voeffray, *L’actio popularis* (n 9), 298–9 citing Dabin, *Le Droit subjectif* (n 204), 22, 24.

²⁴⁸ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 17), 149.

²⁴⁹ Voeffray, *L’actio popularis* (n 9), 27, 52; Bleckmann, ‘Subjective Right’ (n 203), 146.

duties that are not fulfilled or breached towards states.²⁵⁰ The competence to implement is based not on the infringement of states' subjective rights but on their interest in the 'integrity of the [collective norm]'.²⁵¹ Thus, if the duty owed *erga omnes* is breached, all states may implement the wrongful state's responsibility.²⁵²

However, not all share these views. Some, like Voefray, admit that the concept is *de lege ferenda*.²⁵³ Others, like Marek, cast doubt on *actio popularis*' transposability to the international legal system.²⁵⁴ Again, such a view is not limited to literature but shared by tribunals,²⁵⁵ and states.²⁵⁶ There are two primary reasons for this. First, there remain doubts regarding the international legal system's 'publicness'. Second, there is the view that the public-interest litigation's 'two key assumptions'—the 'existence of a thick or value-homogenised community' and structures that make *actio popularis* possible—are absent in the international

²⁵⁰ Crawford, 'Third Report on State Responsibility' (2000) (n 2), 99; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 147; Sachariew, 'Identifying the "Injured State"' (n 1), 279.

²⁵¹ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 147; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 1), 227; Crawford, 'Multilateral Rights & Obligations' (n 2), 229, 434; 444; Simma, 'Bilateralism to Community Interest' (n 1), 298–9; Tams, *Enforcing Obligations Erga Omnes* (n 26), 29.

²⁵² ILC, 'Report on the Work of the 53rd Session' (2001) (n 4), 126–7; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 1), 228–9, 239; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 17), 149; Voefray, *L'actio popularis* (n 9), 321, 331.

²⁵³ Voefray, *L'actio popularis* (n 9), 347 ('Le droit international contemporain a connu certains développements normatifs importants pour la protection des intérêts collectifs [...] mais que ceux-ci n'ont pas été accompagnés par des progrès institutionnels suffisants'); Czapliński W & Danilenko G, 'Conflicts of Norms in International Law' (1990) 21 *Netherlands Yearbook of International Law* 3, 10–1; Rubin, 'Actio Popularis, Jus Cogens, & Erga Omnes' (n 238), 280. See Hernandez, *ICJ & Judicial Function* (n 39), 45 ('It behoves legal scholarship to remain cautious of the distinctive features of the [...] order [...] and avoid [...] the mechanical transposition of municipal law concepts')

²⁵⁴ Ahmadov, *Actio Popularis* (n 9), 1–2 citing Marek, 'Criminalising State Responsibility' (n 165), 481; Simma Bruno, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20(2) *European Journal of International Law* 267, 275.

²⁵⁵ See *Southwest Africa* [1966] (n 12), 47; *Nuclear Tests* (Australia v France) (Judgment) [1974] ICJ 253 (De Castro, dissenting), 387; *Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Preliminary Objections) [1996] ICJ 595 (Oda, declaration), 626; *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422 (Xue, dissenting), 575; (Sur, dissenting), 614; *Application of the Genocide Convention* [2022] (n 22) (Xue, dissenting), 7. *Compare Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192 (Xue, declaration), 1–2.

²⁵⁶ See e.g. UNGA, 'Topical Summary of the Discussion of the Sixth Committee, 51st Session' (1997) (n 175), 12, 23; UNGA, Sixth Committee, 'Summary Record of the 51st Session, 36th Meeting' (1996) (n 175), 7 (France), 13 (Cameroon), 16 (Iran); UNGA, 'Topical Summary of the Discussion of the Sixth Committee, 52nd Session' (20 January 1998) UN Doc A/CN.4/483, 13; UNGA, Sixth Committee, 'Summary Record of the 52nd Session, 23rd Meeting' (5 December 1997) UN Doc A/C.6/52/SR.23, 3 (Slovenia); ILC, 'Comments & Observations of Governments, 50th Session' (1998) (n 191), 31–2 (France); 144 (US), 168 (France); UNGA, Sixth Committee, 'Summary Record of the 55th Session, 15th Meeting' (2000) (n 175), 3 (Israel), 6 (India); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 11th Meeting' (2001) (n 28), 10 (China); UNGA, Sixth Committee, 'Summary Record of the 56th Session, 16th Meeting' (2001) (n 45), 4 (Iran); ILC, 'Comments & Observations of Governments, 53rd Session' (2001) (n 28), 79 (China).

legal order.²⁵⁷

As Thin notes, the ‘fundamental element’ crucial to a system’s public law construction is the ‘political community’—the public.²⁵⁸ For Duff, this implies a ‘normative community of shared values [that] demands [its members’] allegiance and claims the right to call them to account if they violate the values expressed in its law’.²⁵⁹ Yet, as discussed in *Section I–C*, the international community is ‘less integrated’ and ‘its members [appear to have] divergent interests and antagonist values’.²⁶⁰ The ‘social elements’, as Palombella argues, are lacking’—cohesion among members, ‘social fabric’ common to domestic systems, and ‘consciousness of community’ akin to national polities.²⁶¹ Thus, it is doubtful if it could form a basis for a ‘true political community’.²⁶²

Moreover, a concept’s transposability from one system to another depends not only on the similarities in the system’s ‘quality’ but on the concept’s function and the existence of structures that may accommodate it.²⁶³ It bears repeating that ‘proper’ *actio popularis*—those prosecuted by individuals in their capacity—are not actions taken by a member of the public against

²⁵⁷ Mao, ‘Public-Interest Litigation before the ICJ’ (n 241), 606–7 citing Beckett Jason, ‘Behind Relative Normativity: Rules & Process as Prerequisites of Law’ (2001) 12 *European Journal of International Law* 627, 634–5.

²⁵⁸ Thin, ‘Community Interest & International Public Order’ (n 21), 41 citing Palombella, ‘(Re-)constitution of the Public’ (n 172), 286–8. See Ciongaru E, ‘Historical Considerations regarding the Public Law–Private Law Dichotomy’ (2014) 3 *Perspect Business Law Journal* 111, 112; Peters Anne, ‘Compensatory Constitutionalism: Function & Potential of Fundamental International Norms & Structures’ (2006) 19 *Leiden Journal of International Law* 579, 581; Tierney Stephan, ‘Nation as “the Public”’ in Mac Amhlaigh C, *et al.* (eds), *After Public Law* (Oxford University Press 2013), 152.

²⁵⁹ Duff, ‘State Responsibility: An Outsider’s View’ (n 165), 85, 87. See Ellis, ‘Possibility of International Community’ (n 40), 15 (‘Must display the attributes of a legal organisational structure and the idea of a collective reality’)

²⁶⁰ Ahmadov, *Actio Popularis* (n 9), 27. But see Kingsbury & Donaldson, ‘From Bilateralism to Publicness’ (n 18), 86 (‘Such a quality of publicness does seem to depend on the existence of a unified [...] collectivity that is not necessarily present [...] [in the international legal order]’); Thin, ‘Community Interest & International Public Order’ (n 21), 48 (‘Unnecessary to establish the existence of a social community when we can look instead to a community rooted in law’).

²⁶¹ Thin, ‘Community Interest & International Public Order’ (n 21), 48 citing Palombella, ‘(Re-)constitution of the Public’ (n 172), 303, 305; Kritsiotis, ‘Imagining the International Community’ (n 178), 964. See Johnston, ‘World Constitutionalism’ (n 169), 18 (‘[The] international [legal system is] incomplete in comparison with domestic models’); Cohen, ‘Sovereignty in the Context of Globalisation’ (n 170), 262. See also Hernandez, *ICJ & Judicial Function* (n 39), 284.

²⁶² Palombella, ‘(Re-)constitution of the Public’ (n 172), 303

²⁶³ See Hernandez, *ICJ & Judicial Function* (n 39), 44 citing Lauterpacht Hersch, *Private Law Sources and Analogies of International Law* (Longmans 1927), 84–5; Thirlway Hugh, ‘Law & Procedure of the International Court of Justice 1960–1989: Part Nine’ (1998) 69 *British Yearbook of International Law* 389, 410; Rosenne Shabtai, *Law & Practice of the International Court: 1920–2005*, vol I (4th edn, Nijhoff 2006), 528–9; Koskeniemi Martti, ‘International Law in Europe: Between Tradition & Renewal’ (2005) 16 *European Journal of International Law* 113, 122, 285.

another. These actions ensure that public authorities act within the bounds of the law.²⁶⁴ If successful, the individual is granted a remedy that annuls the act of the public authority done against a relevant norm.²⁶⁵ Yet, the international order lacks any public authority. As Ahmadov puts it, this is ‘alien to international law’.²⁶⁶ Thus, this form of *actio popularis* hardly finds relevance in international law.²⁶⁷

The other form of *actio popularis*—those prosecuted by public prosecutors and attorneys-general—also runs into difficulties. Recall that these actions are not prosecuted by members of the public in their individual capacity. Rather, they are brought before the proper authorities who would prosecute the action on the public’s behalf before a competent tribunal.²⁶⁸ Again, the international system lacks these institutions. It does not have authorities vested with the competence to act on its subjects’ behalf.²⁶⁹ This is problematic as, according to Dupuy, the ‘defence of the *ordre public* [...] presupposes the centralisation of the evaluation of any infringements [that the public] suffers’.²⁷⁰ Without an authority that may perform this function, there arises the issue of the legitimacy of states’ invocation of responsibility via *actio popularis*.²⁷¹

Finally, municipal courts, in both kinds of *actio popularis*, make binding legal decisions upon persons within their respective jurisdictions. When courts pronounce the objective illegality of an act brought to its attention via *actio popularis*, that decision becomes ‘part and parcel of the legal order [and binds] every person’.²⁷² This does not happen in the international system. No entity, as scholars like Marek observe, has the competence, through the application of the law, to ‘lay down heteronomous rules’ for all states and enforce such judgement ‘in the common interest’.²⁷³ Unlike in municipal systems, international tribunals’ judgements, even on

²⁶⁴ Ahmadov, *Actio Popularis* (n 9), 22; Villalpando, *La communauté internationale* (n 15), 252.

²⁶⁵ Villalpando, *La communauté internationale* (n 15), 252.

²⁶⁶ Ahmadov, *Actio Popularis* (n 9), 22.

²⁶⁷ Ibid, 23 citing Thio S, *Locus Standi & Judicial Review* (Singapore University Press 1971), 2–3

²⁶⁸ Duff, ‘State Responsibility: An Outsider’s View’ (n 165), 81; Voefray, *L’actio popularis* (n 9), 38–9.

²⁶⁹ Crawford, ‘Responsibility to the International Community’ (n 39), 344. See ILC, ‘Fragmentation of International Law’ (13 April 2006) UN Doc A/CN.4/L.682, 200 (‘The capacity to react [...] lies in the hands of public power’).

²⁷⁰ Dupuy, ‘Multilateral Dimension of Obligations’ (n 189), 1078. See Duff, ‘State Responsibility: An Outsider’s View’ (n 165), 71–2, 76, 79.

²⁷¹ See Duff, ‘State Responsibility: An Outsider’s View’ (n 165), 89–90

²⁷² Ahmadov, *Actio Popularis* (n 9), 22 citing Posner E & Yoo J, ‘Judicial Independence in International Tribunals’ (2005) 93 *California Law Review* 3, 11. Duff, ‘State Responsibility: An Outsider’s View’ (n 165), 90.

²⁷³ Marek, ‘Criminalising State Responsibility’ (n 165), 463. See Focarelli, *International Law as Social Construct* (n 21), 321, 474; Kolb, *Theory of International Law* (n 39), 157, 160.

matters of common interest, only apply to the parties to the dispute.²⁷⁴

Given the foregoing, the international system seems ill-suited to accommodate *actio popularis*.²⁷⁵ It lacks ‘some of the key hallmarks of a [...] domestic legal order’ that *actio popularis* requires—authorities invested with the competence to act on the public’s behalf and courts that may make decisions that bind every member of the public.²⁷⁶ In other words, the public law model seems unsuitable for the implementation of duties owed *erga omnes* by ‘states other than an injured state’.²⁷⁷ If anything, as Duff claims, these duties’ implementation is more akin to ‘domestic private law’ that ‘concern “horizontal” dealings between individuals, which the state facilitates, but to which it is not a party’.²⁷⁸ This will be further examined in the next chapter.

CHAPTER CONCLUSION

This chapter revisited the premises of the present rules on the implementation of duties owed *erga omnes* by ‘states other than an injured state’. It submits that these may not reflect the international legal system’s present realities which may be factors that affect states’ acceptance of the rules. While addressing these issues does not mean that states would accept these rules, it may nevertheless aid towards their further development.

It examined the non-synallagmatic approach under the communitarian view. This conceives duties owed *erga omnes* as owed to the ‘international community’. States do not possess rights that correlate to duties owed *erga omnes* as it is the community which is the duty’s beneficiary. Instead, states only possess a ‘legal interest’ in the duties’ performance. If the duty is breached, states may only implement the wrongful state’s responsibility on the community’s behalf. This view necessarily requires the existence of a community that may hold rights and on whose behalf states may implement duties owed *erga omnes*. Yet, such a community, given that states

²⁷⁴ Mao, ‘Public-Interest Litigation before the ICJ’ (n 241), 609.

²⁷⁵ See Villalpando, *La communauté internationale* (n 15), 252; Ahmadov, *Actio Popularis* (n 9), 22–3.

²⁷⁶ See Mégret Frédéric, ‘International Law as Law’ in Crawford James (ed), *Cambridge Companion to International Law* (Cambridge University Press 2015), 67; Magallona Merlin, ‘Jus Cogens in the Vienna Convention on the Law of the Treaties’ (1976) 51 *Philippine Law Journal* 521, 523; Thin, ‘Community Interest & International Public Order’ (n 21), 37 citing Ciongaru, ‘Public Law–Private Law Dichotomy’ (n 258), 112; Mates & Barton, ‘Public versus Private Interest’ (n 101), 182. See also Friedmann, *Changing Structure* (n 10), 3; Kolb, *Theory of International Law* (n 39), 157.

²⁷⁷ See Villalpando, *La communauté internationale* (n 15), 185. Mao, ‘Public-Interest Litigation before the ICJ’ (n 241), 601–2; Lang Anthony & Wiener Antjie (eds), *Handbook on Global Constitutionalism* (Research Handbooks on Globalisation and the Law, Elgar 2017), 295.

²⁷⁸ Duff, ‘State Responsibility: An Outsider’s View’ (n 165), 71–2, 73, 75–6. See Lauterpacht, *Private Law* (n 263), 81; Murase, ‘Transnational Environmental Issues’ (n 147), 299.

‘lack a sense of solidarity’ and have ‘profoundly divergent interests and antagonist values’, remains ‘ill-defined’.

It also analysed the non-synallagmatic approach based on the international order’s ‘public law’ construction. Under this approach, breaches of duties owed *erga omnes* infringe on collective interests and affect every state as they possess an objective interest in the norm’s integrity. For this reason, states have the capacity to assert the wrongful state’s responsibility. This is based on the concept of *actio popularis* or ‘public interest standing’ found in several municipal jurisdictions that grants any person, in the absence of direct effect, the competence to bring an action relating to acts that affect the public interest. However, given the international legal system’s present structure, it does not seem capable of accommodating the concept of *actio popularis*.■

CHAPTER 11: REVISITING THE SYNALLAGMATIC VIEW OF LEGAL RELATIONS

The previous chapter re-examined the premises of the non-synallagmatic view upon which the present rules on the implementation of duties owed *erga omnes* by ‘states other than an injured state’ are based. It questioned if the communitarian approach’s premise of an international community—an entity to whom duties may be owed and on whose behalf states may act—finds support in the current legal order.¹ It further cast doubt on *actio popularis*’ transposability to the present legal system.² However, *Part II* also showed that in several cases and despite protests from states, some states claimed the competence of a ‘state other than an injured state’ to implement duties owed *erga omnes*. The question then is whether an approach exists that permits ‘states other than an injured state’ to implement duties owed *erga omnes* and which reflects the legal system’s realities.

This chapter submits that the synallagmatic approach fulfils these requirements. It argues that contrary to the majority view, the synallagmatic approach could perfectly accommodate the implementation of duties owed *erga omnes*. First, it addresses the criticisms of the approach and submits these appear to be based on misappreciation. The term ‘synallagmatic’ seems to have been conflated with ‘bilateral’ or ‘bilateralisation’ which is inaccurate. Next, it clarifies the associated terminologies—‘interest’, ‘right’, ‘duty’, ‘injury’ and ‘damage’. By revisiting these terms, it posits that a more cohesive framework could be constructed for the implementation of duties owed *erga omnes*. With this clarification, the chapter then demonstrates through a conceptual analysis of the notion of ‘obligations’ that all multilateral obligations—even those that impose duties owed *erga omnes*—may be represented as synallagmatic relations. If a duty owed *erga omnes* is breached, then all states, whether ‘directly’ or ‘indirectly affected’, are ‘injured’ in the sense that their rights have been infringed. Thus, all may implement the wrongful state’s responsibility. Finally, the chapter demonstrates the synallagmatic approach’s utility. The present rules, in rejecting the ‘exact correlation’ between rights and duties, turned to the existence of an ‘international community’ or the international legal system’s public law construction. Yet, these may not reflect the present order’s realities.

¹ See *Arrest Warrant* (DRC v Belgium) (Judgment) [2002] ICJ 3 (Guillaume, separate opinion), 44 (‘Ill-defined “international community”’); Nissel Alan, ‘ILC Articles on State Responsibility: Between Self-Help & Solidarity’ (2005) 38 *New York University Journal of International Law & Policy* 355, 365–6 (‘Based upon an invalid premise’).

² See Villalpando Santiago, *L’émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 185; Voefray Francois, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 347; Marek Krystyna, ‘Criminalising State Responsibility’ (1978) 14 *Revue Belge de Droit International* 460, 463.

In contrast, the synallagmatic view does not require these concepts but still allows for the orderly implementation of duties owed *erga omnes*.

I. CRITICISMS & MERITS OF THE SYNALLAGMATIC VIEW

Recall from *Chapter 2*, that the synallagmatic view has often been criticised in how it orders legal relations. Many, like Simma, Crawford, and Gaja, submit that the view is incompatible with collective norms.³ Indeed, Simma goes as far as to say that it forms a ‘severe obstacle [...] [to] stronger solidarity’,⁴ that the approach only creates relations between states *inter se*,⁵ and that it limits the competence to implement to states whose rights have been infringed by a duty’s breach.⁶ Yet, although not ‘directly affected’, other states also possess an interest in the fulfilment or observance of duties owed *erga omnes*.⁷ Thus, authors such as Craven, Proukaki, and Goodwin-Gill argue that the approach ‘falls short of providing an effective system’ for

³ See e.g. Simma Bruno, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 231; Crawford James, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 224–5; Gaja Giorgio, 'Protection of General Interests in the International Community' (2011) 364 *Recueil des Cours de l'Académie de Droit International* 9, 21. See also ILC, 'Fragmentation of International Law' (13 April 2006) UN Doc A/CN.4/L.682, 193; Dupuy Pierre-Marie, 'Action publique et crime international de l'Etat' (1979) 25 *Annuaire français de droit international* 539, 543; Sachariew Kamen, 'State Responsibility for Multilateral Treaty Violations: Identifying the “Injured State” & Its Legal Status' (1988) 35 *Netherlands International Law Review* 273, 278; Byers Michael, 'Conceptualising the Relationship between Jus Cogens & Erga Omnes Rules' (1997) 66 *Nordic Journal of International Law* 211, 231; Goodwin-Gill Guy, 'State Responsibility & the “Good Faith” Obligation in International Law' in Fitzmaurice Malgosia & Sarooshi Dan (eds), *Issues of State Responsibility before International Judicial Institutions: Clifford Chance Lectures* (Hart 2004), 81; Tams Christian, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 48 ff; Nollkaemper André, 'International Adjudication of Global Public Goods: Substance & Procedure' (2012) 23 *European Journal of International Law* 769, 771; Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 14.

⁴ Simma Bruno, 'Bilateralism & Community Interest in the Law of State Responsibility' in Dinstein Yoram (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff 1989), 822; Crawford James, 'Multilateral Rights & Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325, 422; Paulus Andreas, 'Reciprocity Revisited' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 123.

⁵ Simma, 'Bilateralism to Community Interest' (n 3), 229; ILC, 'Fragmentation of International Law' (2006) (n 3), 193; Toufayan Mark, 'Reacting to Serious Breaches of Obligations arising under Peremptory Norms of General International Law' (2004) 42 *Canadian Yearbook of International Law* 197, 202; Thin Sarah, 'In Search of Community: Towards a Definition of Community Interests' in Zyberi Gentian (ed), *Protecting Community Interests through International Law* (Intersentia 2021), 11.

⁶ Simma, 'Bilateralism to Community Interest' (n 3), 230–1, 295 cited in ILC, 'Fragmentation of International Law' (2006) (n 3), 193; Byers, 'Jus Cogens & Erga Omnes' (n 3), 232; Sachariew, 'Identifying the “Injured State”' (n 3), 278; Craven Matthew, 'For the “Common Good”: Rights & Interests in the Law of State Responsibility' in Fitzmaurice Malgosia & Sarooshi Dan (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart 2004), 111, 118.

⁷ Simma, 'Bilateralism to Community Interest' (n 3), 233; Crawford, 'Multilateral Rights & Obligations' (n 4), 422–4; Sicilianos Linos-Alexander, 'Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility' (2002) 13(5) *European Journal of International Law* 1127, 1135.

enforcing the duties that collective norms impose.⁸ For this reason, many favour the non-synallagmatic approach either in its communitarian or public law conception.⁹

Nonetheless, not everyone shares these criticisms. As observed in *Chapter 3*, Special Rapporteurs Ago, Riphagen, and Arangio-Ruiz, all favoured the synallagmatic view.¹⁰ Similarly, scholars like De Hoogh, Stern, Villapando, Barboza, and Hernandez have also argued that the approach can accommodate the implementation of duties owed *erga omnes*.¹¹ Furthermore, some tribunals and states, have also endorsed this view.¹² It is also one that this

⁸ Craven, 'Rights & Interests in State Responsibility' (n 6), 118; Proukaki, *Problem of Enforcement* (n 3), 14; Goodwill-Gill, 'State Responsibility & the "Good Faith" Obligation' (n 3), 81; Proulx Vincent-Joël, 'Review of Ragazzi & Villalpando' (2007) 18 *European Journal of International Law* 581, 590.

⁹ See e.g. for the communitarian approach: ILC, 'Report on the Work of the 53rd Session' (2001) II(2) YbILC 20, 126; Simma, 'Bilateralism to Community Interest' (n 3), 232 ff; Annacker Claudia, 'Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 152; Cassese Antonio, *International Law* (Oxford University Press 2005), 16; Coffman Peter, 'Obligations Erga Omnes & the Absent Third State' (1996) 39 *German Yearbook of International Law* 285, 296; Sachariew, 'Identifying the "Injured State"' (n 3), 279, 281; Byers, 'Jus Cogens & Erga Omnes' (n 3), 231. For the public law approach: Crawford James, 'Overview of Part Three of the Articles on State Responsibility' in Crawford James, et al. (eds), *Law of International Responsibility* (Oxford University Press 2010), 934; Crawford, 'Multilateral Rights & Obligations' (n 4), 422; Tams Christian & Tzanakopoulos Antonios, 'Barcelona Traction: ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781, 792; Vaurs-Chaumette Anne-Laure, 'International Community as a Whole' in Crawford James, et al. (eds), *Law of International Responsibility* (Oxford University Press 2010), 1023.

¹⁰ Ago Roberto, 'Second Report on State Responsibility' (1970) II(1) YbILC 177, 192; Riphagen Willem, 'Fifth Report on State Responsibility' (1984) II(1) YbILC 1, 3; Arangio-Ruiz Gaetano, 'Second Report on State Responsibility' (1989) II(1) YbILC 3, 6

¹¹ See De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 44, 53; Stern Brigitte, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des États' (2001) 47 *Annuaire français de droit international* 3, 15–6; Villalpando, *La communauté internationale* (n 2), 237, 242, 254, 279, 397; Barboza Julio, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?' in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martnus Nijhoff 2005), 21; Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014), 222; Duff RA, 'State Responsibility: An Outsider's View' in Besson Samantha (ed), *Theories of International Responsibility Law* (Cambridge University Press 2022), 80; Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol II (Oxford University Press 2013), 1151; De Jesús Jose, 'Obligations Erga Omnes as Multilateral Obligations' (DPhil, University of Oxford 2012), 103, 186; Nedeski Nataša, *Shared Obligations in International Law* (Cambridge University Press 2022), 65, 81, 87. See also Kawasaki Kyoji, '"Injured State" in the Law of State Responsibility' (2000) 28 *Hitobashi Journal of Law & Politics* 17, 20, 22; Weiss Edith Brown, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *American Journal of International Law* 798, 803; Voeffray, *L'actio popularis* (n 2), 229; Picone Paolo, 'Distinction between Jus Cogens & Obligations Erga Omnes' in Cannizzaro Enzo (ed), *Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 421; Hutchinson D, 'Solidarity & Breaches of Multilateral Treaties' (1988) 59 *British Yearbook of International Law* 151, 160, 165; Quirico Ottavio, 'Towards a Peremptory Duty to Curb Greenhouse Emissions?' (2021) 44 *Fordham International Law Journal* 923, 928; Jenks Wilfred, 'The General Welfare as a Legal Interest' in Wilner G (ed), *Jus et Societas: Essays in Tribute to Wolfgang Friedman* (Nijhoff 1979), 154; Koskeniemi Martti, 'Solidarity Measures: State Responsibility as a New International Order?' (2002) 71 *British Yearbook of International Law* 337, 344.

¹² See decisions of several tribunals: *Prosecutor v Furundžija* (Judgment) (ICTY, Trial Chamber, 95-17/1, 10 December 1998), ¶151 ('[T]he prohibition of torture imposes [...] [duties] owed towards all [...] [states] each of which then has a correlative right'); *Application of the Genocide Convention* (Gambia v Myanmar) (Provisional Measures) [2019] (ICJ, 11 November 2019), ¶52 ('There is a correlation [among] the rights of members of groups

thesis takes. Recall that the approach invests upon individual states the rights that correlate to duties owed *erga omnes*.¹³ Under this approach, duties owed *erga omnes* are not owed to the community. Instead, they are deemed owed to every state with each having a ‘corresponding right’.¹⁴ Moreover, states do not possess a mere ‘interest’ in the fulfilment of duties owed *erga omnes*. Rather, each state is a ‘direct addressee’ of a right.¹⁵ Thus, should a duty owed *erga omnes* be breached, all states are ‘injured’ and may, in their individual capacity, implement the wrongful state’s responsibility.¹⁶

The synallagmatic approach, contrary to the view of scholars like Simma and Crawford,¹⁷ must not be equated with ‘bilateral’.¹⁸ It bears stressing that bilateral relations refer to those between two parties under an obligation—one holds a right while another bears a duty.¹⁹ In

[...] under the Convention, the [duties] incumbent on states parties, and the right of [...] party to seek compliance therewith by another state party’); *Application of the Genocide Convention* (Gambia v Myanmar) (Preliminary Objections) [2022] (ICJ, 22 July 2022) (Kress, declaration), 4. *See also Application of the Genocide Convention* (Bosnia & Herzegovina v Serbia & Montenegro) (Provisional Measures) [1993] ICJ 325 (Lauterpacht, separate opinion), 436; *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90 (Weeramantry, dissenting), 172, 209, 215. *See* statements of some states: UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 51st Session’ (1 May 1997) UN Doc A/CN.4/479/Add.1, 12; UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (8 November 1996) UN Doc A/C.6/51/SR.36, 18 (Spain); UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (15 February 2001) UN Doc A/CN.4/513, 25; UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (24 October 2000) UN Doc A/C.6/55/SR.15, 2 (France); 8 (Netherlands); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 17th Meeting’ (27 October 2000) UN Doc A/C.6/55/SR.17, 14 (Greece); ILC, ‘State Responsibility: Comments & Observations of Governments, 53rd Session’ (19 March 2001) UN Doc A/CN.4/515, 74 (France); 74 (Japan); 75 (Netherlands); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (31 October 2001) UN Doc A/C.6/56/SR.12, 2 (Japan); *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192, 78 (‘South Africa [...] seeks to protect its own right to safeguard compliance with the Genocide Convention’)

¹³ Barboza, ‘Legal Injury’ (n 11), 20.

¹⁴ Stern, ‘La notion de préjudice juridique’ (n 11), 24. *Note Tams, Enforcing Obligations Erga Omnes* (n 3), 101, 175 (‘The expression “*erga omnes*” is ambiguous. [It could mean a duty] that is owed “towards all” members of the [...] community [or] towards each state individually’) *citing* Weil Prosper, ‘Towards Relative Normativity in International Law?’ (1983) 77(3) *American Journal of International Law* 413, 432. Voefray, *L’actio popularis* (n 2), 226 (‘Le terme omnis (omnes au pluriel) revêt en effet un sens à la fois collectif et distributif : il désigne le tout, le groupe, mais aussi chacune des parties individuelles qui le composent’),

¹⁵ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 44; Hernandez, *ICJ & Judicial Function* (n 11), 222; Thirlway (ed), *ICJ Law & Procedure vol II* (n 11), 1151; De Jesús, ‘Obligations Erga Omnes’ (n 11), 103, 186; Nedeski, *Shared Obligations* (n 11), 65, 81, 87.

¹⁶ Stern, ‘La notion de préjudice juridique’ (n 11), 16, 24; Villalpando, *La communauté internationale* (n 2), 279; Duff, ‘State Responsibility: An Outsider’s View’ (n 11), 80.

¹⁷ *Compare* Simma, ‘Bilateralism to Community Interest’ (n 3), 231 (‘At the basis of such a bilateralist view of international legal relationships appears to lie a theoretical understanding of the structure of international law according to which the law exhausts itself in correlative rights and [duties] of its subjects’), 295; Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 29 (‘In the field of international relations there is no longer (if there ever was) any *a priori* reason to reduce all relations of responsibility to the form of a bilateral right-duty relation of two states’).

¹⁸ Stern, ‘La notion de préjudice juridique’ (n 11), 15 (‘“Subjectif” n’est en aucune façon synonyme de bilatéral, comme différentes présentations ont pu conduire à le faire croire’)

¹⁹ Crawford, ‘Multilateral Rights & Obligations’ (n 4), 344.

contrast, synallagmatic relations pertain to the correlation between rights and duties.²⁰ As will be shown in *Section III*, these are not exclusive to bilateral relations but may be applied to multilateral ones. Thus, insisting on the exact correlation between rights and duties, as scholars like Nedeski claim, ‘does not preclude’ situations that involve a plurality of states where every state bears a duty or holds a right.²¹

Furthermore, in contrast with the view of authors like Tams, Byers, and Provost,²² the ‘synallagmatic’ representation of legal relations must also not be equated with the ‘bilateralisation’ of multilateral relations.²³ The latter reduces multilateral relations to separate bilateral relations.²⁴ For instance, under a ‘bilateralisable’ multilateral obligation *O*, state *S*₀ may owe a duty *D*₁ to *S*₁. It may also owe a separate duty *D*₂ to *S*₂ and so on with duty *D*_{*n*} to *S*_{*n*}. If *S*₀ breaches its duty *D*₁, only *S*₁ may implement *S*₀’s responsibility as the duties that *S*₀ owes to *S*₁, *S*₂, [...], and *S*_{*n*} are separate.²⁵ Yet, as will be shown in *Section III*, the synallagmatic approach allows for the situation involving interrelated duties and parties as in the case of duties owed *erga omnes*. Here, the duty that a state owes may be ‘due to [every] state simultaneously’.²⁶ There could be a multilateral obligation *O* that imposes duties owed *erga omnes*, where state *S*₀ owes a duty *D*₁ to *S*₁, it owes the same duty *D*₁ to *S*₂, and so on with *D*₁ to *S*_{*n*}. Thus, if *S*₀ breaches its duty *D*₁, then *S*₁, *S*₂, [...], and *S*_{*n*} may implement its responsibility.²⁷

II. CLARIFYING TERMINOLOGIES: INTEREST, RIGHT, DUTY, INJURY, & DAMAGE

Before proceeding, some clarifications must be made regarding the relevant terminologies.

²⁰ Villalpando, *La communauté internationale* (n 2), 240.

²¹ Nedeski, *Shared Obligations* (n 11), 65–6, 100–2; De Jesús, ‘Obligations Erga Omnes’ (n 11), 186.

²² Compare Tams, *Enforcing Obligations Erga Omnes* (n 3), 45 (‘Since these rules are to be performed between pairs of states, they are referred to as ‘bilateralisable’ [...] or ‘bundles of bilateral relations’); Byers, ‘Jus Cogens & Erga Omnes’ (n 3), 232 (‘*Erga omnes* rules are best seen as being more than just rules whose bilateral relations have been fully generalised’); Provost René, ‘Reciprocity in Human Rights & Humanitarian Law’ (1994) 65(1) *British Yearbook of International Law* 383, 384 (‘A state accepts a duty towards another only in so far as that state is similarly obligated’); Sachariew, ‘Identifying the “Injured State”’ (n 3), 277–8; Coffman, ‘Obligations Erga Omnes’ (n 9), 298, 300 (‘Fictionally bilateralising the community’s interest’); Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 9), 135.

²³ See Nedeski, *Shared Obligations* (n 11), 100–2; De Jesús, ‘Obligations Erga Omnes’ (n 11), 231, 265.

²⁴ Tams, *Enforcing Obligations Erga Omnes* (n 3), 45; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 9), 136.

²⁵ Byers, ‘Jus Cogens & Erga Omnes’ (n 3), 232; Coffman, ‘Obligations Erga Omnes’ (n 9), 298, 300.

²⁶ Arangio-Ruiz Gaetano, ‘Fourth Report on State Responsibility’ (1992) II(1) YbILC 6, 34, 44–5; Nedeski, *Shared Obligations* (n 11), 65–6; De Jesús, ‘Obligations Erga Omnes’ (n 11), 186, 231–2; Hutchinson, ‘Solidarity & Breaches of Multilateral Treaties’ (n 11), 160, 165; Quirico, ‘Peremptory Duty & Emissions’ (n 11), 928

²⁷ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 26), 34, 44–5; De Jesús, ‘Obligations Erga Omnes’ (n 11), 110, 174, 186; Nedeski, *Shared Obligations* (n 11), 100.

As Kolb points out, the synallagmatic view's misappreciation may be caused in part by the 'conceptual' and 'terminological' confusion due to the different utilisation of concepts in various 'legal traditions'.²⁸ Indeed, Crawford has observed that the terms 'interest', 'right', 'duty', 'injury', and 'damage' have 'not [been] defined consistently in international law'.²⁹ This section revisits these terms in the abstract to eliminate 'sources of misunderstanding'.³⁰ Then, it will review how the ILC constructed the rules on the implementation of duties owed *erga omnes* under the 2001 Draft Articles based on its understanding of the associated terminologies. Note that this thesis does not claim the definitions below to be definitive. It only submits that they are reasonable. Yet, if one pauses to consider their merit, one may see that they allow for a workable framework elaborated in *Section III*.

A. Terminologies in the Abstract

First, there is the concept of 'interest'—a term often used but 'extremely ill-defined'.³¹ As Ahmadov observes, the language of literature, tribunals, and states do 'not reveal a consistent pattern of [the term's] application'.³² Mostly, it has been used as a 'generic term' for a thing that 'any cause of action' requires.³³ Under the traditional view of competence discussed in *Chapter 2*, a state may implement another's responsibility if its interest is 'positive and concrete' and 'direct and personal'.³⁴ Under the communitarian view, 'indirectly injured' states only have a 'legal interest' in the duties' observance compared to 'directly injured' states which possess 'subjective rights'.³⁵ 'Indirectly injured' states possess this interest as a member of the community which in turn grants them the competence to implement the wrongful state's

²⁸ Kolb Robert, *Theory of International Law* (Hart 2016), 196; Villalpando, *La communauté internationale* (n 2), 245.

²⁹ Crawford James, 'Fourth Report on State Responsibility' (2000) II YbILC 3, 8.

³⁰ Kolb, *Theory of International Law* (n 28), 203. See Hohfeld Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning & Other Legal Essays*, Cook Walter (ed) (Yale University Press 1919), 40 ('Blurring of ideas'); Ahmadov Farid, *Right of Actio Popularis before International Courts & Tribunals* (Brill Nijhoff 2018), 185 citing Popovic Dragojub, 'Judicial Activism over Self-restraint in the Jurisprudence of the ECtHR' (2008) 42 *Greighton Law Review* 361, 365.

³¹ ILC, 'Summary Records of the 17th Session' (1966) I(I) YbILC 1, 60 (Rosenne). See Rosenne Shabtai, 'Some Reflections on Intervention in the International Court of Justice' (1987) 34 *Netherlands International Law Review* 75, 88 ('The concept of "interests" has thus virtually lost any juridical content it might once have had').

³² Ahmadov, *Actio Popularis* (n 30), 74

³³ Ibid. See Tams, *Enforcing Obligations Erga Omnes* (n 3), 29.

³⁴ Voefray, *L'actio popularis* (n 2), 296–7. See *Barcelona Traction, Light, & Power Company* (Belgium v Spain) (Judgment) [1970] ICJ 1, 33; *Reparation for Injuries Suffered in the Service of the UN* (Advisory Opinion) [1949] ICJ 149, 181–2; *Southwest Africa* (Ethiopia & Liberia v South Africa) (Preliminary Objections) [1962] ICJ 319 (Winiarsky, dissenting), 455.

³⁵ ILC, 'Report on the Work of the 53rd Session' (2001) (n 9), 118, 127; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 9), 147; Crawford, 'Multilateral Rights & Obligations' (n 4), 229, 434, 444.

responsibility.³⁶ Under the public law approach, states' 'objective interests' in the 'integrity' of collective norms grant them the competence to do the same.³⁷

As stressed in *Chapter 2*, the possession of 'mere interests' is insufficient to justify competence. Mere interests 'by no means authorise' states to 'demand the performance by every other state' of its duty.³⁸ As Riphagen put it, in the long run, 'every state has an interest in the observance' of international law duties.³⁹ If 'interested' simply means 'being concerned', all states, according to Tams, would 'always be somehow interested in every legal rule'.⁴⁰ Accordingly, making the competence to implement 'dependent on the establishment of an "interest", "concern", or of "affectedness" is of little help' as 'it begs the question [of] which states [...] have an interest in the observance of a [duty imposed by a] rule, or under which circumstances [a state] can claim to be affected or injured by a breach of [duty]'.⁴¹

For this reason, scholars, like Tams and Gaja, suggest that 'mere interests' must be distinguished from 'legal interests'.⁴² The latter, as the name implies, are those which are 'clothed in legal form'.⁴³ If an 'interest has [...] not been accorded protection by law', then it 'cannot be granted [effect] by those charged with [its] application or enforcement'.⁴⁴ Yet, how 'legal interests' differ from 'rights', as examined below, remains to be seen. Proponents of the

³⁶ ILC, 'Report on the Work of the 53rd Session' (2001) (n 9), 127; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 3), 227; Dupuy Pierre-Marie, 'Deficiencies of State Responsibility relating to Breaches of "Obligations owed to the International Community as a Whole"' in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 215.

³⁷ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 9), 149; Voefray, *L'actio popularis* (n 2), 257; Brilmayer Lea & Tesfalidet Isaias Yemane, 'Third State Obligations & the Enforcement of International Law' (2011) 44(1) *New York University Journal of International Law & Policy* 1, 11.

³⁸ Riphagen Willem, 'Fourth Report on State Responsibility' (1983) II(1) YbILC 1, 21. See *Southwest Africa* (Ethiopia & Liberia v South Africa) (Judgment) [1966] ICJ 6, 34; *Lac Lanoux* (France v Spain) (1957) 62 RGDIP 179, 116; *East Timor* [1995] (n 12) (Skubizewski, dissenting) 256.

³⁹ Riphagen, 'Fourth Report on State Responsibility' (1983) (n 38), 21; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 23; Villalpando, *La communauté internationale* (n 2), 244.

⁴⁰ Tams, *Enforcing Obligations Erga Omnes* (n 3), 28; Crawford, 'Multilateral Rights & Obligations' (n 4), 449 ('Which international [norm is] not in some sense "established for the protection of a collective interest"?').

⁴¹ Tams, *Enforcing Obligations Erga Omnes* (n 3), 28. See *Barcelona Traction* [1970] (n 34), 36 ('Not a mere interest affected, but solely a right infringed involves responsibility').

⁴² Tams, *Enforcing Obligations Erga Omnes* (n 3), 29–30; Gaja, 'Protection of General Interests' (n 3), 21; Gervais André, 'L'affaire du lac Lanoux, étude critique de la sentence arbitrale' (1960) 6 *Annuaire français de droit international* 372, 423–4; Villalpando, *La communauté internationale* (n 2), 274; Hillgruber Christian, 'Right of Third States to Take Countermeasures' in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 271.

⁴³ Tams, *Enforcing Obligations Erga Omnes* (n 3), 31 citing *Southwest Africa* [1966] (n 38), 34.

⁴⁴ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 13; *Barcelona Traction* [1970] (n 34) (Amount, separate opinion), 304; *Nuclear Tests* (Australia v France) (Judgment) [1974] ICJ 253 (Petren, dissenting), 455.

non-synallagmatic approach, like Crawford, argue that there is a distinction between ‘legal interests’ and ‘rights’.⁴⁵ That is, ‘legal interests’ are not rights but are nevertheless ‘something entitled to protection’.⁴⁶ Duties owed *erga omnes* do not grant states ‘rights’ as it is the community which is the duty’s beneficiary.⁴⁷ What states possess is an ‘interest’ in the ‘common value protected by [the collective] norm’ or in the ‘integrity of the [...] norm’ which entitles them to demand the duty’s observance or performance.⁴⁸ However, it is difficult to see how the two differ. As Thirlway notes, if ‘legal interests’ are ‘so protected, then ‘there must be a correlative [duty] to respect them’.⁴⁹ More specifically, it must mean that its holder is entitled to demand that the duty bearer observe or perform a certain conduct.⁵⁰ Thus, a ‘legal interest’ must essentially be a ‘right’.⁵¹

Yet, the term ‘right’, as Hohfeld observed, has also been ‘used indiscriminately to denote concepts’ which ‘should be treated separately’.⁵² It has been used to refer to a ‘privilege’ that

⁴⁵ Crawford, ‘Multilateral Rights & Obligations’ (n 4), 443.

⁴⁶ Thirlway Hugh (ed), *Law & Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol I (Oxford University Press 2013), 76; Crawford, ‘Multilateral Rights & Obligations’ (n 4), 434 (‘Does not translate easily into the language of “rights”’); Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 9), 147.

⁴⁷ Crawford, ‘Multilateral Rights & Obligations’ (n 4), 434.

⁴⁸ Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 9), 147; Crawford, ‘Responsibility for Breaches of Communitarian Norms’ (n 3), 227; Crawford, ‘Multilateral Rights & Obligations’ (n 4), 229, 434, 444; Simma, ‘Bilateralism to Community Interest’ (n 3), 298–9.

⁴⁹ Thirlway (ed), *ICJ Law & Procedure vol I* (n 46), 76; Villalpando, *La communauté internationale* (n 2), 243 (‘Le droit subjectif est un “intérêt juridiquement protégé”, c’est-à-dire un avantage pour le bénéficiaire, assuré par les règles de droit au moyen d’une action en justice’), 244 (‘Le pouvoir de prétendre [...] le respect de son intérêt’) citing Virally Michel, *La pensée juridique* (Librairie générale de droit et de jurisprudence 1960), 43–4; Gervais, ‘L’affaire du Lac Lanoux’ (n 42), 426. Stern, ‘La notion de préjudice juridique’ (n 11), 24 (‘Si un État est bénéficiaire d’une obligation qui a été violée, je ne vois pas comment on pourrait considérer qu’il n’est pas un État lésé’).

⁵⁰ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 22 (‘The possession of a legal interest [...] relates nothing other than the correlative right to demand the performance of [a duty]’) citing Weil, ‘Towards Relative Normativity’ (n 14), 431; 46 (‘[If a duty owed] *erga omnes* entails for every state a legal interest [...] that means that they are in possession of a [...] correlative right of protection’)

⁵¹ See *Continental Shelf (Libya/Malta)* (Application to Intervene by Italy) [1984] ICJ 3 (Ago, dissenting), 124 (‘An interest of a legal nature [is] nothing other than a right’); *Territorial & Maritime Dispute (Nicaragua v Colombia)* (Application to Intervene by Honduras) [2011] ICJ 420 (Keith, declaration), 469 (‘If the claim is based on law and is real and concrete, is it not a claim of a right (or a liberty or a power) recognised by the law?’); (Al-Khasawneh, declaration), 383–2 (‘Legal interests [are] nothing other than rights [...] [Indeed], the words “right”, “legal interests” and “entitlements” are used interchangeably [...] when the word “interest” is qualified by the adjective “legal”, we are of necessity expressing the concept of “rights” through other words’); Dinstein Yoram, ‘Interaction Between Customary International Law & Treaties’ (2006) 322 *Recueil des Cours de l’Académie de Droit International* 243, 334 (‘The acid test of a genuine right, as distinct from a mere interest, is that the [...] State—on which the treaty right is conferred—[may] insist directly on its implementation’); Gaja, ‘Protection of General Interests’ (n 3), 26 (‘[The state] will have to show that it has a legal interest, that is, a right allocated to it by the relevant rules of international law’).

⁵² De Jesús, ‘Obligations Erga Omnes’ (n 11), 12 citing Hohfeld, *Fundamental Legal Conceptions* (n 30), 6, 40. See Eleftheriadis Pavlos, *Legal Rights* (Oxford University Press 2008), 69 (‘Collection of legal relations that

‘permits [one] to do something’ in the absence of a duty to ‘abstain from a certain conduct’;⁵³ ‘a power’ or the capacity to create, extinguish, or change legal relations;⁵⁴ or an ‘immunity’ from another’s ‘legal power or control’.⁵⁵ However, as Hohfeld claimed, to which scholars like Hart, Finnis, and Cook agree,⁵⁶ a ‘right’, in the narrowest sense, may simply and reasonably be defined as ‘an affirmative claim against another’ concerning a conduct’s performance or observance.⁵⁷

For Hohfeld, a ‘right’ granted to one requires a ‘duty’ imposed on another.⁵⁸ If one has a right, then another must bear the duty to respect such right and adopt a certain behaviour.⁵⁹

are brought together on grounds that are not related to the moral meaning of rights’) citing Waldron Jeremy, *Liberal Rights* (Cambridge University Press 1993); 73 (‘Rights are therefore best understood as “conceptual markers”, or “place holders”, used to designate a subset of legitimate interests or liberties to be accorded special protection by law’) citing Coleman Jules, *Markets, Morals, & the Law* (Cambridge University Press 1988), 35; 125 citing Thomson Judith Jarvis, *The Realm of Rights* (Harvard University Press 1990), 67. See also Morss John, ‘Legal Relations of Collectives: Belated Insights from Hohfeld’ (2009) 22 *Leiden Journal of International Law* 289, 294 (‘Hohfeld’s project was to define the distinct legal relationships which may be ambiguously referred to by the one term (‘right’), by setting out the external character of claim-rights and of other legal relationships’) citing Simmonds Nigel, *Law as a Moral Idea* (2007), 30. Postema Gerald, *Legal Philosophy in the Twentieth Century: Common Law World* (Springer 2011), 99 (‘Hohfeld approached the understanding of law through a meticulous examination of the language of lawyers and judges’).

⁵³ Hohfeld, *Fundamental Legal Conceptions* (n 30), 36. See De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 17–8 (‘If such is the case, the rule in question confers upon its subjects an entitlement to engage in the conduct specified in the rule’). Note that a ‘right’ is distinct from a ‘privilege’ or the absence of a requirement to do or not do something thereby permitting one to act as he or she pleases (Hohfeld, *Fundamental Legal Conceptions* (n 30), 43, 48. Compare Finnis John, ‘Some Professorial Fallacies About Rights’ (1971) 4 *Adelaide Law Review* 377, 378). For instance, the ‘privilege’ against self-incrimination’ relieves one of the duty to testify and the person does not fail to observe any requirement should he or she choose not to do so (Hohfeld, *Fundamental Legal Conceptions* (n 30), 7).

⁵⁴ Hohfeld, *Fundamental Legal Conceptions* (n 30), 7, 51, 58. Note that a ‘right’ is also distinct from ‘power’ or the ability to perform acts to ‘alter relations’ (ibid, 58; Postema, *Legal Philosophy* (n 52), 100). An illustration of the latter is the capacity to transfer ‘ownership of property from one person to another’ which necessarily involves changes in legal relations between the transferor and the transferee (Hohfeld, *Fundamental Legal Conceptions* (n 30), 30–1).

⁵⁵ Hohfeld, *Fundamental Legal Conceptions* (n 30), 60. Note that a ‘right’ is also different from ‘immunity’ or the ‘freedom from the legal power or control of another’ (ibid, 60–2;). An example of an immunity is a person’s freedom ‘not to be deprived of his liberty or property without due process of the law’ where he or she is granted an ‘exemption’ from the government’s power to alter his or her legal relations (ibid, 62).

⁵⁶ See e.g. Hart HLA, *Essays on Bentham: Jurisprudence & Political Philosophy* (Oxford University Press 1982), 183; Finnis John, *Natural Law & Natural Rights* (Oxford University Press 1980), 200; Cook Walter, ‘Hohfeld’s Contribution to the Science of Law’ (1919) 28 *Yale Law Journal* 721, 724; Kramer Matthew, ‘Rights without Trimmings’ in Kramer Matthew, et al. (eds), *Debate over Rights: Philosophical Enquiries* (Clarendon 1998), 9; Eleftheriadis, *Legal Rights* (n 52), 107, 120. See also ILC, ‘Summary Records of the 16th Session’ (1967) I YbILC 1, 84 (Rosenne); Ago Roberto, ‘Eighth Report on State Responsibility: Addendum’ (1980) II(1) YbILC 13, 18; Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 9), 141; Villalpando, *La communauté internationale* (n 2), 243; Weil, ‘Towards Relative Normativity’ (n 14), 431; Bleckmann Albert, ‘Subjective Right in Public International Law’ (1985) 28 *German Yearbook of International Law* 144, 149 citing Bühler Ottmar *Die subjektiven öffentlichen Rechte* (Kohlhammer 1914), 223 ff.

⁵⁷ Hohfeld, *Fundamental Legal Conceptions* (n 30), 7.

⁵⁸ Ibid, 7, 36–8.

⁵⁹ Ibid, 38 (‘“Duty” and “right” are correlative terms. When a right is invaded, a duty is violated’) citing Gray

Thus, the correspondence between a right and a duty.⁶⁰ In stronger terms, Ago claims that there are no duties ‘incumbent on a subject’ that are not ‘matched by [another’s] subjective right’.⁶¹ The reason for this is evident—without the corresponding duty, the right becomes ‘meaningless’.⁶² Accordingly, rights and duties are deemed ‘logical equivalents’ or ‘correlatives’ that describe situations ‘from [...] one [person’s point of view] and then from another’.⁶³

This idea of ‘exact correlation’ has long received support in scholarship. As Eleftheriadis notes, scholars like Grotius, Salmond, and Savigny recognised this relation.⁶⁴ Others such as Del Vecchio also submit that the correlation is a ‘consequence of the [law’s] logical nature’.⁶⁵ That said, the view is not without criticisms. Some like Finnis, Wellman, and Kramer deem it to be problematic,⁶⁶ Indeed, Raz goes as far as to claim that ‘it is wrong to translate statements

John, *The Nature & Sources of Law* (Columbia University Press 1909), §25; *Lake Shore & Michigan Southern Railway Co v Kurtz* (1883) 10 Ind App 60 (US), 67; *Mellinger v City of Houston* (1887) 68 Tex 37 (US), 45. Dworkin Ronald, *Taking Rights Seriously* (Harvard University Press 1977), 17 (‘To say that someone has a [duty] is to say that he [or she must] [...] do or to forbear from doing something [...] To say [that] he [or she] has a right [...] is to assert [...] that others have [a duty] to act or not act in certain ways’). De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 18 citing Ago, ‘Eighth Report on State Responsibility: Addendum’ (1980) (n 56), 18.

⁶⁰ Hohfeld, *Fundamental Legal Conceptions* (n 30), 38; Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 192 citing Anzilotti Dionisio, *Teoria Generale della Responsabilità dello Stato nel diritto Internazionale*, Lumachi Florence (ed) (Firenze 1902), 83, 91, 121; Sereni Angelo, *Diritto internazionale*, III (Giuffrè 1962), 1514.

⁶¹ Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 192; Postema, *Legal Philosophy* (n 52), 99. Nedeski, *Shared Obligations* (n 11), 61.

⁶² De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 18, 21; Higgins Rosalyn, *Problems & Process: International Law & How We Use It* (Clarendon 1995), 99.

⁶³ Hohfeld, *Fundamental Legal Conceptions* (n 30), 10, 38; Eleftheriadis, *Legal Rights* (n 52), 110; Kelsen Hans, *Pure Theory of Law* (Lawbook Exchange 1934), 127; Ginossar Shalev, ‘Rights in Rem—A New Approach’ (1979) 14 *Israel Law Review* 286, 290. See Tapper CFH, ‘Powers & Secondary Rules of Change’ in Simpson AWB (ed), *Oxford Essays in Jurisprudence* (Clarendon 1973), 244; Corbin Arthur, ‘Jural Relations & their Classification’ (1920) 30 *Yale Law Journal* 226, 229. Note that for similar reasons, a ‘privilege’ that a person holds or the ‘absence of a requirement to do or not do something’—the absence of ‘duty’—corresponds to another’s ‘lack of right’ or ‘no-right’ to compel that person to act or not act (Hohfeld, *Fundamental Legal Conceptions* (n 30), 39, 41; Postema, *Legal Philosophy* (n 52), 99). Likewise, the ‘power’ or the ability to change legal relations implies another’s ‘liability’ or the ‘potential of having one’s legal relations changed’ (Hohfeld, *Fundamental Legal Conceptions* (n 30), 50–1; Postema, *Legal Philosophy* (n 52), 100). Finally, one’s ‘immunity’ or the ‘freedom from the power or control of another’—the negation of ‘liability’—correlates to another’s ‘disability’ to exercise power or control (Hohfeld, *Fundamental Legal Conceptions* (n 30), 51).

⁶⁴ Eleftheriadis, *Legal Rights* (n 52), 112 citing Salmond John, *Jurisprudence* (7th edn, Sweet & Maxwell 1924), 235–51; 114 citing Del Vecchio Giorgio, *Formal Bases of Law*, Lisle John (tr) (The Boston Book Company 1914), 164; 116 citing Grotius Hugo, *Jurisprudence of Holland*, vol I, Lee R (tr) (Scientia 1655), 48, 73; Savigny FC, *System des Heutigen Roemischen Rechts*, vol I (1840), 7 ff; Austin John, *Province of Jurisprudence Determined*, Rumble Wilfred (ed) (Cambridge University Press 1995), 237. Bleckmann, ‘Subjective Right’ (n 56), 147 citing von Jhering Rudolf, *Der Geist des römische Rechts*, vol 3 (6th edn, 1907), 339; von Dernburg Heinrich, *System des römischen Rechts* (2nd edn, 1911), 65 ff. Virally, *La pensée juridique* (n 49), 43–4.

⁶⁵ Eleftheriadis, *Legal Rights* (n 52), 114 citing Del Vecchio, *Formal Bases of Law* (n 64), 164.

⁶⁶ Eleftheriadis, *Legal Rights* (n 52), 110–1 noting Finnis, ‘Some Professorial Fallacies About Rights’ (n 53),

of rights into statements of the “corresponding” duties’.⁶⁷ A full discussion of correlativity's merits lies outside this thesis' scope. However, it is also worth noting that the defence of correlation lies not just in the logic but in its utility. Maintaining the correlation between rights and duties allows for the legal relations' precise ordering. It further allows for the clear identification of ‘who has a right or a claim against whom’ and against whom it may be demanded.⁶⁸ This is something, as will be shown in *Section III*, from which the rules on the implementation of duties owed *erga omnes* could benefit.

If this right-duty correlation is accepted, then a duty's breach logically corresponds to a right's infringement or lesion.⁶⁹ This is what may be properly deemed as ‘injury’ or ‘legal prejudice’.⁷⁰ ‘Injury’ links the right holder's competence, the ‘power’ to be more precise,⁷¹ to implement the duty bearer's responsibility, more accurately ‘liability’.⁷² This is a necessary

379; Wellman Carl, *A Theory of Rights: Persons Under Laws, Institutions, & Morals* (Rowman & Alanheld 1985), 13; Kramer, ‘Rights without Trimmings’ (n 56), 24; 127 citing MacCormick Neil, ‘Rights in Legislation’ in Hacker PM & Raz Joseph (eds), *Law, Morality, & Society: Essays in Honour of HLA Hart* (Oxford University Press 1977), 207.

⁶⁷ Raz Joseph, *Morality of Freedom* (Oxford University Press 1988), 171 (‘A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by considerations justifies holding that other person to have a duty’).

⁶⁸ Simma, ‘Bilateralism to Community Interest’ (n 3), 232; Chinkin Christine, *Third Parties in International Law* (Oxford University Press 1993), 2 (‘“Bilateralism” contributes to an “orderly” outward appearance of the law’). See Eleftheriadis, *Legal Rights* (n 52), 118 noting Calabresi Guido & Melamed Douglas, ‘Property Rules, Liability Rules, & Inalienability’ (1972) 85 *Harvard International Law Journal* 1089 1106.

⁶⁹ Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 192 citing Anzilotti, *Teoria Generale della Responsabilità* (n 60), 83, 91; Ago Roberto, ‘Le délit international’ (1939) 68 *Recueil des Cours de l'Académie de Droit International* 415, 434; Morelli Gaetano, *Nozioni di diritto internazionale* (7th edn, CEDAM 1967), 347; Sereni, *Diritto internazionale* (n 60), 1514. See *Spanish Zone of Morocco* (Great Britain v Spain) (Award) (1924) 2 RIAA 615, 615.

⁷⁰ Hunter William, *A Systematic & Historical Exposition of Roman Law* (Maxwell 1885), 146; Stern, ‘La notion de préjudice juridique’ (n 11), 5, (‘l'idée pourtant fort simple de préjudice juridique constitué par la violation du droit’), 26 (‘Nous utilisons quant à nous le terme de préjudice juridique [...] pour désigner la violation du droit’); Villalpando, *La communauté internationale* (n 2), 293 (‘Cette lésion cause un préjudice [...] que nous préférons qualifier de “préjudice juridique”’). Compare De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 27, 31.

⁷¹ Hohfeld, *Fundamental Legal Conceptions* (n 30), 59; Postema, *Legal Philosophy* (n 52), 102 (‘[E]very legal right includes [...] a power/subjection relation on the part of the right-bearer to call on the state to act in a certain way’).

⁷² Hohfeld, *Fundamental Legal Conceptions* (n 30), 50–1, 59, 101; Postema, *Legal Philosophy* (n 52), 100. Compare Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 9), 137; Barboza, ‘Legal Injury’ (n 11), 10 citing Ago Roberto, ‘Third Report on State Responsibility’ (1971) II(1) YbILC 199, 206. But note the ILC's concept of ‘liability’ for the ‘consequences of acts not prohibited by international law’ (ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 149; ILC, ‘Report on the Work of the 58th Session’ (2006) II(2) YbILC 59, 62–3). It deals with situations in which ‘damage’, as discussed below, has been caused, but the act is ‘lawful’ (Schmalenbach Kirsten, ‘State Responsibility & Liability for Transboundary Environmental Harm’ in Gailhofer Peter, *et al.* (eds), *Corporate Liability for Transboundary Harm* (Springer 2023), 59; Horbach N, ‘Confusion between State Responsibility & International Liability’ (1991) 4 *Leiden Journal of International Law* 47, 50). This is the subject of the Commission's 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 148 ff) and the 2006 Draft Principles on

result of the correlation. Holding a right implies an affirmative claim to ‘receive something’ or an entitlement to a conduct’s performance or observance.⁷³ If that right is infringed, its holder must have the ‘power’ to ‘call on the [duty bearer] to act in a certain way’.⁷⁴ Otherwise, the ‘right may be but an empty shell’.⁷⁵

Finally, the distinction between ‘injury’ and ‘damage’ must also be examined. Like ‘interests’ and ‘rights’, ‘injury’ and ‘damage’, as Crawford observes, have not been ‘consistently defined in international law’.⁷⁶ Indeed, the two have been used interchangeably in some cases.⁷⁷ Yet, they are not synonymous.⁷⁸ As discussed above, ‘injury’ may sensibly pertain to the infringement of a right due to the duty bearer’s failure to observe or perform its correlative duty.⁷⁹ In contrast, ‘damage’ may be reasonably defined as the actual harm, loss, or

the Allocation of Loss in the case of Hazardous Harm Arising from Hazardous Activities (ILC, ‘Report on the Work of the 58th Session’ (2006) (n 72), 59 ff)

⁷³ Hohfeld, *Fundamental Legal Conceptions* (n 30), 7, 36–8; Dworkin, *Taking Rights Seriously* (n 59), 17; Eleftheriadis, *Legal Rights* (n 52), 122 citing Kelsen Hans, *General Theory of Law & State*, Wedberg A (tr) (Harvard University Press 1945), 82. Postema, *Legal Philosophy* (n 52), 99. See Finnis, ‘Some Professorial Fallacies About Rights’ (n 53), 379 (‘A Hohfeldian right [...] is always a claim that somebody else do or omit something’); ILC, ‘Summary Records of the 16th Session’ (1964) (n 56), 84 (Rosenne)

⁷⁴ Villalpando, *La communauté internationale* (n 2), 244 (‘Lorsque la jouissance de l’intérêt est empêchée par d’autres sujets, le droit subjectif est lésé et l’ordre juridique déclenche des mécanismes de protection, pouvant consister dans la possibilité de faire valoir la prétention [...] ou dans la naissance d’une prétention secondaire de responsabilité’); Bleckmann, ‘Subjective Right’ (n 56), 149 citing Bühler, *Die subjektiven öffentlichen Rechte* (n 56), 223 ff.

⁷⁵ Higgins, *Problems & Process* (n 62), 99; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 18 citing Ago, ‘Eighth Report on State Responsibility: Addendum’ (1980) (n 56), 18.

⁷⁶ Crawford, ‘Fourth Report on State Responsibility’ (2000) (n 29), 8; Stern Brigitte, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone 1973), 26 (‘Une des explications possibles de ces incertitudes de vocabulaire est [...] l’extrême disparité des droits internes’) citing Crawford James, *International Law Commission’s Articles on State Responsibility* (Cambridge University Press 2002), 31. Arangio-Ruiz, ‘Second Report on State Responsibility’ (1989) (n 10), 3 (‘While most frequently understood in a very general sense [...] the term “damage” is not infrequently used [...] in the narrower sense of physical or material damage. “Injury” and “loss” are perhaps more often used, as is the French prejudice, in the broadest sense [...] It seems, nevertheless, that the four terms are often if not mostly used as synonyms’); Barboza, ‘Legal Injury’ (n 11), 7 (‘“Legal injury” or “damage” was understood to mean the damage caused to the subjective right of the injured state by the breach of a legal obligation’)

⁷⁷ Ahmadov, *Actio Popularis* (n 30), 65; Barboza, ‘Legal Injury’ (n 11), 7.

⁷⁸ See *Alabama Power Co v Ickes* (1938) 302 US 464 (US), 479 (‘An injury [...] consists of a violation of [...] right [...] Where, there has been a violation of a right, the person injured is entitled to an action [...] Conversely, although there is damage, there is no violation of a right, no action can be maintained’); ILC, ‘Summary Records of the 50th Session’ (1998) I YbILC 1, 193 (Crawford ‘A state might be damaged without being injured, and vice versa’); Crawford James, ‘First Report on State Responsibility’ (1998) II(1) YbILC 1, 24 (‘The concept of “injury” [...] involves the concept of a “legal injury” or *injuria*, whereas the term “damage” refers to material or other loss suffered by the injured state’); Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 26), 43 (‘An essential element of the definition of injured state [...] is the infringement of a right [...] whether or not damage has been caused’);

⁷⁹ Hunter, *Roman Law* (n 70), 146 (‘*Injuria*’); Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 192; Riphagen Willem, ‘Third Report on State Responsibility’ (1982) II(1) YbILC 22, 35, fn 68; Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 26), 43; Stern, ‘La notion de préjudice juridique’ (n 11),

detriment that one suffers.⁸⁰ ‘Damage’ may be ‘moral’ or ‘legal’ if the harm is intangible, or ‘material’ if the harm is tangible.⁸¹ This distinction is highlighted in the following scenarios: First, there are instances where the right holder only suffers ‘injury’—its rights are infringed and thus suffers ‘legal damage’ but there is no ‘material damage’.⁸² As there is no tangible harm, the only reparations required of the duty bearer is to ‘[re-establish] legality’, or the ‘situation prevailing before the breach’.⁸³ Second, the right holder, in addition to ‘injury’, may also suffer some ‘material damage’.⁸⁴ In such an instance, as tangible harm was caused, the duty bearer’s duty to restore legality may involve providing material reparations.⁸⁵ Finally, there may be instances where there is ‘material damage’ but no ‘injury’. As some municipal jurisdictions put it: *damnum absque injuria*.⁸⁶ This happens when one causes tangible harm to another but breaches no duty and infringes no right.⁸⁷ In such a case, there is no reparable ‘damage’.⁸⁸

26; Villalpando, *La communauté internationale* (n 2), 244. Note De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 27, 31.

⁸⁰ Crawford, ‘First Report on State Responsibility’ (1998) (n 78), 24; Riphagen, ‘Third Report on State Responsibility’ (1982) (n 79), 35, fn 68; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 26.

⁸¹ Villalpando, *La communauté internationale* (n 2), 122 (‘Le dommage [peut être] conçu au sens étroit (incluant uniquement les dommages susceptibles d’une évaluation économique) ou dans un sens plus large (incluant les dommages moraux)’); Barboza, ‘Legal Injury’ (n 11), 8, 17. Compare Stern, ‘La notion de préjudice juridique’ (n 11), 26 (equating ‘préjudice juridique’ or ‘la violation du droit’ with ‘dommage moral’ which is distinct from ‘dommage matériel’).

⁸² Stern, ‘La notion de préjudice juridique’ (n 11), 13 (‘le préjudice juridique peut exister indépendamment d’un dommage’), 33; Islam Rizwanul, ‘Not an Overreach of the Court’s Jurisdiction, Putting Erga Omnes into Motion’ (2022) 21 *Chinese Journal of International Law* 611, 612 citing *Southwest Africa* [1966] (n 38), 32 (‘A legal right [...] can be infringed even though no [damage] has been suffered’). See Barboza, ‘Legal Injury’ (n 11), 17 (‘A state may incur a breach simply through a *bona fide*, albeit wrong, interpretation of its duties’); De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 26 (‘[An] example may [be the] situation in which the police officers of a state, [pursue] suspects of a criminal offence, unknowingly cross the border with another state, fail to capture the suspects, and then return to their state [...] Authors have been wont to speak of moral damage in such cases’).

⁸³ Barboza, ‘Legal Injury’ (n 11), 17–8 citing ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 95. Stern, ‘La notion de préjudice juridique’ (n 11), 31 (‘Restitution de l’ordre juridique violé’); Annacker, ‘Legal Regime of Erga Omnes Obligations’ (n 9), 151 citing Dupuy Pierre-Marie, ‘The International Law of State Responsibility: Revolution or Evolution’ (1989) 11(1) *Michigan Journal of International Law* 105, 122

⁸⁴, Barboza, ‘Legal Injury’ (n 11), 17; Stern, ‘La notion de préjudice juridique’ (n 11), 33.

⁸⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 95, 96–8, 98–105; Barboza, ‘Legal Injury’ (n 11), 17–8; Stern, ‘La notion de préjudice juridique’ (n 11), 31 (‘Restitution de l’ordre juridique violé par l’obtention de la cessation de la violation et des garanties de non-renouvellement [...] assurer la légalité internationale pour la réparation du préjudice juridique [...] et restitution ou indemnisation ou satisfaction pour l’ordre matériel ou moral violé’);

⁸⁶ See *Alabama Power Co v Ickes* (n 78), 479; *Custodio v CA* (1996) GR 116100, 9 Feb 1996 (PHL); *Rylands v Fletcher* (1868) LR 3 HL 330 (ENG); ILC, ‘Summary Records of the 50th Session’ (1998) (n 78), 193 (Crawford).

⁸⁷ *Barcelona Traction* [1970] (n 34), 36 (‘Evidence that damage was suffered does not *ipso facto* justify a [...] claim. Persons suffer damage or harm in [the] most varied circumstances. This [*per se*] does not involve the [duty to] make reparation. [Responsibility requires] not a mere interest affected but [...] a right infringed’).

⁸⁸ See Stern, *Préjudice dans responsabilité internationale* (n 76), 12 (‘Dommage réparable, c’est-à-dire selon la conception que l’on se fait de l’intérêt juridiquement protégé, dont la lésion ouvre un droit à réparation’).

B. Revisiting the ILC's Approach

Having set out this thesis' view of the associated terminologies, the examination now revisits ILC's approach to the rules on implementation under the 2001 Draft Articles. Note that during Ago's tenure, the ILC had already 'eliminated any reference to damage, [meaning material harm], as a condition for the existence of [...] responsibility'.⁸⁹ Yet, while the ILC accepted that a wrongful act only consists of an 'action or omission attributable to a state' that 'constitutes a breach of [its] duty',⁹⁰ it maintained under 1996 Draft Article 40/1985 Draft Article 5 that an 'injured state' is one whose 'right has been infringed by another'.⁹¹ Thus, as Villalpando observes, the concepts of right, duty, and injury remained expressly linked for the purposes of implementation.⁹² Regardless of the nature of the duty breached, even if the duty is owed *erga omnes*, there are only 'injured states'.⁹³

This changed under the 2001 Draft Articles.⁹⁴ The ILC, under 2001 Draft Article 42, defined 'injured states' as states to whom 'the [duty] breached is owed'—those that have suffered 'injury'—or if the duty is owed to a collective, those that have been 'specially-affected'—those that have suffered 'material damage'.⁹⁵ Still, under 2001 Draft Article 48, there are breaches of duties that do not correspond to the infringement of a 'right' but only

⁸⁹ Stern, 'La notion de préjudice juridique' (n 11), 4 ('La CDI, sous l'impulsion d'Ago, a éliminé toute référence au dommage—et du même coup, par implication nécessaire, au lien de causalité—comme condition d'apparition de la responsabilité internationale'); De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 25; Dupuy, 'Deficiencies of State Responsibility' (n 36), 212; Pellet Alain, 'Remarques sur une révolution inachevée: Le projet d'articles de la CDI sur la responsabilité des Etats' (1996) 42 *Annuaire français de droit international* 7. 7. See Ago, 'Second Report on State Responsibility' (1970) (n 10), 183; Ago, 'Third Report on State Responsibility' (1971) (n 72), 223; Riphagen, 'Fourth Report on State Responsibility' (1983) (n 38), 14.

⁹⁰ ILC, 'Report on the Work of the 48th Session' (1996) II(2) YbILC 57, 59.

⁹¹ ILC, 'Summary Records of the 37th Session' (1985) I YbILC 1, 308; ILC, 'Report on the Work of the 48th Session' (1996) (n 90), 62.

⁹² Villalpando, *La communauté internationale* (n 2), 122–3 citing ILC, 'Report on the Work of the 25th Session' (1973) II YbILC 163, 184. See Stern, 'La notion de préjudice juridique' (n 11), 21 ('Malgré sa complexité, le projet de 1996 apparaissait bien plus cohérent que l'analyse définitivement retenue en 2001').

⁹³ Ago Roberto, 'Fifth Report on State Responsibility' (1976) II(1) YbILC 3, 29; Riphagen Willem, 'Sixth Report on State Responsibility' (1986) II(1) YbILC 1, 8; Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 49. See Stern Brigitte, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury' in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 96; Kawasaki, 'Injured State' (n 11), 20, 22; Duff, 'State Responsibility: An Outsider's View' (n 11), 80.

⁹⁴ Urs Priya, 'Obligations Erga Omnes & the Question of Standing before the International Court of Justice' (2021) 34 *Leiden Journal of International Law* 1, 4 ('Discarding an earlier preference for a broad definition of "injury", which would have provided a unified basis for the invocation of responsibility'). See Crawford, 'Third Report on State Responsibility' (2000) (n 17), 29 ff; ILC, 'Summary Records of the 52nd Session' (2000) I YbILC 1, 393–4.

⁹⁵ ILC, 'Report on the Work of the 53rd Session' (2001) (n 9), 117, 119; Villalpando, *La communauté internationale* (n 2), 288 ('Tel que le précise le commentaire, [le] [...] violation d'une obligation *erga omnes* [...] cause à un ou plusieurs Etats un "préjudice individuel", ce par quoi il faut entendre vraisemblablement un dommage matériel ou moral')

affect states in their ‘interests’.⁹⁶ As discussed in *Chapter 3*, this change was made for two reasons. First, there was the perceived need to distinguish between ‘directly’ and ‘indirectly affected states,’⁹⁷ in relation to the wrongful acts’ consequences,⁹⁸ and the competence to implement responsibility.⁹⁹ The ILC thought that by defining breaches based solely on the infringement of rights, all ‘injured states’—whether ‘directly’ or ‘indirectly affected’—are entitled to similar reparations,¹⁰⁰ and means of implementation including the resort to countermeasures.¹⁰¹ Second, the ILC also considered the synallagmatic premise defective.¹⁰² Indeed, Crawford argued that the assumption that ‘all [...] relations are to be assimilated to [...] right-duty relations’ is problematic,¹⁰³ and that ‘could not provide a suitable basis for the [law of state responsibility’s] codification and [...] development’.¹⁰⁴

Yet, this thesis submits that the issue on the need to distinguish between ‘directly’ and ‘indirectly affected’ states is resolved by merely recalling the distinction between ‘injury’ and ‘material damage’.¹⁰⁵ As highlighted in *Chapter 3*, Riphagen and Arangio-Ruiz already dealt

⁹⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 126 (‘[2001 Draft] Article 48 is based on the idea that in case of breaches of [duties owed *erga omnes* or *erga omnes partes*], responsibility may be [implemented] by states which are not themselves injured in the sense of [2001 Draft] Article 42’)

⁹⁷ Kramer Francisco, ‘Draft Report of the International Law Commission on the Work of its 47th Session’ (6 July 1995) UN Doc A/CN.4/L.512, 25 (‘Universalisation of the status of injured state’). See Voefray, *L’actio popularis* (n 2), 259 (‘Les critiques les plus sévères que l’on peut adresser à l’article [...] rapportent [...] à l’idée implicite d’une uniformité des droits entre les différents Etats lésés. Dès lors qu’on considère que chaque Etat est lésé dans un droit subjectif, il est difficile ne pas reconnaître à tous des droits similaires’); Urs, ‘Question of Standing before the ICJ’ (n 94), 4 (‘[The] broad definition of “injury” [...] would have provided a unified basis for the invocation of responsibility’).

⁹⁸ Crawford, ‘Multilateral Rights & Obligations’ (n 4), 343 (‘Once a state had qualified as an “injured state” under [1996 Article 40], it seemed to have, individually, all the rights that the most directly injured state would have, including [...] restitution [...] compensation [and] satisfaction’).

⁹⁹ Ibid, 343 (‘Even the right to take countermeasures individually’). See Stern, ‘La notion de préjudice juridique’ (n 11), 21 (‘Le problème [...] c’est que cet élargissement du concept d’Etat lésé au delà du cas de l’Etat lésé [...] s’est accompagné de la diversification de la responsabilité introduite par la CDI, et en particulier, du droit de prendre des contre-mesures, qui voyaient du coup leur champ d’action considérablement étendu, ce qui n’était pas sans poser problème’).

¹⁰⁰ Crawford, ‘Multilateral Rights & Obligations’ (n 4), 343; Crawford, ‘Third Report on State Responsibility’ (2000) (n 17), 49

¹⁰¹ Crawford, ‘Multilateral Rights & Obligations’ (n 4), 343 See Stern, ‘La notion de préjudice juridique’ (n 11), 21

¹⁰² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 126; Crawford, ‘Third Report on State Responsibility’ (2000) (n 17), 25. See ILC, ‘Summary Records of the 50th Session’ (1998) (n 78), 103 (Economides), 104 (Simma), 124 (Rosenstock), 130 (Yamada), 135 (Mikulka), 146 (Goco), 155 (Pellet); ILC, ‘Summary Records of the 51st Session’ (1999) I YbILC 1, 53 (Economides), 244 (Melescanu).

¹⁰³ Crawford, ‘Third Report on State Responsibility’ (2000) (n 17), 33.

¹⁰⁴ Crawford, ‘Multilateral Rights & Obligations’ (n 4), 442; Crawford, ‘Third Report on State Responsibility’ (2000) (n 17), 29. See Villalpando, *La communauté internationale* (n 2), 122 (‘Cette approche [est] libérée de la conception strictement bilatérale de la théorie classique’); Voefray, *L’actio popularis* (n 2), 299

¹⁰⁵ Stern, ‘La notion de préjudice juridique’ (n 11), 32. See Voefray, *L’actio popularis* (n 2), 263 (‘La CDI réhabilite [...] dommage, non pas comme un élément de la responsabilité [...] ni comme une condition spécifique

with the issue of allocating the reparations to which states are entitled.¹⁰⁶ Arangio-Ruiz stressed that this only required the general rules' 'proper understanding and application'.¹⁰⁷ Both saw no problem in considering all states 'injured', in the sense that their rights have been infringed, if a duty owed *erga omnes* is breached.¹⁰⁸ They stressed that as 'material damage' is a precondition for material reparations, states that only suffered 'injury' may only demand 'cessation, guarantees of non-repetition, [and perhaps satisfaction]'.¹⁰⁹ Without tangible harm, there is nothing to materially 'restitute' or 'recompense'.¹¹⁰

The same reasoning may be extended to countermeasures. As it stands, the ILC limited the prerogative to resort countermeasures to states that have been 'directly affected' by the wrongful act.¹¹¹ Yet, as Stern points out, the same 'result could be achieved by indicating that countermeasures are not available to states which have only suffered injury'.¹¹² This further moves the need to distinguish between 'injured states' and 'states other than an injured state'.¹¹³

However, whether countermeasures should be limited to states that have suffered 'material damage' remains to be seen. Arguably, the resort to countermeasures only requires 'injury'. It is not, as Arangio-Ruiz argues, dependent on 'material damage'.¹¹⁴ Indeed, the ILC itself

de la qualité pour agir mais [...] comme un critère d'appréciation de la nature de cette qualité pour agir et donc des droits y afférents [...] c'est la nature et le degré du préjudice subi qui déterminent le type de qualité pour agir et l'étendue des droits qui y sont attachés'). See also Wyler Eric, 'From "State Crime"' to Responsibility for "Serious Breaches of Obligations under Peremptory Norms' (2002) 13(5) *European Journal of International Law* 1147, 1153.

¹⁰⁶ Riphagen Willem, 'First Report on State Responsibility' (1980) II(1) YbILC 107, 114; Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 49. See Villalpando, *La communauté internationale* (n 2), 289 ('Réparation du préjudice causé et la mesure de cette réparation devront être appréciées à la lumière des normes juridiques qui leur reconnaissent ce droit individuel')

¹⁰⁷ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 49

¹⁰⁸ Riphagen, 'Sixth Report on State Responsibility' (1986) (n 93), 8; Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 45.

¹⁰⁹ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 47; Riphagen, 'First Report on State Responsibility' (1980) (n 106), 114; Kawasaki, 'Injured State' (n 11), 27 ('[Material] damage must be considered as a prerequisite for reparation'); Barboza, 'Legal Injury' (n 11), 9 ('Obviously, restitution [...] and compensation [...] [are] intended to make reparation for a material [damage]'); Stern, 'La notion de préjudice juridique' (n 11), 32.

¹¹⁰ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 47; Barboza, 'Legal Injury' (n 11), 9; Kawasaki, 'Injured State' (n 11), 22.

¹¹¹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 9), 135–7.

¹¹² Stern, 'La notion de préjudice juridique' (n 11), 32 ('Mais un tel résultat aurait pu être atteint [...] en indiquant que les contre-mesures ne sont pas à la disposition des États qui ne subissent qu'un préjudice juridique').

¹¹³ Ibid, 32

¹¹⁴ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 47 ('Any special restrictions of the individual *faculte* of resort to countermeasure on the part of the states injured by the breach of an *erga omnes* [duty], do not derive from any alleged indirectness of the injury'). But see 48–9 ('The *faculte* of any injured state to resort to reprisals does not arise automatically from the breach but only after a prior intimation or *sommation* has proved unsuccessful, and only after exhaustion of dispute settlement procedures')

recognises countermeasures as a ‘feature of a decentralised system’ by which states ‘vindicate their rights and to restore [legality]’.¹¹⁵ If a state’s right has been infringed, it should be able to impose countermeasures to enforce the wrongful state’s responsibility.¹¹⁶ Thus, conceptually, despite most states’ concerns,¹¹⁷ the resort to countermeasures should be available to all states whose rights have been ‘injured’. ‘Damage’, as observed in *Chapter 2*, only plays a role in the determination of proportionality or ‘degree of equivalence’, under the empirical approach, between the breach and countermeasure.¹¹⁸

From the foregoing, this thesis submits that re-examining the concepts of ‘injury’ and ‘damage’, as scholars like Stern posit, ‘obviates the need for the laborious distinction introduced by the ILC [among] “injured states”, [“specially-affected states”], and “states other than an injured state”’.¹¹⁹ ‘Injured states’ hold the right correlative to the duty breached, according to the Commission,¹²⁰ and thus have suffered legal ‘injury’ or ‘prejudice’, as defined above.¹²¹ ‘Injured states’ may also be ‘specially affected’, according to the ILC,¹²² or ‘materially damaged’, as used in this thesis.¹²³ In contrast, ‘states other than an injured state’ have only

¹¹⁵ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 128. See Crawford James, *State Responsibility: General Part* (Cambridge University Press 2013), 675; Crawford, ‘Overview of Part Three’ (n 9), 932 (‘A further mechanism for the implementation’), 936; Proulx Vincent-Joël, ‘Marshall Islands Judgements & Multilateral Disputes at the World Court’ (2017) 111 *American Journal of International Law (Unbound)* 96, 98 (‘Default mode of implementation’)

¹¹⁶ Kawasaki, ‘Injured State’ (n 11), 20 (‘A state must have a right, corresponding to the [duty] of the [wrongful state], [that has been] infringed by the [wrongful] state’). See *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa (Naulilaa)* (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1028 (‘Acts of self-help by the injured state [...] in retaliation for acts contrary to international law on the part of the offending state’); *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 443 (‘[A] state is entitled, within the limits set by the general rules of international law [...] to affirm its rights through “counter-measures”’)

¹¹⁷ See Crawford, ‘Fourth Report on State Responsibility’ (2000) (n 29), 18.

¹¹⁸ See *Air Services Agreement* (n 116), 448; *Naulilaa* (n 116), 1028.

¹¹⁹ Stern, ‘La notion de préjudice juridique’ (n 11), 22 (‘Le recours à la notion de préjudice de droit permet avantageusement et simplement de résoudre cette fausse difficulté’). 30 (‘La prise en compte du préjudice juridique permet de faire l’économie de la distinction laborieuse [...] entre les États lésés et les “États autres que les États lésés”, qui ne sont même pas des “États ayant un intérêt juridique”’); Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 26), 45 (‘The distinction between directly and non-directly injured states does not hold water [...] [such] differences relate] only to the nature or the degree of the injury’) citing Lattanzi Flavia, *Garanzie dei diritti dell'uomo nel diritto internazionale* (Giuffrè 1983), 120 ff. See Nissel, ‘Self-Help & Solidarity’ (n 1), 367.

¹²⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 117.

¹²¹ See Hunter, *Roman Law* (n 70), 146; Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 192; Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 26), 43; Stern, ‘La notion de préjudice juridique’ (n 11), 26; Villalpando, *La communauté internationale* (n 2), 244.

¹²² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 119.

¹²³ Kawasaki, ‘Injured State’ (n 11), 22 (‘The right-infringed state [may also] personally suffer some kind of damage, material or moral’). See Stern, ‘La notion de préjudice juridique’ (n 11), 31 (‘Ce que la CDI appelle un “état lésé”, c’est-à-dire un état individuellement ou spécialement atteint, serait lésé à la fois au niveau juridique (préjudice juridique) et autrement (préjudice matériel et/ou moral)’)

been ‘affected in their legal interests’, to use the ILC’s term,¹²⁴ or have only suffered legal ‘injury’ or ‘prejudice’, to use the definition above.¹²⁵

The claim that duties owed *erga omnes* cannot be reduced to synallagmatic relations will be examined below. For now, given the review of terminologies above, it is worth stressing that it is difficult to accept, as Stern, Villalpando, Dupuy, and Kolb argue, how states ‘should be able to [implement another’s] responsibility’ if, in the ILC’s view, they ‘have not been “injured”’.¹²⁶ If a state is a ‘beneficiary of a [duty] that has been breached’, it is ‘hard to see how [it would not be considered] an “injured state”’.¹²⁷ If a ‘legal interest’ is nothing more than a ‘right’, then a breach of a duty owed *erga omnes* means that all states are ‘injured states’.¹²⁸ Thus, ‘the [creation] of a separate [draft] article to deal with [“states other than an injured state”] is arguably misleading’.¹²⁹

III. REVISITING THE CONCEPT OF OBLIGATIONS

The discussion above demonstrated that all states may be considered ‘injured’, in the sense that their rights have been infringed, should a duty owed *erga omnes* be breached. However, it still needs to be shown why, in the first place, all states possess rights that correlate to these duties. As highlighted in *Chapters 2 and 3*, scholars who supported the synallagmatic view

¹²⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 126.

¹²⁵ Kawasaki, ‘Injured State’ (n 11), 22 (‘Although their subjective rights are infringed, they do not personally suffer any kind of damage, material or moral’); Barboza, ‘Legal Injury’ (n 11), 21 (‘The only injury suffered by one of those states is a legal injury’); Stern, ‘La notion de préjudice juridique’ (n 11), 31 (‘Ce que la CDI appelle “un État autre que l’État lésé” subirait quant à lui uniquement un préjudice juridique,’).

¹²⁶ Stern, ‘Responsibility based on Legal Injury’ (n 93), 96; Villalpando, *La communauté internationale* (n 2), 289 (‘L’Etat est titulaire d’un droit subjectif [...] auquel correspond une obligation qui lui est due à titre individuel [...] En somme, les Etats en question ne sont pas “spécialement atteints” par la violation de l’obligation erga omnes, mais sont les seuls atteints par la violation d’obligations qui leur sont dues individuellement’); Dupuy, ‘Deficiencies of State Responsibility’ (n 36), 215 (‘It makes little sense to say that “non-injured states” have a right of action against another. If they are not injured, what is the legal ground for them legitimately to take remedial action?’); Kolb Robert, *International Law of State Responsibility* (Elgar 2017), 173 (‘The [duty] is here directed towards all other states; if it is breached, all these other states are also affected in their subjective right [...] thus, all these other states are also injured’).

¹²⁷ *Application of the Genocide Convention* [2022] (n 12) (Kress, declaration), 3 citing Stern, ‘La notion de préjudice juridique’ (n 11), 24 (‘Si un État est bénéficiaire d’une obligation qui a été violée, je ne vois pas comment on pourrait considérer qu’il n’est pas un État lésé’). Kolb, *International Law of Responsibility* (n 126), 173

¹²⁸ Stern, ‘Responsibility based on Legal Injury’ (n 93), 96; Duff, ‘State Responsibility: An Outsider’s View’ (n 11), 80 (‘Every state is [...] injured by [the] breach’); Villalpando, *La communauté internationale* (n 2), 398 (‘Tous les états sont habilités, de manière autonome et en vertu de leur droit subjectif au respect de l’obligation erga omnes’); Barboza, ‘Legal Injury’ (n 11), 21; Kawasaki, ‘Injured State’ (n 11), 20, 22; Peel Jacqueline, ‘New State Responsibility Rules & Compliance with Multilateral Environmental Obligations’ (2020) 10 *Review of European, Comparative & International Environmental Law* 82, 93.

¹²⁹ Weiss, ‘Invoking State Responsibility’ (n 11), 803; Fernandez Gemmo, ‘Revisiting the Concepts of Rights, Obligations, & Injury in the Invocation of State Responsibility in Inter-State Adjudication’ (2018) 91 *Philippine Law Journal* 832, 847–8. See Stern, ‘Responsibility based on Legal Injury’ (n 93), 103; Barboza, ‘Legal Injury’ (n 11), 21.

like Arangio-Ruiz posited that duties owed *erga omnes* bind ‘simultaneously [...] every state concerned with respect to all others’.¹³⁰ Thus, if state S_0 owes an *erga omnes* duty to states S_1 , S_2 , [...], and S_n , S_0 ’s breach of its duty constitutes a ‘simultaneous infringement of states [S_1 , S_2 , [...], and S_n ’s] [corresponding rights]’.¹³¹ Accordingly, states [S_1 , S_2 , [...], and S_n] are all ‘injured states’.¹³² Yet, as discussed in *Chapter 3* and as reiterated in the previous section, the ILC still deemed the synallagmatic approach defective and did not adopt the synallagmatic approach. By analysing the concept of obligations, this section will demonstrate that contrary to the ILC’s claim,¹³³ relations involving duties owed *erga omnes* may be properly represented as synallagmatic relations. That is, duties owed *erga omnes* correlate to rights held by every state such that all states may be deemed ‘injured’ should a duty owed *erga omnes* be breached and have the competence to implement these duties.

A. Obligations in General

Recall from *Chapter 1* that an ‘obligation’ does not only refer to the requirements that a norm imposes in the sense that it ‘obliges’ its subjects to observe or perform a particular conduct.¹³⁴ It may also pertain to the juridical tie or relationship,¹³⁵ that results from the norm,¹³⁶ between one holding a right and another bearing a duty.¹³⁷ An obligation, in this sense, involves three elements:¹³⁸ the parties to the obligation—the ‘obligor’ or ‘debtor’ bearing a duty and the ‘obligee’ or ‘creditor’ holding a correlative right;¹³⁹ the object or prestation which is

¹³⁰ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 26).

¹³¹ Ibid, 44–5 citing Lattanzi, *Garanzie dei diritti* (n 119), 79–155.

¹³² Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 26), 45. See Nedeski, *Shared Obligations* (n 11), 100–2; De Jesús, ‘Obligations Erga Omnes’ (n 11), 186, 231–2. See also Villalpando, *La communauté internationale* (n 2), 246; Ragazzi Maurizio, *Concept of International Obligations Erga Omnes* (Oxford University Press 1997), 9; Hutchinson, ‘Solidarity & Breaches of Multilateral Treaties’ (n 11), 175.

¹³³ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 126.

¹³⁴ Hogg Martin, *Obligations: Law & Language* (Cambridge University Press 2017), 15; Birks Peter & Descheemaeker Eric, *Roman Law on Obligations* (Oxford University Press 2014), 3–5.

¹³⁵ Birks & Descheemaeker, *Roman Law on Obligations* (n 134), 3–5; Zimmermann Reinhard, *Law of Obligations: Roman Foundations* (Clarendon 1996), 2–3; Hunter, *Roman Law* (n 70), 453; Hogg, *Obligations* (n 134), 27, 41.

¹³⁶ Ago, ‘Fifth Report on State Responsibility’ (1976) (n 93), 4; Ago, ‘Second Report on State Responsibility’ (1970) (n 10), 192; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 16 citing Birkas Géza, *Das Staatsinteresse als Grundlage des Völkerrechts* (Heymans 1993); Nelson Leonard, *Die Rechtswissenschaft ohne Recht* (1917), 181. Jørgensen Nina, *The Responsibility of States for International Crimes* (Oxford University Press 2000), 93.

¹³⁷ Hogg, *Obligations* (n 134), 28 citing De Bracton Henry, *Laws & Customs of England*, vol 2 (Harvard University Press 1968), 283; Johnson AC, Coleman-Norton PR, & Bourn FC, *Roman Statutes* (University of Texas Press 1961), 2.

¹³⁸ Pothier Robert Joseph, *Treaties on the Law of Obligations or Contracts*, vol I, Evans William David (tr) (Strahan 1806), 2; Tolentino Arturo, *Commentaries & Jurisprudence on the Philippine Civil Code*, vol IV (Central 1991), 56.

¹³⁹ Hunter, *Roman Law* (n 70), 454; Barboza, ‘Legal Injury’ (n 11), 14.

the thing that the debtor ought to give or the conduct it has to perform or observe;¹⁴⁰ and the efficient cause or *vinculum* that establishes the obligation.¹⁴¹ Recall from *Section II* that, as scholars like Hohfeld claim, there is an exact correlation between the duty D that debtor P_0 bears, and the right that creditor P_1 holds.¹⁴² This may be represented as: P_0 has a duty D concerning object O owed to P_1 . If P_0 breaches its duty, P_1 's right is infringed and is injured. In turn, P_1 has the power to demand P_0 to perform or observe its duty.¹⁴³

This correlation extends to instances involving multiple parties.¹⁴⁴ For Hohfeld, this is the case for a *multital* right or a class of separate but fundamentally similar rights held by several creditors that correlate to a duty borne by a debtor.¹⁴⁵ The same is true for a *multital* duty or a class of separate but fundamentally similar duties borne by several debtors that correlate to a right held by a creditor.¹⁴⁶ For instance, in an 'active joint' obligation, there are several creditors holding rights that correspond to a duty borne by a debtor.¹⁴⁷ Here, each creditor is only entitled to its share of the credit.¹⁴⁸ Consider the situation where P_0 owes duties to P_1 , P_2 , [...], and P_n . This may be represented as: P_0 has a duty D_1 concerning object O_1 to P_1 ; P_0 has a duty D_2 concerning object O_2 to P_2 ; [...] and P_0 has a duty D_n concerning object O_n to P_n . Thus, the case where P_0 owes \$100 to P_1 , P_2 , and P_3 , with shares of \$20, \$30, and \$50 respectively, may be illustrated as: P_0 has a duty to pay P_0 's debt to P_1 of \$20 to P_1 ; P_0 has a duty to pay P_0 's debt to P_2 of \$30 to P_2 ; and P_0 has a duty to pay P_0 's debt to P_3 of \$50 to P_3 .¹⁴⁹

The example above illustrates obligations involving a plurality of parties where the relations among the debtors or the creditors are severable. However, as authors like Pothier and

¹⁴⁰ Tolentino, *Philippine Civil Code* (n 138), 57, 59.

¹⁴¹ Hunter, *Roman Law* (n 70), 453; Hogg, *Obligations* (n 134), 14, 19.

¹⁴² Hohfeld, *Fundamental Legal Conceptions* (n 30), 7, 36–8; Dworkin, *Taking Rights Seriously* (n 59), 17.

¹⁴³ See Hohfeld, *Fundamental Legal Conceptions* (n 30), 59; Postema, *Legal Philosophy* (n 52), 102.

¹⁴⁴ Hunter, *Roman Law* (n 70), 551 ('In almost every legal transaction there may be more than two parties')

¹⁴⁵ Hohfeld, *Fundamental Legal Conceptions* (n 30), 73; Ginossar, 'Rights in Rem' (n 63), 290.

¹⁴⁶ Hohfeld, *Fundamental Legal Conceptions* (n 30), 75.

¹⁴⁷ Ibid, 95. Tolentino, *Philippine Civil Code* (n 138), 236; Pothier, *Law of Obligations* (n 138), 144.

¹⁴⁸ Pothier, *Law of Obligations* (n 138), 144; Tolentino, *Philippine Civil Code* (n 138), 236; Hunter, *Roman Law* (n 70), 554; *The Digest of Justinian*, vol IV, Watson Alan (ed) (University of Pennsylvania Press 1998), 191 (45.2.11.1); *The Code of Justinian*, Blume FH & Frier BW (eds), (Oxford University Press 2016), 8.40.1–3.

¹⁴⁹ Note that conversely, there may be several debtors owing duties to a creditor (Hohfeld, *Fundamental Legal Conceptions* (n 30), 73). Each debtor is only liable for its share of the credit (Pothier, *Law of Obligations* (n 138), 160; Tolentino, *Philippine Civil Code* (n 138), 217. See Hunter, *Roman Law* (n 70), 554; *Digest of Justinian vol IV* (n 148), 193 (45.2.11.1)). Consider the situation where debtors P_1 , P_2 , [...], and P_n owe duties to creditor P_0 . This may be represented as: P_1 has a duty D_1 concerning object O_1 to P_0 ; P_2 has a duty D_2 concerning object O_2 to P_0 ; [...] and P_n has a duty D_n concerning object O_n to P_0 . Thus, the case where P_1 , P_2 , and P_3 , owe \$100 to P_0 with respective shares of \$20, \$30, and \$50, may be illustrated as: P_1 has a duty to pay P_1 's debt to P_0 of \$20 to P_0 ; P_2 has a duty to pay P_2 's debt to P_0 of \$30 to P_0 ; and P_3 has a duty to pay P_3 's debt to P_0 of \$50 to P_0 .

Tolentino point out, there are also multilateral obligations where interrelation exists among the parties as in the case of ‘solidary’ or ‘joint and several’ obligations.¹⁵⁰ For instance, in an ‘active solidary’ obligation, ‘each creditor’ may ‘claim and [implement] the rights of all’ creditors against every debtor.¹⁵¹ Yet, despite this interrelation, there are still distinct yet similar legal relations among the parties.¹⁵² Consider the situation where debtor P_0 owes duties to solidary creditors P_1 , P_2 , [...], and P_n . This may be represented as: P_0 has a duty D_1 concerning object O_1 to P_1 ; P_0 has a duty D_2 concerning object O_2 to P_1 ; [...] and P_0 has a duty D_n concerning object O_n to P_1 . The same goes for P_2 , [...], and P_n such that P_0 has a duty D_1 concerning object O_1 to P_n ; P_0 has a duty D_2 concerning object O_2 to P_n ; [...] and P_0 has a duty D_n concerning object O_n to P_n . Thus, the case where P_0 owes \$100 to P_1 , P_2 , and P_3 , with shares of \$20, \$30, and \$50 respectively but where P_1 , P_2 , and P_3 may demand the total sum from P_0 , may be illustrated from P_3 ’s perspective as: P_0 has a duty to pay P_0 ’s debt to P_1 of \$20 to P_3 ; P_0 has a duty to pay P_0 ’s debt to P_2 of \$30 to P_3 ; and P_0 has a duty to pay P_0 ’s debt to P_3 of \$50 to P_3 .¹⁵³

Obligations, as Pothier and Tolentino observe, may also be classified based on the duties’ susceptibility to partial performance. In a ‘divisible’ obligation, the duty may be performed in parts.¹⁵⁴ In contrast, in an ‘indivisible’ obligation, the duty, whether due to the parties’ express will or the prestation’s nature,¹⁵⁵ must be performed as a whole by the debtors to the creditors.¹⁵⁶ Note that it is the prestation *per se* and not the legal relation that is indivisible.¹⁵⁷ Thus, despite the indivisibility, there are still distinct yet similar legal relations among the parties.¹⁵⁸ Consider

¹⁵⁰ Pothier, *Law of Obligations* (n 138), 144; Tolentino, *Philippine Civil Code* (n 138), 227, 229.

¹⁵¹ Pothier, *Law of Obligations* (n 138), 144, 146; Tolentino, *Philippine Civil Code* (n 138), 227; Hunter, *Roman Law* (n 70), 554; *Code of Justinian* (n 148), 8.40.1–3; *Digest of Justinian vol IV* (n 148), 193 (45.2.11.2).

¹⁵² Hunter, *Roman Law* (n 70), 561. See Pothier, *Law of Obligations* (n 138), 144–5.

¹⁵³ Note that conversely, in a ‘passive solidary’ obligation, ‘each debtor may be made to answer for the duties’ of other debtors with the paying debtor having the right to recover from the others their respective shares (Pothier, *Law of Obligations* (n 138), 144, 146; Tolentino, *Philippine Civil Code* (n 138), 217; Hunter, *Roman Law* (n 70), 555; *Digest of Justinian vol IV* (n 148), 193 (45.2.11.2)). Consider the situation where solidary debtors P_1 , P_2 , [...], and P_n owe duties to creditor P_0 . This may be represented as: P_1 has a duty D_1 concerning object O_1 to P_0 ; P_1 has a duty D_2 concerning object O_2 to P_0 [...] and P_1 has a duty D_n concerning object O_n to P_0 . The same goes for P_2 , [...], and P_n such that P_n has a duty D_1 concerning object O_1 to P_0 ; P_n has a duty D_2 concerning object O_2 to P_0 ; [...], and P_n has a duty D_n concerning object O_n to P_0 . Thus, the case where P_1 , P_2 , and P_3 owe \$100 to P_0 with respective shares of \$20, \$30, and \$50 but where P_0 may demand the total sum from P_1 , P_2 , or P_3 , may be illustrated from P_0 ’s perspective as: P_1 has a duty to pay P_1 ’s debt to P_0 of \$20 to P_0 ; P_1 has a duty to pay P_2 ’s debt to P_0 of \$30 to P_0 ; and P_1 has a duty to pay P_3 ’s debt to P_0 of \$50 to P_0 .

¹⁵⁴ Pothier, *Law of Obligations* (n 138), 171–4.

¹⁵⁵ Ibid, 174; Tolentino, *Philippine Civil Code* (n 138), 255.

¹⁵⁶ Pothier, *Law of Obligations* (n 138), 196, 197–8; Hunter, *Roman Law* (n 70), 561.

¹⁵⁷ Pothier, *Law of Obligations* (n 138), 174; Tolentino, *Philippine Civil Code* (n 138), 252.

¹⁵⁸ Hunter, *Roman Law* (n 70), 561 (‘There is [...] as many [right duty relations] as there are parties’); Pothier, *Law of Obligations* (n 138), 196, 198.

the situation where debtor P_0 owes a duty D to creditors $P_1, P_2, [...]$, and P_n under an ‘active’ indivisible obligation. This may be represented from P_0 ’s point of view as: P_0 has a duty D concerning object O to P_1 ; P_0 has a duty D concerning object O to P_2 ; [...], and P_0 has a duty D concerning object O to P_n . Thus, the case where P_0 owes \$100 to P_1, P_2 , and P_3 , with shares of \$20, \$30, and \$50 respectively but containing a stipulation that the payment must be made as a whole, may be illustrated from P_0 ’s perspective as: P_0 has a duty *to pay* \$20 to P_1 simultaneously with P_2 and P_3 ; P_0 has a duty *to pay* \$30 to P_2 simultaneously with P_1 and P_3 ; P_0 has a duty *to pay* \$50 to P_3 simultaneously with P_1 and P_2 .¹⁵⁹

Note that indivisibility does not imply solidarity.¹⁶⁰ Again, indivisibility pertains to the obligation’s prestation while solidarity refers to the *vinculum*.¹⁶¹ Indeed, an indivisible obligation may be joint or solidary.¹⁶² Still, regardless of solidarity, as the prestation cannot be performed in parts, each creditor is a ‘creditor of the whole’ and may demand the entire prestation from every debtor.¹⁶³ Conversely, each debtor is a ‘debtor of the whole’ and must perform the prestation to every creditor.¹⁶⁴ Parenthetically, solidarity’s effect lies when the indivisible obligation, due to non-performance, is ‘converted to an obligation of damages’.¹⁶⁵ In a solidary indivisible obligation, each creditor may demand and every debtor is liable for the entire indemnity.¹⁶⁶ In contrast, in a joint indivisible obligation, each creditor is entitled to and every debtor is liable for only their share.¹⁶⁷

¹⁵⁹ Note that conversely, consider the situation where debtors $P_1, P_2, [...]$, and P_n owe a duty D to creditor P_0 , under a ‘passive’ indivisible obligation. This may be represented from P_0 ’s point of view as: P_1 has a duty D concerning object O to P_0 ; P_2 has a duty D concerning object O to P_0 ; [...]; and P_n has a duty D concerning object O to P_0 . Thus, the case where P_1, P_2 , and P_3 owe \$100 with respective of shares \$20, \$30, and \$50 to P_0 but containing a stipulation that the payment must be made as a whole, may be represented from P_0 ’s perspective as: P_1 simultaneously with P_2 and P_3 has a duty *to pay* \$20 to P_0 ; P_2 simultaneously with P_1 and P_3 has a duty *to pay* \$30 to P_0 ; P_3 simultaneously with P_1 and P_2 has a duty *to pay* \$50 to P_0 (See Pothier, *Law of Obligations* (n 138), 199).

¹⁶⁰ Tolentino, *Philippine Civil Code* (n 138), 254; Pothier, *Law of Obligations* (n 138), 195

¹⁶¹ Tolentino, *Philippine Civil Code* (n 138), 252; Pothier, *Law of Obligations* (n 138), 195–6 (‘Indivisibility is a real quality of the obligation [while] solidity [proceeds] from the personal act of the co-debtors [or co-creditors] who have contracted each for the entire obligation’); Hunter, *Roman Law* (n 70), 561.

¹⁶² Pothier, *Law of Obligations* (n 138), 195–7; Tolentino, *Philippine Civil Code* (n 138), 254; Hunter, *Roman Law* (n 70), 561.

¹⁶³ Pothier, *Law of Obligations* (n 138), 198 (‘But not creditor[s] *totaliter*’); Hunter, *Roman Law* (n 70), 561 (‘Every creditor is severally entitled to receive the whole object of the active obligation’).

¹⁶⁴ Pothier, *Law of Obligations* (n 138), 196 (‘They are [not] debtors *totaliter*’); Hunter, *Roman Law* (n 70), 561 (‘Every debtor is bound to discharge the whole object of the passive obligation’).

¹⁶⁵ Pothier, *Law of Obligations* (n 138), 196, 198; Tolentino, *Philippine Civil Code* (n 138), 253–4.

¹⁶⁶ Pothier, *Law of Obligations* (n 138), 196–7, 198; Tolentino, *Philippine Civil Code* (n 138), 253.

¹⁶⁷ Pothier, *Law of Obligations* (n 138), 196, 198; Tolentino, *Philippine Civil Code* (n 138), 254.

B. *Applied to International Multilateral Obligations*

The discussion above shows that multilateral relations, despite interrelations among the parties or the prestation's indivisibility, may be represented as synallagmatic relations. It may be that the relations created by collective norms are outside the scope of bilateral and bilateralisable relations.¹⁶⁸ Yet, the 'exact correlation' between rights and duties remains valid even for multilateral relations. As prefaced in *Section I*, this is what the synallagmatic approach's critics may have missed.¹⁶⁹ The approach has been equated with bilateral relations where one bears a duty and another holds the corresponding right.¹⁷⁰ It has also been conflated with 'bilateralisation' where a multilateral obligation is reduced to a series of separate bilateral relations.¹⁷¹ However, as Nedeski submits, this is 'inaccurate'.¹⁷² As shown above, the synallagmatic approach still allows for the interrelation among the multiple parties to an obligation and the indivisibility of duties to be performed or observed. Thus, the right-duty correlation, as Arangio-Ruiz stressed, is not incompatible with collective norms.¹⁷³ Indeed, as will now be demonstrated, the synallagmatic view accommodates all international multilateral obligations—those that give rise to duties owed *inter partes*, interdependent obligations, and even those that impose duties owed *erga omnes*.

First, bilateralisable obligations or those that give rise to duties owed *inter partes* may be considered joint obligations.¹⁷⁴ They create separate right-duty relations. In case of breach, only the state to whom the duty is owed may implement the wrongful state's responsibility. Consider the situation where state S_0 owes separate duties to states S_1 , S_2 , [...], and S_n . The relations, from S_0 's perspective, may be represented as: S_0 has a duty D_1 concerning object O_1 to S_1 ; S_0 has a

¹⁶⁸ See e.g. Simma, 'Bilateralism to Community Interest' (n 3), 231; Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 3), 224–5; Gaja, 'Protection of General Interests' (n 3), 21; Dupuy, 'Action publique et crime international de l'Etat' (n 3), 543; Sachariew, 'Identifying the "Injured State"' (n 3), 278; Byers, 'Jus Cogens & Erga Omnes' (n 3), 231; Proukaki, *Problem of Enforcement* (n 3), 14; Tams, *Enforcing Obligations Erga Omnes* (n 3), 61.

¹⁶⁹ Nedeski, *Shared Obligations* (n 11), 65 ('Simma's critique has a serious connotation since it essentially implies that the idea of a correlation between obligations and rights leaves no room for multilateral legal relations').

¹⁷⁰ See e.g. Simma, 'Bilateralism to Community Interest' (n 3), 231, 295; Crawford, 'Third Report on State Responsibility' (2000) (n 17), 29.

¹⁷¹ See e.g. Tams, *Enforcing Obligations Erga Omnes* (n 3), 45; Byers, 'Jus Cogens & Erga Omnes' (n 3), 232; Provost, 'Reciprocity in Human Rights & Humanitarian Law' (n 22), 384; Sachariew, 'Identifying the "Injured State"' (n 3), 277–8; Coffman, 'Obligations Erga Omnes' (n 9), 298, 300; Annacker, 'Legal Regime of Erga Omnes Obligations' (n 9), 135–6.

¹⁷² Nedeski, *Shared Obligations* (n 11), 65 ('This does not necessarily entail that every legal relation is [...] bilateral').

¹⁷³ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 34, 44–5; De Jesús, 'Obligations Erga Omnes' (n 11), 110, 174, 186; Nedeski, *Shared Obligations* (n 11), 100.

¹⁷⁴ Nedeski, *Shared Obligations* (n 11), 101; De Jesús, 'Obligations Erga Omnes' (n 11), 88, 110

duty D_2 concerning object O_2 to S_2 ; [...] and S_0 has a duty D_n concerning object O_n to S_n .¹⁷⁵

An example of this kind of obligation is the Vienna Convention on Diplomatic Relations' Article 22(1) which imposes a duty upon receiving states 'to take all appropriate steps to protect the premises of the [sending state's] mission'.¹⁷⁶ For S_0 , a state party, its relations may be illustrated as: S_0 has a duty *to protect the premises of S_1 's mission* owed to S_1 ; S_0 has a duty *to protect the premises of S_2 's mission* owed to S_2 ; [...] and S_0 has a duty *to protect the premises of S_n 's mission* owed to S_n . Clearly, the obligation gives rise to separate bilateral relations. S_0 's duty to protect the embassy of S_1 is owed only to S_1 . If S_0 fails to protect S_1 's embassy, only S_1 suffers injury and has the competence to implement S_0 's responsibility.

Second, interdependent obligations, as the name suggests, may be deemed akin to joint indivisible obligations. As stressed above, it is not the 'obligation' *per se* but rather the duty that is indivisible.¹⁷⁷ There are still distinct yet similar legal relations among the parties.¹⁷⁸ It is true, as Sicilianos claims, that these relations are premised on 'global reciprocity'.¹⁷⁹ Likewise, as Fitzmaurice asserted, states hold similar interests in seeing the duty observed.¹⁸⁰ Yet, what sets these obligations apart, as discussed above, is that they impose upon states duties which are not susceptible to partial performance and must be performed as a whole to all states to whom the duty is owed.¹⁸¹ A state's breach of its duty does not just, as the ILC asserts, 'radically change the position of all states to whom the [duty] is owed'.¹⁸² Rather, due to the duty's

¹⁷⁵ See De Jesús, 'Obligations Erga Omnes' (n 11), 88, 110; Nedeski, *Shared Obligations* (n 11), 67.

¹⁷⁶ *Vienna Convention on Diplomatic Relations* (adopted 19 April 1961, entered into force 24 April 1964) 500 UNTS 95, art 22(1).

¹⁷⁷ Compare Simma, 'Bilateralism to Community Interest' (n 3), 336 ('The rights and [duties] of the parties to such treaties or particular treaty provisions are inextricably interrelated [and] form an indivisible whole'); Fitzmaurice Gerald, 'Third Report on the Law of Treaties' (1958) II YbILC 20, 27–8, 41, 44; Sachariew, 'Identifying the "Injured State"' (n 3), 281 ('[E]ncompasses such legal relationships, which cannot be simply split up into bilateral rights and [duties]'); Tams, *Enforcing Obligations Erga Omnes* (n 3), 56 ('Interdependent obligations cannot be split up into pairs of legal relations'); Pegna Olivia Lopes, 'Counter-claims and Obligations Erga Omnes before the International Court of Justice' (1998) 9 *European Journal of International Law* 724, 732.

¹⁷⁸ Hunter, *Roman Law* (n 70), 561; Pothier, *Law of Obligations* (n 138), 196, 198.

¹⁷⁹ See Sicilianos, 'Classification of Obligations' (n 7), 1135; Dupuy Pierre-Marie, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations & Codification of the Law of Responsibility' (2002) 13(5) *European Journal of International Law* 1053, 1071; Pergantis Vassilis, *Paradigm of State Consent in the Law of Treaties* (Elgar 2017), 48; Klein Eckart, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 482.

¹⁸⁰ See Fitzmaurice Gerald, 'Second Report on the Law of Treaties' (1957) II YbILC 16, 31, 54; Fitzmaurice Gerald, 'Fourth Report on the Law of Treaties' (1959) II YbILC 39, 46; Crawford, 'Third Report on State Responsibility' (2000) (n 17), 31

¹⁸¹ Pothier, *Law of Obligations* (n 138), 174; Tolentino, *Philippine Civil Code* (n 138), 252

¹⁸² See ILC, 'Report on the Work of the 53rd Session' (2001) (n 9), 119; Sachariew, 'Identifying the "Injured

indivisibility, the breach results in the ‘injury’ of all states to whom the rule applies.¹⁸³ Thus, each has the power to demand that the duty be observed.¹⁸⁴ Consider the situation where S_0 owes a duty D to S_1 , S_2 , [...], and S_n under an interdependent obligation. S_0 ’s relations may be represented as: S_0 has a duty D concerning object O to S_1 ; S_0 has a duty D concerning object O to S_2 ; [...] and S_0 has a duty D concerning object O to S_n .¹⁸⁵

A commonly cited example of this obligation is disarmament.¹⁸⁶ Consider the Partial Test Ban Treaty’s Article 1 which requires states ‘to prohibit, to prevent, and not to carry out any [...] nuclear explosion [within their] jurisdiction or control’.¹⁸⁷ For S_0 , a state party, its relations may be illustrated as: S_0 has a duty *not to test nuclear weapons* owed to S_1 ; S_0 has a duty *not to test nuclear weapons* owed to S_2 ; [...] and S_0 has a duty *not to test nuclear weapons* owed to S_n .¹⁸⁸ S_0 observes or performs its duty not only to one state but simultaneously to all parties. If S_0 tests nuclear weapons, S_1 , S_2 , [...], and S_n ’s rights are infringed and all are injured. Thus, all may implement S_0 ’s responsibility.

Finally, norms that impose duties owed *erga omnes* or *erga omnes partes* may be considered akin to a series of joint indivisible obligations.¹⁸⁹ A state still owes duties

State” (n 3), 276; Crawford, ‘Third Report on State Responsibility’ (2000) (n 17), 31; Happold Matthew, ‘“Injured State” in the Breach of a Non-Proliferation Treaty & the Legal Consequences of such a Breach’ in Joyner Daniel & Roscini Marco (eds), *Non-Proliferation Law as a Special Regime* (Cambridge University Press 2012), 175.

¹⁸³ Nedeski, *Shared Obligations* (n 11), 70, 97; De Jesús, ‘Obligations Erga Omnes’ (n 11), 245–7.

¹⁸⁴ De Jesús, ‘Obligations Erga Omnes’ (n 11), 110.

¹⁸⁵ See *ibid*, 197, 200; Nedeski, *Shared Obligations* (n 11), 68

¹⁸⁶ See e.g. *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v India) (Preliminary Objections) [2016] ICJ 255, (Tomka, separate opinion), 311; Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) (n 180), 54; Stern, ‘La notion de préjudice juridique’ (n 11), 17; Happold, ‘“Injured State” in the Breach of a Non-Proliferation Treaty’ (n 182), 175; Crawford, *State Responsibility* (n 115), 60; Klabbers Jan, ‘Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, & Threat or Use of Force’ in Weller Marc (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 504.

¹⁸⁷ *Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, & Underwater* (adopted 5 August 1963, entered into force 10 October 1963) 480 UNTS 43, art 1.

¹⁸⁸ See De Jesús, ‘Obligations Erga Omnes’ (n 11), 200, 268; Nedeski, *Shared Obligations* (n 11) 11, 100.

¹⁸⁹ See those who view the obligation as indivisible and synallagmatic: Nedeski, *Shared Obligations* (n 11), 68 (‘The legal relationship that arises from an indivisible shared obligation is, quite literally, the mirror image of the multilateral legal relation that arises from an erga omnes obligation’). Villalpando, *La communauté internationale* (n 2), 249 (‘De par leur nature, les prérogatives des Etats en tant que membres de la communauté internationale sont interdépendantes’). See also those who view the obligation as indivisible but not synallagmatic Voeffray, *L’actio popularis* (n 2), 222 (‘La caractéristique fondamentale des obligations erga omnes est d’être indivisibles: leur contenu juridique ne peut pas être divisé en une série de relations juridiques bilatérale’), 223 (‘Par obligations erga omnes, on entend seulement celles protégeant des intérêts collectifs et qui sont dues, à chaque fois, d’une manière indivisible à l’égard de tous les membres de la collectivité’), 266 (‘Les obligations “intégrales” ne semblent rien d’autre qu’une formulation antérieure, mais de portée similaire, du concept d’obligations erga omnes’); Linderfalk Ulf, ‘International Legal Hierarchy Revisited—Status of Obligations Erga Omnes’ (2011) 80 *Nordic Journal of International law* 1, 11; Simma, ‘Bilateralism to Community Interest’ (n 3),

individually to states. Yet, while the duties are distinct, they are interrelated.¹⁹⁰ That is, they are observed or performed simultaneously to all states.¹⁹¹ A breach of duty infringes each state's corresponding right and is injured.¹⁹² Thus, every state may demand every duty's observance.¹⁹³ In other words, each state has the power to implement the wrongful state's responsibility even if it has not been 'directly affected' or 'materially damaged'. If states intended for the duties to be owed *erga omnes* or *erga omnes partes*, then every state has a correlative right and is 'injured' if the duty is breached. Consider the situation where S_0 owes duties *erga omnes* or *erga omnes partes* to S_1 , S_2 , [...], and S_n . S_0 's relations may be illustrated as: S_0 has a duty D_1 concerning object O_1 to S_1 ; S_0 has a duty D_1 concerning object O_1 to S_2 ; [...] and S_0 has a duty D_1 concerning object O_1 to S_n .¹⁹⁴ The same goes for S_2 , [...], and S_n such that S_0 has a duty D_n concerning object O_n to S_1 ; S_0 has a duty D_n concerning object O_n to S_2 ; [...] and S_0 has a duty D_n concerning object O_n to S_n . To make the illustration clearer, consider the case from creditor S_1 's perspective. The relationship between S_0 and S_1 may be illustrated as: S_0 has a duty D_1 concerning object O_1 to S_1 ; S_0 has a duty D_2 concerning object O_2 to S_1 ; [...] and S_0 has a duty D_n concerning object O_n

370. Note that solidarity is not required as indivisibility already allows all creditors to demand the duty's performance from any of the debtors (Pothier, *Law of Obligations* (n 138), 196; Hunter, *Roman Law* (n 70), 561). That said, some consider obligations involving duties owed *erga omnes* as solidary obligations: Villalpando, *La communauté internationale* (n 2), 246 ('La notion d'obligations erga omnes implique une solidarité de la situation active du rapport juridique [l'ensemble des Etats ont une prétention au sujet de la même prestation de chaque Etat oblige], mais non une solidarité de la situation passive [chaque Etat a une obligation qui lui est propre vis-à-vis de la communauté]'); Annacker, 'Legal Regime of Erga Omnes Obligations' (n 9), 141; Ragazzi, *Obligations Erga Omnes* (n 132), 9 citing Cassese Antonio, 'Note sull'opera di Giuseppe Sperdutti' (1994) 77 *Rivista di diritto internazionale* 313, 317 ('It cannot be denied that [joint and several obligations] is the basis of the [ICJ's] *dictum* on [duties owed] *erga omnes*'); Fitzmaurice Malgosia, 'International Protection of the Environment' (2001) 293 *Recueil des Cours de l'Académie de Droit International* 1, 178–9; Hutchinson, 'Solidarity & Breaches of Multilateral Treaties' (n 11), 175). Yet, solidarity arguably presents more complexity as it entails 'mutual representation [...] and agency' among creditors (See Tolentino, *Philippine Civil Code* (n 138), 227, 233; Pothier, *Law of Obligations* (n 138), 144; Hunter, *Roman Law* (n 70), 643).

¹⁹⁰ See Hunter, *Roman Law* (n 70), 561; Pothier, *Law of Obligations* (n 138), 196, 198.

¹⁹¹ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 34 ('[Duties owed *erga omnes*] are not characterised by the importance of the interest protected by the norm [...] but by the "indivisibility" of the content of the obligation [...] The rule [...] provides for [duties] which bind simultaneously every state with respect to all the others'); Villalpando, *La communauté internationale* (n 2), 242 ('Réciproquement, l'obligation erga omnes consisterait en une prestation unique, exigée par l'ordre juridique à l'Etat obligé et due à chacun des autres Etats de manière simultanée').

¹⁹² Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 45; De Jesús, 'Obligations Erga Omnes' (n 11), 186–7; Nedeski, *Shared Obligations* (n 11), 100. See Stern, 'Responsibility based on Legal Injury' (n 93), 96; Villalpando, *La communauté internationale* (n 2), 398; Barboza, 'Legal Injury' (n 11), 21; Kolb, *International Law of Responsibility* (n 126), 173; Duff, 'State Responsibility: An Outsider's View' (n 11), 80; Kawasaki, 'Injured State' (n 11), 20, 22.

¹⁹³ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 45–6; Villalpando, *La communauté internationale* (n 2), 242 ('Droits subjectifs se traduiraient en des prétentions personnelles de Etats à ce que l'obligation soit respectée (prétentions autonomes, mais liées de par leur contenu, leur objet et leur destinataire identiques)').

¹⁹⁴ See De Jesús, 'Obligations Erga Omnes' (n 11), 110, 174, 186; Nedeski, *Shared Obligations* (n 11), 100.

to S_I .

Using this framework, S_0 's relations under the norm against force may be illustrated as: S_0 has a duty *not to use force* against S_I owed to S_I ; S_0 has a duty *not to use force* against S_I owed to S_2 ; [...] and S_0 has a duty *not to use force* against S_I owed to S_n . The same goes for S_2 , [...], and S_n such that S_0 has a duty *not to use force* against S_n owed to S_I ; S_0 has a duty *not to use force* against S_n owed to S_2 ; [...] and S_0 has a duty *not to use force* against S_n owed to S_n . If S_0 unlawfully uses force against S_I , it injures S_I which would be the state 'directly affected'. Furthermore, S_0 also infringes on S_2 , S_3 , [...], and S_n 's rights as it also owes to these states the duty *not to use force* against S_I . Thus, S_2 , S_3 , [...], and S_n , are also injured.¹⁹⁵ Hence, the power to implement S_0 's responsibility is not limited to S_I but extends to S_2 , S_3 , [...], and S_n . The duty is owed *erga omnes*—in this sense that is owed 'to every' state rather than 'to all'—and each may implement the wrongful state's responsibility.¹⁹⁶ Clearly, the synallagmatic view permits the implementation of duties owed *erga omnes* or *erga omnes partes* without recourse to the non-synallagmatic approach's concept of 'states other than an injured state'.¹⁹⁷

It is important to note that the synallagmatic view also clarifies the relations among 'injured states' if a duty arising from an interdependent obligation or a duty owed *erga omnes* is

¹⁹⁵ Note that this justifies the definition of an 'injured state' by Ago, Riphagen, and Arangio-Ruiz: Ago, 'Fifth Report on State Responsibility' (1976) (n 93), 29; Riphagen, 'Fifth Report on State Responsibility' (1984) (n 10), 3; Arangio-Ruiz, 'Second Report on State Responsibility' (1989) (n 10), 6.

¹⁹⁶ De Jesús, 'Obligations Erga Omnes' (n 11), 121 ('The primary rights correlative to [duties] owed *erga omnes* are individual rights'); De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 46 ('It follows that when speaking of [duties owed] *erga omnes* the essential idea is not that the [duties] are owed to all states, but that in case of the breach of such [a duty] the corresponding rights of protection are in possession of each [...] state'); Villalpando, *La communauté internationale* (n 2), 242 ('L'obligation erga omnes consisterait en une prestation unique, exigée par l'ordre juridique à l'état obligé et due à chacun des autres Etats de manière simultanée'); Hernandez, *ICJ & Judicial Function* (n 11), 222; Duff, 'State Responsibility: An Outsider's View' (n 11), 80; Thirlway (ed), *ICJ Law & Procedure vol II* (n 11), 1151.

¹⁹⁷ Note that some authors consider that the norm against the threat or use of force is still 'bilateralisable' (See e.g. De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 46–7). Contrast this with the norms that protect human rights which several scholars consider 'absolute obligations' (See e.g. Annacker, 'Legal Regime of Erga Omnes Obligations' (n 9), 135; Tams, *Enforcing Obligations Erga Omnes* (n 3), 56–7 citing Fitzmaurice, 'Second Report on the Law of Treaties' (1957) (n 180), 54). For the avoidance of doubt, consider the conventional norm against torture. Under the Torture Convention's Article 2, states must prevent torture in 'any territory under [their] jurisdiction' (*Convention against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 2). For S_0 , a state party, its relations may be illustrated as: S_0 has a duty *to prevent torture in its jurisdiction against S_0 's citizens* owed to S_I ; S_0 has a duty *to prevent torture against S_0 's citizens in its jurisdiction* owed to S_2 ; [...] and S_0 has a duty *to prevent torture against S_0 's citizens in its jurisdiction* owed to S_n (See De Jesús, 'Obligations Erga Omnes' (n 11), 174). The same goes for S_I , S_2 , [...], and S_n such that S_0 has a duty *to prevent torture against S_n 's citizens in its jurisdiction* owed to S_I ; S_0 has a duty *to prevent against S_n 's citizens in its jurisdiction* owed to S_2 ; [...] and S_0 has a duty *to prevent torture against S_n 's citizens in its jurisdiction* owed to S_n . If S_0 fails to prevent torture against its own citizens or that of S_I , S_2 , [...], and S_n , all are 'injured' as their rights have been infringed even if they had not been 'directly affected'. Thus, all may implement the S_0 's responsibility.

breached.¹⁹⁸ As each state has a distinct right that correlates to duties arising from an interdependent obligation and duties owed *erga omnes*,¹⁹⁹ the situation still falls under 2001 Draft Article 46 which provides that ‘where several states are injured by the same [...] wrongful act, each injured state may separately [implement] the [wrongful state’s] responsibility’.²⁰⁰ This means, as Villalpando and De Jesus claim, that a state’s implementation of responsibility would not have an *inter omnes partes* effect among the ‘injured states’. A state’s implementation of the duty does not affect the relations that other ‘injured states’ have with the wrongful state.²⁰¹ Indeed, this is a feature of joint indivisible obligations under municipal law as exemplified by the fact that the release by a creditor made to the debtor ‘only concerns [the creditor]’ and the ‘debtor will not be liberated against the other [creditors]’.²⁰² Thus, in cases of conflicting claims,²⁰³ such as where a state does not implement the wrongful state’s duty,²⁰⁴ acquiesces to the wrongful state’s conduct, or waives its claim against the wrongful state,²⁰⁵ the other states’

¹⁹⁸ See ILC, ‘Report on the Work of the 52nd Session’ (2000) II(2) YbILC 13, 57 (‘It could become chaotic if a number of states began demanding different things under the rubric of state responsibility’).

¹⁹⁹ See Hunter, *Roman Law* (n 70), 561; Pothier, *Law of Obligations* (n 138), 196, 198. Compare ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 118 (‘Such cases are to be contrasted with situations where performance of the [duty] is owed generally to the parties to the treaty at the same time and is not individualised’).

²⁰⁰ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 123–4. See Crawford, *State Responsibility* (n 115), 646 (‘[2001 Draft] Article 48 and its commentary do not make express reference to a plurality of states invoking responsibility, nor does the provision refer back to [2001 Draft] Article 46 [...] Nonetheless, it is clear that multiple states could [implement] responsibility under [2001 Draft] Article 48 simultaneously, or along with states [...] under [2001 Draft] Article 42’); Huesa Vinaixa Rosario ‘Plurality of Injured States’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 952 (‘Even though the collective invocation of responsibility is not necessarily ruled out because of [2001 Draft Article 46].’)

²⁰¹ Villalpando, *La communauté internationale* (n 2), 249 (‘Indépendamment de la position de chacun’); De Jesús, ‘Obligations Erga Omnes’ (n 11), 119–21. *Contra* Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 26), 34 (‘[The consequence of the legal structure of *erga omnes* rules with regard to [...] unilateral reactions to wrongful acts is that measures adopted by a state vis-a-vis a wrongdoing state infringes not only the right of the latter but also the rights of all the other parties to which the rule infringed applies’); Sachariew, ‘Identifying the “Injured State”’ (n 3), 282 (‘Such a claim—even if put forward by an individual party—has an *inter omnes partes* effect, and remains essentially integral by its nature since its fulfilment may be effected only towards all parties and not just towards the claimant state’).

²⁰² Pothier, *Law of Obligations* (n 138), 198, 201.

²⁰³ See Huesa Vinaixa, ‘Plurality of Injured States’ (n 200), 953 (‘[In] the case of breaches of [interdependent obligations and] collective obligations [...] the risk of divergence between the members of the group is even higher’)

²⁰⁴ De Jesús, ‘Obligations Erga Omnes’ (n 11), 120–1. See Urs, ‘Question of Standing before the ICJ’ (n 94), 18 (‘The [ILC] neither affirmed nor denied the continued availability of [2001 Draft] Article 48 where an injured state has lost its right to [implement] responsibility’) citing ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 122;

²⁰⁵ De Jesús, ‘Obligations Erga Omnes’ (n 11), 120–1; Villalpando, *La communauté internationale* (n 2), 246. See Crawford, *State Responsibility* (n 115), 563 (‘A waiver or settlement by an individual state relying on [2001 Draft] Article 48 would not have the same effect, as that state’s entitlement to claim is secondary to the entitlement of the injured state’); Pauwelyn Joost, ‘Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 *European Journal of International Law* 907, 921 (‘The mere waiver of the underlying substantive rights of ‘specially affected’ parties should not impair or extinguish the rights of the other parties’). But see Tams Christian, ‘Waiver, Acquiescence, & Extinctive Prescription’ in Crawford James, *et*

rights are unaffected.

The synallagmatic view also sheds light on the issue of indispensable parties and the participation of ‘specially-affected’ states’ when it comes to judicial dispute resolution.²⁰⁶ Again, the right-duty relations between states and the wrongful state, albeit related, remain distinct.²⁰⁷ States seeking to implement a duty arising from an interdependent obligation or a duty owed *erga omnes* do not act in conjunction with nor on other states’ behalf—they implement their individual rights.²⁰⁸ This means that courts would only deal with the relations between the parties to the case—the implementing and wrongful state. Their decisions do not necessarily affect the legal relations which states that are not parties to the case have with the wrongful state.²⁰⁹ Thus, the non-participation of other ‘injured’ states, including the ‘specially-affected’ state, does not render the dispute inadmissible.²¹⁰ In any case, the other states’ rights are protected by *res judicata*’s relative effect.²¹¹

al. (eds), *Law of International Responsibility* (Oxford University Press 2010), 1041 (‘A valid waiver by the individually injured State would also extinguish all claims that ‘other interested States’ have under [2001 Draft Article 48]’)

²⁰⁶ See Urs, ‘Question of Standing before the ICJ’ (n 94), 18 (‘[The ILC] did not overlook that the entitlement of a state acting under [2001 Draft] Article 48 “will coincide with that of an injured state [...] but did not conclusively address the issue”) citing ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 126. *But see* Crawford, *State Responsibility* (n 115), 366–7 (‘Even though every state may have legitimate concerns at some breach of an international [duty], particular states may be particularly injured or affected by it, and their priority when it comes to reactions should be recognised’); Peel, ‘New State Responsibility Rules & Environmental Obligations’ (n 128), 88 (‘A state as specially affected [has] priority over those of states with a more general interest in the protection of the affected environment. [But] where [injury is caused] to common areas or resources, the priority given to the rights of specially affected states does not seem as well founded. In such a case, states [seeking to implement the duty] [...] are invoking their [individual] rights’).

²⁰⁷ See *East Timor* [1995] (n 12) (Weeramantry, dissenting), 172 (‘These rights are in no way dependent one upon the other [...] the rights enjoyed *erga omnes* become *opposable erga singulum* to the state so acting’)

²⁰⁸ Villalpando, *La communauté internationale* (n 2), 249; De Jesús, ‘Obligations Erga Omnes’ (n 11), 119–21.

²⁰⁹ See Proulx Vincent-Joël, ‘World Court’s Jurisdictional Formalism & its Lost Market Share: Marshall Islands Decisions & the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes’ (2017) 30 *Leiden Journal of International Law* 925, 942 citing *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v UK) (Preliminary Objections) [2016] ICJ 833 (Tomka, separate opinion), 898.

²¹⁰ See *Monetary Gold Removed from Rome in 1943* (Italy v France, UK, & US) (Judgment) [1954] ICJ 2, 32; *Military & Paramilitary Activities in & against Nicaragua* (Nicaragua v US) (Jurisdiction & Admissibility) [1984] ICJ 14, 392; *Certain Phosphate Lands in Nauru* (Nauru v Australia) (Judgment) [1992] ICJ 240, 240. See also Chinkin Christine, ‘East Timor Case (Portugal v Australia)’ (1996) 45 *International & Comparative Law Quarterly* 712, 717–9

²¹¹ See *East Timor* [1995] (n 12), 172–3 cited in Urs, ‘Question of Standing before the ICJ’ (n 94), 18. See also *Continental Shelf* (Libya/Malta) (Application to Intervene by Italy) [1984] ICJ 3, 15; *Territorial & Maritime Dispute* (Nicaragua v Colombia) (Application to Intervene by Costa Rica) [2011] ICJ 348, 372. *Contra* ‘Application to Intervene of Australia’, *Request for Examination of Nuclear Test* (New Zealand v France) (Intervention) (ICJ, General List No 97, 23 August 1995), 10 (‘The Court would [...] be required to pronounce on the rights of all states’).

IV. CONCEPTUAL & PRACTICAL IMPLICATIONS OF THE SYNALLAGMATIC VIEW

The previous section demonstrated that the synallagmatic view properly accommodates the implementation of duties owed *erga omnes*. This section stresses the view's merits. It will also show that the synallagmatic view works with the present legal order's reality as observed in *Chapter 10* and *Part II*. It does not require the concept of a 'community' to whom duties may be owed and on whose behalf states may act or the 'public law' construction of the international legal system.

A. Conceptual Implications

The synallagmatic approach's value lies in the simplicity and certainty of its application.²¹² It subscribes to the 'Occam's Razor'—'the unprovable rule of "parsimony" that requires each analyst to adopt as a rule and apply to reality the simplest generality with fewest exceptions'.²¹³ It dispenses with the subjective and problematic examination of the importance of the interest that a norm safeguards,²¹⁴ or the commonality of states' interest in the observance or performance of the duties the norm imposes,²¹⁵ to determine if all states have the competence to implement the duties it imposes. The analysis focuses on the obligation itself and the legal relations that states intended to create.²¹⁶ Thus, it re-characterises the concept of duties owed *erga omnes*. These are not duties that 'by their very nature [and] in view of the importance of the rights involved' are the 'concern of all states' such that 'all can be held to have a legal interest in their protection'.²¹⁷ Rather, as scholars like Hillgruber submit, they are duties that states have intended,²¹⁸ due to the importance of the interests that norms imposing these duties

²¹² See De Jesús, 'Obligations Erga Omnes' (n 11), ('[It] brings clarity to a subject mired in terminological imprecision and unwarranted generalisations').

²¹³ Rubin Alfred, 'Actio Popularis, Jus Cogens, & Erga Omnes' (2001) 35 *New England Law Review* 265, 265.

²¹⁴ See Kolb Robert, *Peremptory International Law—Jus Cogens: A General Inventory* (Hart 2020), v; Focarelli Carlo, *International Law as Social Construct: Struggle for Global Justice* (Oxford University Press 2012), 470.

²¹⁵ See Ruys Tom, 'Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?' (2021) 20 *Chinese Journal of International Law* 457, 467; Mao Xiao, 'Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case' (2002) 21 *Chinese Journal of International Law* 589, 598

²¹⁶ Hillgruber, 'Third States & Countermeasures' (n 42), 271–2. De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 37; Voefray, *L'actio popularis* (n 2), 328. See Weil, 'Towards Relative Normativity' (n 14), 421.

²¹⁷ *Barcelona Traction* [1970] (n 34), 32.

²¹⁸ Hillgruber, 'Third States & Countermeasures' (n 42), 272; Byers, 'Jus Cogens & Erga Omnes' (n 3), 233; Bradley Marthe, 'Jus Cogens' Preferred Sister: Obligations Erga Omnes & the International Court of Justice' in Tladi Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (BRILL 2021), 203. See Paulus

protect,²¹⁹ or because of states' common interests in these duties' observance or performance,²²⁰ to be owed indivisibly to every state.²²¹

The approach permits the orderly implementation of duties owed *erga omnes*. For Weiss and Stern, it 'facilitates [the] precise identification of who has a right, [...] against whom, and who may [implement] it'.²²² If a duty owed *erga omnes* is breached then all states are 'injured' in the sense that their rights have been infringed.²²³ Every state may implement the wrongful state's responsibility by relying on its right, instead of a 'legal interest', and in its capacity, rather than on behalf of the international community.²²⁴ Furthermore, the approach also 'strengthens the implementation' of international [duties].²²⁵ By attributing to each state a subjective right arising from duties owed *erga omnes*, there 'would never be a situation where there [are] no "injured states" but only "states other than an injured state" or "where there would be both "injured states" and "states other than an injured state"'.²²⁶ There would be no 'responsibility in a vacuum'.²²⁷ There would always be 'one or more "injured states"' suffering legal [or material] injury' and states that may 'demand [...] the re-establishment of the legal

Andreas, 'Whether Universal Values can Prevail over Bilateralism & Reciprocity' in Cassese Antonio (ed), *Realising Utopia: Future of International Law* (Oxford University Press 2012), 91. Lekhi Pranay, 'Nuclear Problem: A Communitarian Response' (2021) 68 *Netherlands International Law Review* 89, 100

²¹⁹ Hillgruber, 'Third States & Countermeasures' (n 42), 271; Sartipi Hossein & Hojatzadeh Ali Reza, 'Erga-Omnisation of International Law' (2018) 2 *International Journal of Humanities & Social Science Studies* 189, 222; Linderfalk, 'Legal Hierarchy Revisited' (n 189), 10.

²²⁰ *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ 422 (Skotnikov, separate opinion), 484; (Xue, dissenting), 575.

²²¹ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 45. See Nedeski, *Shared Obligations* (n 11), 100–2; De Jesús, 'Obligations Erga Omnes' (n 11), 186, 231. See also Villalpando, *La communauté internationale* (n 2), 246; Ragazzi, *Obligations Erga Omnes* (n 132), 9; Hutchinson, 'Solidarity & Breaches of Multilateral Treaties' (n 11), 175.

²²² Weiss, 'Invoking State Responsibility' (n 11), 801 ('This theory provides a [precise ordering] of international law [and] it makes it relatively easy to identify who has the obligation and who the right of invocation'); Stern, 'La notion de préjudice juridique' (n 11), 32–3. See Eleftheriadis, *Legal Rights* (n 52), 72 ('Identifying rights as claims that are correlative to duties [provides for the precise determination of] the claim-holder and the duty-bearer'), 117 ('Identifying a claim-holder specifies the person[s] who can call upon legal institutions to recognise the authoritative force and, if necessary, the remedial consequences of the legal duty').

²²³ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 45; De Jesús, 'Obligations Erga Omnes' (n 11), 186–7; Nedeski, *Shared Obligations* (n 11), 100. See Stern, 'Responsibility based on Legal Injury' (n 93), 96; Villalpando, *La communauté internationale* (n 2), 398; Barboza, 'Legal Injury' (n 11), 21; Kolb, *International Law of Responsibility* (n 126), 173; Duff, 'State Responsibility: An Outsider's View' (n 11), 80; Kawasaki, 'Injured State' (n 11), 20, 22.

²²⁴ De Jesús, 'Obligations Erga Omnes' (n 11), 121; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 46; Villalpando, *La communauté internationale* (n 2), 242.

²²⁵ Villalpando, *La communauté internationale* (n 2), 284.

²²⁶ Stern, 'Responsibility based on Legal Injury' (n 93), 102.

²²⁷ De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 19; Ahmadov, *Actio Popularis* (n 30), 61 noting Crawford, 'First Report on State Responsibility' (1998) (n 78), 30.

order'.²²⁸

Scholars like Stern also submit that the approach eliminates the 'laborious distinction' among 'injured states', 'specially affected states', and 'states other than an injured state'.²²⁹ Under the synallagmatic approach, there are no 'third states', 'indirectly affected states', or 'states other than an injured state'. There are only 'injured states'.²³⁰ It thus allows for the 'reunification of the concept of responsibility' which under the 2001 Draft Articles 'seems split between different elements that it is difficult to regroup'.²³¹ As there are only 'injured states', 2001 Draft Article 48 may be removed and 2001 Draft 42 may be simply rephrased, as it was under 1984 Draft Article 5/1996 Draft Article 40, as 'any state whose right is infringed by the act of another'.²³² This permits every state to invoke responsibility through actions of a 'relatively formal character' such as judicial dispute resolution,²³³ and enforce duties owed *erga omnes* via unilateral measures including countermeasures.²³⁴

Finally, contrary to the view of authors like Simma that the synallagmatic approach constitutes a 'barrier in the way of stronger solidarity' among states,²³⁵ the approach actually fosters 'greater solidarity'.²³⁶ Indeed, for Stern and Eleftheriadis, 'solidarity is implied' in 'the

²²⁸ Stern, 'La notion de préjudice juridique' (n 11), 30 ('Il y aurait toujours un État lésé [...] subissant un préjudice juridique, seul ou accompagné d'un préjudice matériel et/ou moral; et il y aurait donc toujours un État lésé [...] pouvant demander à titre de réparation, en son nom, au nom d'un groupe d'États ou au nom de la communauté internationale, le rétablissement de l'ordre juridique violé, seul ou accompagné de la réparation d'un préjudice matériel ou et/moral').

²²⁹ Ibid, 30.

²³⁰ Stern, 'Responsibility based on Legal Injury' (n 93), 96; Villalpando, *La communauté internationale* (n 2), 289; Dupuy, 'Deficiencies of State Responsibility' (n 36), 215; Kolb, *International Law of Responsibility* (n 126), 173.

²³¹ Stern, 'La notion de préjudice juridique' (n 11), 30; Nissel, 'Self-Help & Solidarity' (n 1), 367.

²³² Fernandez, 'Invocation of State Responsibility' (n 129), 853 *citing* Kawasaki, 'Injured State' (n 11), 23.

²³³ ILC, 'Report on the Work of the 53rd Session' (2001) (n 9), 117, 126–7.

²³⁴ See Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 47. *Note* that should states still reserve the competence to states that have suffered legal injury and material damage, 2001 Draft Article 54 could be revised as the 'chapter [on countermeasures] [...] does not prejudice the [competence] of ['injured] states [that have not suffered material damage] to [implement] the [wrongful state's responsibility] and to take [countermeasures] against that state' (See Stern, 'La notion de préjudice juridique' (n 11), 31: Mais un tel résultat aurait pu être atteint [...] oit en indiquant que les contre-mesures ne sont pas à la disposition des États qui ne subissent qu'un préjudice juridique').

²³⁵ Simma, 'Bilateralism & Community Interest' (n 4), 822; Crawford, 'Multilateral Rights & Obligations' (n 4), 422; Paulus, 'Reciprocity Revisited' (n 4), 123.

²³⁶ Stern, 'La notion de préjudice juridique' (n 11), 16 ('Le bilatéralisme peut, à mon avis, être utilisé fonctionnellement pour développer une plus grande solidarité entre les États [...] Si l'on reconnaît en effet l'existence d'intérêts collectifs en l'absence de personnification de la communauté internationale, il est possible de considérer que chacun de ses éléments constitutifs de base—à savoir chacun des États qui composent cette communauté—est dépositaire de ces intérêts collectifs et comptable de leur respect par tous les autres États.'); Eleftheriadis, *Legal Rights* (n 52), 118 ('The correlativity of all instances of law aims at the same ideal. It makes legal rules sufficiently public').

recognition of a subjective right which is specific to each [state] but whose object is in essence collective'.²³⁷ States do not only possess an 'interest' in the duties owed *erga omnes* observance nor are merely 'affected' in their interests when these duties are breached. Rather, each state has a right that is injured by the wrongful act.²³⁸ It no longer acts as the community's 'policeman' or 'trustee'—a notion, as shown in *Chapter 3* and *Part II*, that several states deem problematic or unacceptable. As Stern puts it, the duties are truly owed *erga omnes* such that they are 'imposed to each [state]' and every state 'is accountable to all others' in 'complying with these fundamental duties'.²³⁹

B. Practical Implications

The synallagmatic approach's re-examination is more than an intellectual exercise. The conception of 'responsibility relations', as Crawford observes, affects the 'legal system and the security of legal transactions'.²⁴⁰ The rules on the implementation rely on the structure of the relations that norms create.²⁴¹ In turn, this structure depends on the premises concerning the legal order it seeks to govern.²⁴² For the rules to be effective, their premises must, according to scholars like Villalpando, reflect the current 'social reality'.²⁴³ As discussed in *Chapters 2, 3,*

²³⁷ Villalpando, *La communauté internationale* (n 2), 242 ('La solidarité communautaire impliquait, à notre sens, la reconnaissance d'une situation subjective qui est propre à chacun des membres du groupe social international, mais dont l'objet est en substance collectif').

²³⁸ De Jesús, 'Obligations Erga Omnes' (n 11), 121; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 46; Villalpando, *La communauté internationale* (n 2) 2, 242; Hernandez, *ICJ & Judicial Function* (n 11), 222; Duff, 'State Responsibility: An Outsider's View' (n 11), 80; Thirlway (ed), *ICJ Law & Procedure vol II* (n 11), 1151.

²³⁹ Stern, 'La notion de préjudice juridique' (n 11), 29 ('Si l'approche ici proposée avait été retenue, il y aurait eu là reconnaissance d'une solidarité forte, de la fusion de tous les États dans le concept de communauté internationale, de l'affirmation qu'une atteinte portée au tout est une atteinte portée à chaque partie et que chaque partie est redevable à l'égard de toutes les autres du respect des normes essentielles du droit international') noting Kolliopoulos Alexandros, *La Commission d'indemnisation des Nations Unies et le droit de la responsabilité internationale* (Librairie générale de droit et de jurisprudence 2001), 333.

²⁴⁰ Crawford, 'Multilateral Rights & Obligations' (n 4), 346.

²⁴¹ Ibid, 346–8. See Villalpando, *La communauté internationale* (n 2), 229.

²⁴² Crawford, 'Multilateral Rights & Obligations' (n 4), 345. See Weil, 'Towards Relative Normativity' (n 14), 413

²⁴³ Villalpando, *La communauté internationale* (n 2) 2, 200 ('réalité sociale'). See Abi-Saab Georges, 'Whither the International Community' (1998) 9 *European Journal of International Law* 248, 256 ('The success of legal regulation [...] depends on the verification of the presumption underlying [the] approach'); Friedmann Wolfgang, *Changing Structure of International Law* (Columbia University Press 1964), 3 ('As the purpose of law is the ordering of social relations, every legal system must reflect the principles of the social order that it seeks to regulate'); Weil, 'Towards Relative Normativity' (n 14), 442 ('It is impossible to approve them insofar as they are aiming to set up [...] a normative system that the present structures of international society are not ready to accommodate'); Ghering Markus, 'Treaty-Making & Evolution' in Bodansky Daniel, *et al.* (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2008), 469 ('If social norms are to be used to change an undesirable status quo, they must be moulded prior to the action that they are intended to guide'). See also Slaughter Anne-Marie, 'International Law & International Relations Theory: A Prospectus' in Benvenisti Eyal &

and 10, the rules on the implementation of duties owed *erga omnes* under the 2001 Draft Articles, arguably based on the synallagmatic approach's misappreciation, necessitated the resort to the concept of an 'international community' to whom duties may be owed and on whose behalf states may act and the international order's 'public' structure. Yet, *Part II*'s analysis of state practice and *opinio juris*, as reiterated in *Chapter 10*, demonstrates that these concepts' premises do not reflect the order's present reality.

The synallagmatic approach does not depend on these concepts. It acknowledges the systems' limitations: decentralisation and the lack of an 'all-purpose representative',²⁴⁴ a 'society' that is 'segmentally differentiated' having 'profoundly divergent interests and antagonist values';²⁴⁵ and an 'ill-defined' community that does not constitute 'an entity that can be individualised',²⁴⁶ 'express its own will', and 'hold the collective interest'.²⁴⁷ It recognises that the present system is more akin to 'domestic private law' that 'concerns "horizontal" dealings between individuals'.²⁴⁸ Borrowing Judge Higgins' words, the approach 'works with the seams of political and institutional realities and not against the grain'.²⁴⁹ It recognises that the 'protection of community interests' must be 'effected through the adaptation, not the abandonment, of the existing legal regime'.²⁵⁰

Hirsch Moshe (eds), *Impact of International Law on International Cooperation* (Cambridge University Press 2004), 17; Hofer Alexandra, 'Negotiating International Public Policy through Adoption & Contestation of Sanctions' (2017) 50 *Revue Belge de Droit International* 440, 442 citing Gowlland-Debbas W, 'An Emerging International Public Policy?' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 244

²⁴⁴ Crawford James, 'Responsibility to the International Community as a Whole' (2001) 8 *Indiana Journal of Global Legal Studies* 303, 344. See also Hernandez, *ICJ & Judicial Function* (n 11), 206.

²⁴⁵ Cohen Jean, 'Sovereignty in the Context of Globalisation: A Constitutional Pluralist Perspective' in Besson Samantha & Tasioulas John (eds), *Philosophy of International Law* (Oxford University Press 2010), 262; Ahmadov, *Actio Popularis* (n 30), 27; Kolb, *Theory of International Law* (n 28), 271 citing Luard Evan, *International Society* (Macmillan 1990), 6–10; Schaumburge-Müller Sten, 'To What Extent does International Law Obstruct the Protection of Common Interests?' in Benedek Wolfgang, *et al.* (eds), *Community Interest in International Law* (Intersentia 2014), 46; Ago Roberto, 'Pluralism & the Origins of the International Community' (1977) 3 *Italian Yearbook of International Law* 3, 24.

²⁴⁶ *Arrest Warrant* [2002] (n 1) (Guillaume, separate opinion), 44.

²⁴⁷ Villalpando, *La communauté internationale* (n 2), 243, 249 citing Cahier Philippe, 'Changements et continuité du droit international' (1985) 195 *Recueil des Cours de l'Académie de Droit International* 9, 96. See Focarelli Carlo, 'International Law & Third-Party Countermeasures in the Age of Global Instant Communication' (2016) 29 *Questions of International Law* 18, 21.

²⁴⁸ See Duff, 'State Responsibility: An Outsider's View' (n 11), 71–2, 73, 75–6. See also Lauterpacht Hersh, *Private Law Sources and Analogies of International Law* (Longmans 1927), 81; Murase Shinya, 'Perspectives from International Economic Law on Transnational Environmental Issues' (1995) 253 *Recueil des Cours de l'Académie de Droit International* 283, 299.

²⁴⁹ See Higgins Rosalyn, 'A Comment on the Current Health of Advisory Opinions' in Lowe Vaughan & Fitzmaurice Malgosia (eds), *Fifty Years of the ICJ: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 2009), 580.

²⁵⁰ Villalpando Santiago, 'Legal Dimension of the International Community: How Community Interests are

In doing so, the approach increases the possibility that it would be accepted by states. Recall that the competence to implement, based on the ‘exact correlation’ between rights and duties, has been the ‘traditional’ view of ordering legal relations.²⁵¹ States do not consider this problematic *per se*.²⁵² The same may be said about the concept of indivisible obligations. States have recognised this under the VCLT when it comes to responding to material breaches of some agreements,²⁵³ and under the 2001 Draft Articles in implementing certain duties.²⁵⁴ Thus, all that is left is for states to accept the claim that duties owed *erga omnes* may be viewed as a series of joint indivisible obligations.

Perhaps crucially, the synallagmatic view also addresses some of the states’ concerns regarding the implementation of duties owed *erga omnes* by states that have only suffered ‘legal injury’. As observed in *Part II*, several states have accepted the competence to implement duties owed *erga omnes* absent ‘material damage’. Some sought to invoke the wrongful state’s responsibility via judicial dispute resolution.²⁵⁵ Others asserted the competence to enforce the

Protected in International Law’ (2010) 21 *European Journal of International Law* 387, 410. See Weil, ‘Towards Relative Normativity’ (n 14), 441 (‘[I]t is impossible to approve them insofar as they are aiming to set up here and now a normative system that the present structures of international society are not ready to accommodate’), 442 (‘By seeking to create today the law of tomorrow’s international society, one runs the risk of cutting a key that will not fit the lock it will have to open’); Ragazzi, *Obligations Erga Omnes* (n 132), xii (‘While the evolution of the concept of [duties owed] *erga omnes* may sooner or later induce [the reconsideration of] current theories [...] [the] exercise can only be undertaken when the time is ripe’); Grotius Hugo, *The Rights of War & Peace*, vol I, Tuck Richard (tr) (Liberty Fund 2005), 78.

²⁵¹ Simma, ‘Bilateralism to Community Interest’ (n 3), 231; Focarelli, ‘International Law & Third-Party Countermeasures’ (n 247), 466; Villalpando, *La communauté internationale* (n 2), 240.

²⁵² See e.g. UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 19th Meeting’ (3 November 1998) UN Doc A/C.6/53/SR.19, 4 (Singapore); ILC, ‘State Responsibility: Comments & Observations of Governments, 50th Session’ (1998) UN Doc A/CN.4/488, 104 (Italy), 139 (Singapore), 141 (Switzerland), 142 (US).

²⁵³ See *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331, art 60(2)(c).

²⁵⁴ See e.g. UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 55th Session’ (2001) (n 12), 26; UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 12th Meeting’ (2001) (n 12), 9 (Australia); UNGA, Sixth Committee, ‘Summary Record of the 56th Session, 14th Meeting’ (1 Nov 2001) UN Doc A/C.6/56/SR.14, 7 (India). See also ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 12), 73 (Mexico), 74 (Japan). But see 76–7 (US), 77 (South Korea).

²⁵⁵ See *Southwest Africa* [1962] (n 34), 343; *Southwest Africa* [1966] (n 38) 39, 41–2, 47; ‘Memorial of Australia’, *Nuclear Tests* (Australia v France) (Jurisdiction & Admissibility) (ICJ, General List No 58, 23 November 1973), 332–43; ‘Memorial of New Zealand’, *Nuclear Tests* (New Zealand v France) (Jurisdiction & Admissibility) (ICJ, General List No 58, 29 October 1973), 203–4; ‘Memoire du Portugaise’, *East Timor* (Portugal v Australia) (Judgement) (ICJ, General List No 84, 18 November 1991), 9–11; ‘Memorial of Belgium’, *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Merits) (ICJ, General List No 144, 1 July 2010), 53 ff; ‘Memorial of Australia’, *Whaling in the Antarctic* (Australia v Japan) (Merits) (ICJ, General List No 148, 9 March 2012), 16, 50–1, 84; ‘Memorial of the Marshall Islands’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v the UK) (Preliminary Objections) (ICJ, General List no 160, 16 March 2015) 19, 21, 46–8, 98; ‘Memorial of the Marshall Islands’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v India) (Preliminary Objections) (ICJ, General List no 158, 16 December 2014),

duty via unilateral measures including countermeasures.²⁵⁶ In this regard, the synallagmatic approach, by ‘investing [each state] with a subjective right’ that correlates to the duty owed *erga omnes*, permits every state to implement responsibility should a duty owed *erga omnes* be breached.²⁵⁷

However, many states have not adopted this practice or have opposed this competence. First, as observed in *Chapter 3* and *Part II*, some have claimed that without ‘material damage’, states do not have the competence to implement another’s responsibility via judicial dispute resolution,²⁵⁸ let alone impose countermeasures.²⁵⁹ The synallagmatic view addresses this concern by clarifying the basis of states’ competence to implement duties owed *erga omnes*. It

5, 11; ‘Memorial of the Marshall Islands’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v Pakistan) (Preliminary Objections) (ICJ, General List no 159, 12 January 2015), 5, 9, 13–6, 20–1, 25; ‘Application’, *Application of the Genocide Convention* (The Gambia v Myanmar) (ICJ, General List No 178, 11 November 2019), ¶15; ‘Joint Application Instituting Proceedings’, *Application of the Torture Convention* (Canada & The Netherlands v Syria) (ICJ, General List No 188, 8 June 2023), 3; ‘Application’, *Application of the Genocide Convention in Gaza* (South Africa v Israel) (ICJ, General List No 192, 28 December 2023), 3, 6, 9, 78 (‘South Africa [...] seeks to protect its own right [under] the [...] Convention’).

²⁵⁶ See e.g. UNGA, ‘Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report’ (21 October 1999) UN Doc A/54/486, 4 (US); UNGA, Second Committee, ‘Summary Record of the 66th Session, 37th Meeting’ (1 December 2011) UN Doc A/C.2/66/SR.37, 3–4 (US); Council of the EC, ‘Arab Economic Boycott of Israel (A3-0239/93)’ (16 November 1993) C 329/47, 48; UNGA, ‘Verbatim Record, 55th Session, 41st Meeting’ (26 October 2000) UN Doc A/55/PV.41, 23 (France on behalf of the EU); Council of the EU, ‘Council Decision (CFSP) 2020/1999’ (7 December 2020) LI 410/13; Cm 9403, *Consultation on the UK’s Legal Framework for Imposing & Implementing Sanctions* (2017) (UK), 7; No 28, 2011, *Autonomous Sanctions Act* (2011) (AUS), Explanatory Memorandum; Canada Ministry of Foreign Affairs, ‘Government Response to the Seventh Report of the Standing Committee on Foreign Affairs and International Developmental’ (17 July 2017), 2.

²⁵⁷ Barboza, ‘Legal Injury’ (n 11), 20; Stern, ‘La notion de préjudice juridique’ (n 11), 31; De Jesús, ‘Obligations Erga Omnes’ (n 11), 121; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 11), 46; Villalpando, *La communauté internationale* (n 2), 242; Hernandez, *ICJ & Judicial Function* (n 11), 222; Duff, ‘State Responsibility: An Outsider’s View’ (n 11), 80; Thirlway (ed), *ICJ Law & Procedure vol II* (n 11), 1151.

²⁵⁸ See e.g. ‘Preliminary Objections’, *Southwest Africa* (Preliminary Objections) (ICJ, General List Nos 46 & 47, 30 November 1961), 213 (‘Does not affect any material interests of the applicant states or their nationals’); ‘Verbatim Record 2019/19’, *Application of the Genocide Convention* (The Gambia v Myanmar) (Provisional Measures) (ICJ, General List No 178, 11 December 2019), 53 (Myanmar) (‘The Gambia also has [no] standing to bring a case before the Court in respect of a claimed breach by Myanmar, without being specially affected’)

²⁵⁹ See e.g. UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 34th Meeting’ (7 November 1996) UN Doc A/C.6/51/SR.34, 8 (Austria); UNGA, Sixth Committee, ‘Summary Record of the 51st Session, 36th Meeting’ (1996) (n 12), 16 (Iran); 14 (Bulgaria); UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 51st Session’ (1997) (n 12), 11, 17; UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 52nd Session’ (20 January 1998) UN Doc A/CN.4/483, 14; UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 20th Meeting’ (4 November 1998) UN Doc A/C.6/52/SR.20, 4 (Iran); UNGA, Sixth Committee, ‘Summary Record of the 52nd Session, 23rd Meeting’ (5 December 1997) UN Doc A/C.6/52/SR.2, 3 (Slovenia); UNGA, Sixth Committee, ‘Summary Record of the 53rd Session, 21st Meeting’ (5 November 1998) UN Doc A/C.6/53/SR.21, 6 (India); ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 252), 100 (US), 101 (France); UNGA, ‘Topical Summary of the Discussion of the Sixth Committee, 53rd Session’ (16 February 1999) UN Doc A/CN.4/496, 13, 18; UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 14th Meeting’ (23 October 2000) UN Doc A/C.6/55/SR.14, 8 (China); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 15th Meeting’ (2000) (n 12), 10 (Botswana); ILC, ‘Comments & Observations of Governments, 53rd Session’ (2001) (n 12), 79 (China); UNGA, Sixth Committee, ‘Summary Record of the 55th Session, 22nd Meeting’ (1 November 2000) UN Doc A/C.6/55/SR.22, 8 (Libya).

demonstrates that the prerogative to demand a duty's fulfilment or observance does not depend on the existence of 'material damage'.²⁶⁰ What is relevant, as stressed in *Sections II* and *III*, is if a state has a right that has been infringed.²⁶¹ Holding a right implies an affirmative claim to 'receive something' or an entitlement to a conduct's performance or observance.²⁶² If that right is infringed by a breach of duty, its holder has the 'power' to 'call on the [duty bearer] to act in a certain way'.²⁶³ Thus, 'injured' states have the competence to implement the wrongful state's responsibility through 'whatever means [...] available',²⁶⁴ such as invocation as in the case of judicial dispute resolution or enforcement via unilateral measures including countermeasures.

Second, as shown in *Chapter 3* and *Part II*, many states have also claimed that states may not unilaterally act on behalf of the international community or other states to implement duties owed *erga omnes*. Indeed, some have stressed the need for collective decisions for the invocation of responsibility via judicial dispute resolution.²⁶⁵ Likewise, many states have done the same for the enforcement of duties owed *erga omnes* through unilateral measures,²⁶⁶ and

²⁶⁰ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 45.

²⁶¹ Stern, 'Responsibility based on Legal Injury' (n 93), 96; Dupuy, 'Deficiencies of State Responsibility' (n 36), 215.

²⁶² Hohfeld, *Fundamental Legal Conceptions* (n 30), 7, 36–8; Dworkin, *Taking Rights Seriously* (n 59), 17; Eleftheriadis, *Legal Rights* (n 52), 122 citing Kelsen, *General Theory of Law & State* (n 73), 82. Postema, *Legal Philosophy* (n 52), 99.

²⁶³ Postema, *Legal Philosophy* (n 52), 102; Villalpando, *La communauté internationale* (n 2), 244.

²⁶⁴ See ILC, 'Summary Records of the 16th Session' (1964) (n 56), 84 (Rosenne). Note Annacker, 'Legal Regime of Erga Omnes Obligations' (n 9), 161 ('The fact that [duties owed] *erga omnes* [...] create tertiary rights in all states bound by the norm does not say anything about the means of redress available [...] The availability of a particular remedy depends on the conditions formulated by [...] law') citing Silagi M, 'Die Popularklage als Fremdkörper im Völkerrecht' (1978) 4 *South African Yearbook of International Law* 10, 16; Morelli Gaetano, 'La théorie générale du procès international' (1937) 61 *Recueil des Cours de l'Académie de Droit International* 253, 363; Scerni Mario, 'La procédure de la cour permanente de justice internationale' (1938) 65 *Recueil des Cours de l'Académie de Droit International* 561, 577.

²⁶⁵ 'Counter-Memorial of Australia', *East Timor* (Portugal v Australia) (Judgment) (ICJ, General List No 84, 1 June 1992), 119 ('To allow states to proceed [...] in the absence of a collective decision would lead to action of a highly subjective character'); 'Counter-Memorial of Japan', *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Merits) (ICJ, General List No 148, 9 March 2012), 53 ('Australia [...] has made no attempt to explain its *jus standi* in respect to its application to the Court') 'Counter-memorial of Pakistan', *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v Pakistan) (Preliminary Objections) (ICJ, General List no 159, 1 December 2015), 8, 18 ('[The Marshall Islands] has not presented [...] evidence of [...] [its] very standing on behalf of the international community [...] these proceedings').

²⁶⁶ Hofer Alexandra, 'Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 *Chinese Journal of International Law* 1, 17. See e.g. UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (11 September 2003) UN Doc A/58/301, 4 (Costa Rica); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (12 August 2005) UN Doc A/60/226, 9 (Panama); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (14 July 2011) UN Doc A/66/138, 7 (Egypt), 8 (Gabon), 10 (Mauritius), 11 (Mexico); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (29 July 2013) UN Doc A/68/218, 5 (Brazil); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (31 July 2019) UN Doc A/74/264, 11 (Russia); 13 (South

have expressed preference for collective measures.²⁶⁷ As discussed in *Chapter 10*, this is hardly surprising. Permitting states to unilaterally act on the community's behalf or that of other states, given states' divergent interests presents an issue of legitimacy.²⁶⁸ The synallagmatic approach does not present this issue as it does not require states to act *uti universi*. Instead, states act in their individual capacity to vindicate their individual rights that correlate to duties owed *erga omnes* which the wrongful state infringed.²⁶⁹

Finally, many states have also highlighted the issue of risk of abuse that the general competence to implement duties owed *erga omnes* poses. While some states, as observed in *Part II*, consider the competence of every state to implement duties owed *erga omnes* as desirable and appropriate as they 'serve higher values',²⁷⁰ others are concerned with the prerogative's potential for abuse. Indeed, many states have repeatedly condemned the unilateral measures taken by the 'minority of the powerful states' purporting to act on the community's behalf.²⁷¹ This is understandable considering that allowing every state to implement duties owed *erga omnes* may open the 'floodgates' to litigation,²⁷² and enforcement measures.²⁷³ However, it must be pointed out that as for the invocation of responsibility via judicial dispute resolution, the risk posed by the synallagmatic approach does not differ from the present regime under the 2001 Draft Articles. All that differs is the basis for the competence to implement—individual right rather than 'legal interest'. As to enforcement via unilateral measures, this thesis acknowledges that these measures 'could turn into a powerful weapon in the hands of

Africa), 19 (Turkey); UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (30 August 2021) UN Doc A/76/310, 7 (Iran), 14 (South Africa). *See also* HRC, 'Human Rights & Unilateral Coercive Measures: SG Report' (15 August 2010) UN Doc A/HRC/15/43, 6 (Russia); UNGA, 'Human Rights & Unilateral Coercive Measures: SG Report' (5 August 2011) UN Doc A/66/272, 7 (Burkina Faso).

²⁶⁷ Hofer, 'Adoption & Contestation of Sanctions' (n 243), 447; Henry Etienne, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law' (2017) 18 *Melbourne Journal of International Law* 1, 17.

²⁶⁸ Nissel, 'Self-Help & Solidarity' (n 1), 356, 366. *See also* Bodansky Daniel & Crook Robert, 'Symposium on the ILC's State Responsibility Articles: Introduction & Overview' (2002) 96 *American Journal of International Law* 773, 786.

²⁶⁹ Villalpando, *La communauté internationale* (n 2), 249; De Jesús, 'Obligations Erga Omnes' (n 11), 119–21.

²⁷⁰ Hofer, 'Divide on Unilateral Coercive Measures' (n 266), 41.

²⁷¹ *Ibid.*, 39; Hofer, 'Adoption & Contestation of Sanctions' (n 243), 446 *citing* Jouannet Emmanuelle, 'Universalism & Imperialism: True-False Paradox of International Law?' (2007) 18 *European Journal of International Law* 379, 391.

²⁷² Ruys, 'Legal Standing & Public Interest Litigation' (n 215), 488; Tams Christian, 'Individual States as Guardians of Community Interests' in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 382

²⁷³ Hakimi Monica, 'Unfriendly Unilateralism' (2014) 55 *Harvard International Law Journal* 105, 117; Weiss, 'Invoking State Responsibility' (n 11), 805; Craven, 'Rights & Interests in State Responsibility' (n 6), 125; Hillgruber, 'Third States & Countermeasures' (n 42), 265.

states'.²⁷⁴ Yet, these measures arguably remain necessary given the decentralisation of the international legal system and the absence of a 'centralised machinery to secure compliance with [duties] owed *erga omnes*'.²⁷⁵ What is needed is to ensure that such measures are 'subjected to [strict] limitations' including the requirement of proportionality.²⁷⁶

Admittedly, the assessment of the proportionality of countermeasures levied by states that have only suffered 'injury' to enforce duties owed *erga omnes* remains difficult. As discussed in *Chapter 2*, the empirical approach which the ILC endorses requires a quantitative and qualitative comparison between the wrongful act and the countermeasure.²⁷⁷ Quantitatively, it necessitates a 'degree of equivalence' between the injury and damage that the wrongful act and the countermeasure caused.²⁷⁸ In this regard, measures that are excessive compared to the wrongful act are deemed disproportionate.²⁷⁹ Qualitatively, it considers also the 'gravity of the [...] wrongful act, and the rights in question'.²⁸⁰ These are treated as aggravating or extenuating factors in assessing a countermeasure's appropriateness.²⁸¹ However, applying the quantitative test to countermeasures by states that have only suffered 'injury' may be problematic.²⁸² As these states have not suffered 'material damage', the equivalent measures they may levy against the wrongful state under the empirical approach must be limited if not innocuous. Arguably, as observed in *Chapter 2*, the more reasonable view is to adopt the functional approach endorsed by scholars like Oppenheim, McDougal, and Feliciano.²⁸³ Proportional countermeasures, under

²⁷⁴ Proukaki, *Problem of Enforcement* (n 3), 72.

²⁷⁵ Tanaka Yoshifumi, 'Legal Consequences of Obligations Erga Omnes in International Law' (2021) 68 *Netherlands International Law Review* 1, 17; Tams, *Enforcing Obligations Erga Omnes* (n 3), 24; Hutchinson, 'Solidarity & Breaches of Multilateral Treaties' (n 11), 158. See Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 26), 46 ('To exclude the lawfulness of individual state claims or measures would be to accept that the *erga omnes* violations in question would not give rise to [responsibility]; and this would be tantamount to accepting that the rules infringed are not binding.')

²⁷⁶ Proukaki, *Problem of Enforcement* (n 3), 72; Dawidowicz Martin, *Third Party Countermeasures in International Law* (Cambridge University Press 2017), 382. See UNGA, 'Unilateral Economic Measures as a Means of Political & Economic Coercion: SG Report' (2013) (n 266), 5 (Brazil: 'there should be acceptance of clear parameters of legality, such as proportionality, to provide guarantees that human rights will not be put at risk').

²⁷⁷ ILC, 'Report on the Work of the 53rd Session' (2001) (n 9), 135; *Air Services Agreement* (n 116), 443; *Gabčíkovo-Nagymaros* (Hungary v Slovakia) (Judgment) [1997] ICJ 3, 56–7.

²⁷⁸ *Air Services Agreement* (n 116), 443.

²⁷⁹ *Naulilaa* (n 116), 1028.

²⁸⁰ ILC, 'Report on the Work of the 53rd Session' (2001) (n 9), 135.

²⁸¹ Proukaki, *Problem of Enforcement* (n 3), 266.

²⁸² Dawidowicz, *Third Party Countermeasures* (n 276), 347 ('The adoption of third-party countermeasures in response to, for example, aggression, genocide or other massive violations of international human rights and humanitarian law will likely require "an awkward balancing of apples and oranges"') citing Franck Thomas, 'On Proportionality of Countermeasures in International Law' (2008) 102 *American Journal of International Law* 715, 716.

²⁸³ Oppenheim Lassa, *International Law: A Treatise*, vol II, Lauterpacht Hersch (ed) (Longmans, Green and

this view, are those that are ‘necessary or reasonably connected’ to the ‘aim of ensuring compliance’,²⁸⁴ and are the least restrictive means of attaining this objective.²⁸⁵ The approach avoids the problematic comparison of what Dawidowicz and Franck consider as ‘incommensurable’ factors—the injury caused by the breach of a duty owed *erga omnes* and the injury resulting from the countermeasure enforcing such duty.²⁸⁶ Yet, it still fulfils the purpose of the proportionality requirement which is to curtail the imposing state’s ‘broad discretion’ in levying the measure and ‘reduce the risk of abuse’.²⁸⁷

CHAPTER CONCLUSION

This chapter revisited the synallagmatic approach’s merits—one that arguably has been misappreciated due to the confusion in the associated terminologies and the concept of an ‘obligation’. Despite views to the contrary, it is arguably capable of accommodating collective norms. The approach insists on the ‘exact’ correlation between a ‘right’ held by a state and a ‘duty’ borne by another to perform or observe a particular conduct. Should the duty be breached, the right-holder may implement the duty-bearer’s responsibility. This correlation remains valid even for obligations where the parties are interrelated or the duties are indivisible. Indeed, this may be seen in the case of interdependent obligations, which may be considered similar to indivisible obligations, and those that impose duties owed *erga omnes*, which may be deemed

Co 1937), 141 (‘Reprisals must be in proportion to the wrong done and to the amount of compulsion necessary to get reparation’); McDougal Myres & Feliciano Florentino, *Law & Minimum World Public Order: Legal Regulation of International Coercion* (Yale University Press 1961), 682–3 (‘They should be adapted and related not so much to the past illegality but rather and primarily to the future purpose sought’); Zoller Elizabeth, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational 1984), 135; Proukaki, *Problem of Enforcement* (n 3), 271. See Council of the EU, ‘Guidelines on Implementation and Evaluation of Restrictive Measures’ (02 December 2005) PESC 1084 FIN 475, ¶9 (‘Proportionate to their objective’)

²⁸⁴ ILC, ‘Report on the Work of the 48th Session: State Responsibility’ (January 1997) UN Doc CN.4/L528/Add.3, 321 (‘Proportionality is concerned with the relationship between the alleged wrongful act and the countermeasure. The purpose of countermeasures, namely to induce the wrongdoing state to comply with its [duties] [...] [It is] not intended to [...] unduly restrict a state’s ability to take effective countermeasures in respect to wrongful acts involving [breaches of duties owed] *erga omnes*. A legally injured state, as compared to a materially injured state, would be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered’); Dawidowicz, *Third Party Countermeasures* (n 276), 358 (‘Necessary or reasonably connected to the aim of ensuring compliance’) citing *ADM & Tate v Mexico* (Award) (2007) ARB/(AF)/04/5, ¶¶152–60; Cannizzaro Enzo, ‘Role of Proportionality in the Law of International Countermeasures’ (2001) 12 *European Journal of International Law* 889, 899 (‘[The] appropriateness of the aim that the state wishes to attain [...] [and] the appropriateness of the content of the measures adopted in relation to the result that they seek to achieve’). See also ILC, ‘Comments & Observations of Governments, 50th Session’ (1998) (n 252), 124 (Czech Republic), 125–6 (Ireland), 127 (US).

²⁸⁵ Hofer Alexandra, ‘The Proportionality of Unilateral “Targeted” Sanctions: Whose Interests Should Count?’ (2020) 89 *Nordic Journal of International Law* 399, 403, 321; Zoller, *Peacetime Unilateral Remedies* (n 283), 135 (‘The police may not use machine guns to kill birds’).

²⁸⁶ Dawidowicz, *Third Party Countermeasures* (n 276), 347 (‘Quantitative factors must be weighed against qualitative’) citing Franck, ‘Proportionality of Countermeasures’ (n 282), 716.

²⁸⁷ Cannizzaro, ‘Proportionality & Countermeasures’ (n 284), 891, 914; Proukaki, *Problem of Enforcement* (n 3), 249, 260. See ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 9), 134.

akin to a series of indivisible obligations.

The synallagmatic approach allows for the precise ordering of legal relations, certainty in the identification of states that may implement duties owed *erga omnes*, and ‘reunification of the concept of responsibility’. Yet, this is more than an intellectual exercise. The approach does not rely on premises that may not be present in the current legal order—a factor that may have contributed to the uncertain status of the rules on the implementation of duties owed *erga omnes* under the 2001 Draft Articles. It ‘works with the seams of political and institutional realities’. It does not require states to act on behalf of or as a trustee for an ‘ill-defined’ community to whom duties are presumably owed. Nor does it necessitate a ‘public law’ construction of the international legal system that allows for ‘public interest’ standing. Instead, it employs the traditional conception of responsibility that states have already accepted. It posits that if states deem a duty to be owed *erga omnes*, all states’ rights are infringed and each state is ‘injured’ should the duty be breached. Thus, every state in its individual capacity may implement the wrongful state’s responsibility through any available means including invocation via judicial dispute resolution or enforcement through countermeasures.■

THESIS CONCLUSION

As discussed in *Part I*, the rules on the implementation of responsibility, under the ILC's 2001 Draft Articles, are split among the concepts of 'injured states', 'specially affected states', and 'states other than an injured state'. 'Injured states', under 2001 Draft Article 42 are states to whom the duty breached is owed. 'Specially affected states', under the same article, are states that have suffered 'particular adverse effects' where the duty is owed to a collective. In contrast, in what the Commission referred to as a 'progressive measure',¹ 2001 Draft Article 48 defines 'states other than an injured state' as states that have only been affected in their 'legal interests' should a duty owed *erga omnes* or *erga omnes partes* be breached. 'States other than an injured state' are entitled to a limited range of reparations compared to 'injured states'. Furthermore, due to the divergent views of states, their prerogative to resort to countermeasures, under 2001 Draft Article 54 was left to the 'further development of international law'.²

It appears, as observed in *Part II*, that the ILC correctly considered 2001 Draft Article 48 as a 'progressive measure' and properly left, under the 2001 Draft Article 54, the question of whether 'states other than an injured state' may enforce duties owed *erga omnes* to international law's 'further development'. As for judicial dispute resolution, one of the means by which states may invoke another's responsibility, no 'state other than an injured state' resorted to this method when it comes to the norm against force and certain human rights norms. Regarding the norm on self-determination and some environmental norms, *Chapters 7* and *8* saw that only in a few instances, two for self-determination and one for the environment, did 'states other than an injured state' implement responsibility through this method.³ In most of these instances, the respondents objected to the competence of the 'states other than an injured state' to bring the cases.⁴

As for enforcement through unilateral measures, *Chapters 5A*, *6A*, and *7* observed that states in several instances sought to enforce via countermeasures the duties imposed by the

¹ ILC, 'Report on the Work of the 53rd Session' (2001) II(2) YbILC 20, 127.

² Ibid, 139.

³ See *Southwest Africa* (Ethiopia & Liberia v South Africa) (Judgment) [1966] ICJ 6, 39, 41–2, 47; *East Timor* (Portugal v Australia) (Judgment) [1995] ICJ 90, 104–5; 'Memorial of Australia', *Nuclear Tests* (Australia v France) (Jurisdiction & Admissibility) (ICJ, General List No 58, 23 November 1973), 337; 'Memorial of New Zealand', *Nuclear Tests* (New Zealand v France) (Jurisdiction & Admissibility) (ICJ, General List No 58, 29 October 1973), 203–4; 'Application', *Request for an Examination of the Court's Judgment in the Nuclear Tests* (New Zealand v France) (Application) (ICJ, General List No 97, 21 August 1995), 58.

⁴ See 'Preliminary Objections', *Southwest Africa* (Preliminary Objections) (ICJ, General List Nos 46 & 47, 30 November 1961), 213; 'Counter-Memorial of Australia', *East Timor* (Portugal v Australia) (Judgment) (ICJ, General List No 84, 1 June 1992), 119;

norms on force, human rights, and self-determination. Yet, the practice was not widespread nor representative and involved primarily Western states. State practice was also not consistent nor uniform as in comparable situations, the repetition of the conduct, even from Western states, had not been apparent. Finally, there was a lack of a broad acknowledgement as law. Some Western states asserted the prerogative of ‘states other than an injured state’ to enforce responsibility through unilateral measures. However, most states condemned these measures citing, among others, the actions taken by the minority purporting to act on the international community’s behalf.⁵

There may have been a trend towards the recognition of the competence of ‘states other than an injured state’ to invoke another’s responsibility via judicial dispute resolution between 2001 and 2023. It is true that no ‘state other than an injured state’, as observed in *Chapters 5B* and *7*, invoked another’s responsibility for breaches of the duties imposed by the norms on force and on self-determination. Likewise, only in two instances, as seen in *Chapter 8*, did states commence proceedings against the wrongful state for breaches of environmental duties.⁶ However, as to certain human rights norms, there were five instances, as observed in *Chapter 6B*, in which ‘states other than an injured state’ invoked responsibility.⁷ Furthermore, some of these cases received support from several states.⁸ Thus, when it comes to certain human rights

⁵ Hofer Alexandra, 'Negotiating International Public Policy through Adoption & Contestation of Sanctions' (2017) 50 *Revue Belge de Droit International* 440, 447. See Henry Etienne, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law' (2017) 18 *Melbourne Journal of International Law* 1, 17.

⁶ See ‘Verbatim Record 2013/18’, *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Merits) (ICJ, General List No 148, 9 July 2013), 28, 33–4; ‘Memorial of the Marshall Islands’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v the UK) (Preliminary Objections) (ICJ, General List no 160, 16 March 2015), 19, 21, 46–8, 98; ‘Memorial of the Marshall Islands’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v India) (Preliminary Objections) (ICJ, General List no 158, 16 December 2014), 5, 11; ‘Memorial of the Marshall Islands’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v Pakistan) (Preliminary Objections) (ICJ, General List no 159, 12 January 2015), 5, 9, 13–6, 20–1, 25. But see ‘Counter-Memorial of Japan’, *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Merits) (ICJ, General List No 148, 9 March 2012), 53; ‘Counter-Memorial of Pakistan’, *Obligations concerning Negotiations relating to Nuclear Disarmament* (Marshall Islands v Pakistan) (Preliminary Objections) (ICJ, General List no 159, 1 December 2015), 8, 18

⁷ See ‘Memorial of Belgium’, *Obligation to Prosecute or Extradite* (Belgium v Senegal) (Merits) (ICJ, General List No 144, 1 July 2010), 53 ff; ‘Application’, *Application of the Genocide Convention* (The Gambia v Myanmar) (ICJ, General List No 178, 11 November 2019), ¶15; ‘Joint Application Instituting Proceedings’, *Application of the Torture Convention* (Canada & The Netherlands v Syria) (ICJ, General List No 188, 8 June 2023), 3; ‘Application’, *Application of the Genocide Convention in Gaza* (South Africa v Israel) (ICJ, General List No 192, 28 December 2023), 3, 6, 9, 78; ‘Application Instituting Proceedings’, *Proceedings between Nicaragua & Germany* (Nicaragua v Germany) (Institution of Proceedings) (ICJ, 1 March 2024), 10, 31, 36.

⁸ See e.g. Organisation of Islamic Cooperation, ‘Final Communiqué: 14th Islamic Conference’ (15 August 2012) OIC/SUM-14/2019/FC/FINAL, 11. But see ‘Preliminary Objections of Myanmar’, *Application of the Genocide Convention* (The Gambia v Myanmar) (Provisional Measures) (ICJ, General List No 178, 21 January 2021), 68, 71, 73.

norms, the state practice and *opinio juris* relating to 2001 Draft Article 48 may be ‘evolving’.⁹

Yet, the same may not be said as to the enforcement of duties owed *erga omnes* through countermeasures. As *Chapters 7* and *8* observed, during this period, no ‘state other than an injured state’ levied unilateral measures to enforce responsibility as to the norm on self-determination and certain environmental norms. There were several instances, as examined in *Chapters 5B* and *6B*, in which states imposed unilateral measures to enforce the duties under the norm on force and certain human rights norms. However, this is still a practice by primarily Western states which suggests that the practice is still not widespread nor representative. The practice is also not consistent nor uniform as comparable situations did not result in similar conduct. Crucially, while some Western states asserted the prerogative of ‘states other than an injured state’ to unilaterally impose countermeasures against wrongful states, this view has not been shared by others. Most states continued to condemn these measures for being taken on behalf of other states without collective decisions.

Perhaps due to the uncertain status of the rules on the implementation of duties owed *erga omnes* by ‘states other than an injured state’, states have also resorted to alternative means to respond to breaches of these duties. As discussed in *Chapter 9*, states have made use of the ICJ’s advisory function and intervened in contentious cases to safeguard common interests. Likewise, states have also used targeted unilateral measures against individuals and entities that are responsible for or have contributed to a state’s breach of its duties thereby putting pressure on them or limiting their ability to continue their actions.¹⁰ However, it must be noted that these are not measures of implementation. These responses do not involve the invocation or enforcement of state responsibility and thus avoid the issue of competence to implement.

This thesis submits that rules’ uncertain status is due in part to its premises. As highlighted in *Chapter 10*, there are two ways in which the relations under the non-synallagmatic approach may be structured. Under the communitarian view, to which the ILC subscribes, states do not possess rights that correspond to duties owed *erga omnes* as it is the international community which is the duty’s beneficiary. States only possess a ‘legal interest’ in the duties’ performance or observance.¹¹ Thus, if the duty is breached, states may only invoke the wrongful state’s

⁹ *Application of the Genocide Convention in Gaza* (South Africa v Israel) (Provisional Measures) [2024] General List No 192 (Xue, declaration), 1–2

¹⁰ See Hofer Alexandra, ‘The “Curiouser & Curiouser” Legal Nature of Non-UN Sanctions: US Sanctions against Russia’ (2018) 23 *Journal of Conflict & Security Law* 76, 78.

¹¹ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126–7.

responsibility on the community's behalf.¹² This approach requires the existence of a community that may hold rights and on whose behalf states may implement duties owed *erga omnes*.¹³ Yet, it remains to be seen if such a community exists. Based on the observations in *Part II*, the present community does not appear to be 'an entity that can be individualised', 'express its own will', and 'hold the collective interest'.¹⁴ Thus, it can hardly be viewed as the recipient of rights correlative to duties owed *erga omnes*.¹⁵ Moreover, it also seems that states have profoundly divergent interests and antagonistic values,¹⁶ and 'lack of a sense of solidarity'.¹⁷ With divergent interests, it may be problematic to allow a state to act on the community's behalf. The approach presents an issue of legitimacy.¹⁸ While it posits the existence of duties owed to the community, it does not 'predicate their assertion on community decisions'.¹⁹ In other words, it allows states to act 'as agents for an ill-defined "international community"'.²⁰

Under the 'public law' approach, breaches of duties owed *erga omnes* infringe on collective interests and affect every state as they possess an objective interest in the norm's integrity.²¹ For this reason, states have the capacity to assert the wrongful state's responsibility. This is based on the concept of *actio popularis* or 'public interest standing' found in several municipal jurisdictions that grants any person, in the absence of direct effect, the competence to bring an

¹² Ibid.

¹³ Annacker Claudia, 'Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 138; Toufayan Mark, 'Reacting to Serious Breaches of Obligations arising under Peremptory Norms of General International Law' (2004) 42 *Canadian Yearbook of International Law* 197, 228. See Ago Roberto, 'Obligations Erga Omnes & Community' in Weiler Joseph, et al. (eds), *International Crimes of State: Critical Analysis of the ILC's Draft Article 19* (1989), 238 cited in De Hoogh André, *Obligations Erga Omnes & International Crimes: Theoretical Inquiry into the Implementation & Enforcement of the International Responsibility of States* (Kluwer 1996), 81–2.

¹⁴ Villalpando Santiago, *L'émergence de la communauté internationale dans la responsabilité des états* (Graduate Institute 2005), 243, 249.

¹⁵ Ibid, 241.

¹⁶ Cohen Jean, 'Sovereignty in the Context of Globalisation: A Constitutional Pluralist Perspective' in Besson Samantha & Tasioulas John (eds), *The Philosophy of International Law* (Oxford University Press 2010), 262; Kolb Robert, *Theory of International Law* (Hart 2016), 271

¹⁷ Kolb, *Theory of International Law* (n 16), 271; Hernandez Gleider, *International Court of Justice & Judicial Function* (Oxford University Press 2014), 199.

¹⁸ Nissel Alan, 'ILC Articles on State Responsibility: Between Self-Help & Solidarity' (2005) 38 *New York University Journal of International Law & Policy* 355, 356, 366.

¹⁹ Bodansky Daniel & Crook Robert, 'Symposium on the ILC's State Responsibility Articles: Introduction & Overview' (2002) 96 *American Journal of International Law* 773, 786.

²⁰ *Arrest Warrant* (DRC v Belgium) (Judgment) [2002] ICJ 3 (Guillaume, separate opinion), 44. See Focarelli Carlo, *International Law as Social Construct: Struggle for Global Justice* (Oxford University Press 2012), 147; Weil Prosper, 'Towards Relative Normativity in International Law?' (1983) 77(3) *American Journal of International Law* 413, 441.

²¹ Annacker, 'Legal Regime of Erga Omnes Obligations' (n 13), 149.

action relating to acts that affect the public interest.²² However, it remains to be seen if the present order may accommodate *actio popularis*. The ‘most fundamental element’ crucial to a legal system’s public law construction—the ‘existence of a political community’ or a public,²³ appears to be absent in the international order. Furthermore, the present system lacks the structures present in municipal systems that make *actio popularis* possible— authorities invested with the competence to act on the public’s behalf and courts that may make binding decisions upon every member of the public.²⁴

The question then is whether an approach exists that reflects the present order’s realities and allows for the implementation of duties owed *erga omnes*. This thesis submits that the synallagmatic approach fulfils these requirements. As discussed in *Chapter 3*, the ILC rejected 1996 Draft Article 40 which defined an ‘injured state’ as the state whose right has been infringed in favour of the split among ‘injured states’, ‘specially affected states’, and ‘states other than an injured state’. This change was done for two primary reasons. First, there was the perceived need to distinguish between ‘directly’ and ‘indirectly affected’ states. Some of the ILC’s members and several states found 1996 Draft Article 40 problematic as it made the consequences of wrongful acts and the competence to resort to countermeasures ‘too broadly available’.²⁵ By distinguishing among the kinds of states that may implement responsibility, the Commission was able to specify that only ‘injured states’ and ‘specially affected states’ may demand material reparations in their individual capacity and resort to countermeasures.²⁶ Second, like most of literature, the ILC deemed the synallagmatic approach to be defective in its assumption that all relations may be ‘assimilated to [...] right-duty relations’.²⁷

Yet, as stressed in *Chapter 11*, the need to distinguish between ‘directly’ and ‘indirectly affected’ states could have been addressed by revisiting the difference between ‘injury’ and

²² Voefray Francois, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 27, 50, 331; Crawford James, ‘Overview of Part Three of the Articles on State Responsibility’ in Crawford James, *et al.* (eds), *Law of International Responsibility* (Oxford University Press 2010), 934

²³ Thin Sarah, ‘Community Interest & the International Public Legal Order’ (2021) 68 *Netherlands International Law Review* 35, 41.

²⁴ Mao Xiao, ‘Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case’ (2002) 21 *Chinese Journal of International Law* 589, 606–7; Marek Krystyna, ‘Criminalising State Responsibility’ (1978) 14 *Revue Belge de Droit International* 460, 463.

²⁵ Crawford James, ‘Third Report on State Responsibility’ (2000) II(2) YbILC 12, 27.

²⁶ Ibid, 36. See Stern Brigitte, ‘Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l’occasion de la fin des travaux de la C.D.I. sur la responsabilité des États’ (2001) 47 *Annuaire français de droit international* 3, 21.

²⁷ Crawford, ‘Third Report on State Responsibility’ (2000) (n 25), 33.

‘material damage’. As ‘material damage’ is a precondition for material reparations, states that only suffered ‘injury’ may only demand ‘cessation, guarantees of non-repetition, [and perhaps satisfaction]’.²⁸ As for countermeasures, the same ‘result could be achieved by indicating that countermeasures are not available to states which have only suffered injury’.²⁹ That said, whether countermeasures should be limited, in the first place, to states that have suffered ‘material’ damage remains to be seen. The resort to countermeasures only requires ‘injury’. Thus, if a state’s right has been infringed, then it should be able to enforce the wrongful state’s responsibility through countermeasures.³⁰

This thesis submits that defining an ‘injured state’ solely in reference to the infringement of rights obviates the need for the ILC’s distinction among differently affected states.³¹ ‘Injured states’ hold the right that correlates to the duty breached, according to the ILC,³² and thus have suffered ‘injury’.³³ ‘Injured states’ may also be ‘specially affected’, according to the ILC,³⁴ or ‘materially damaged’ to be more precise.³⁵ In contrast, ‘states other than an injured state’ have only been ‘affected in their legal interests’, to use the ILC’s term,³⁶ or have only suffered legal ‘injury’ to be more accurate.³⁷ As there are only ‘injured states’, 2001 Draft Article 48 may be removed and 2001 Draft 42 may be simply rephrased, as it was under 1984 Draft Article 5/1996 Draft Article 40, as ‘any state whose right is infringed by the act of another’.³⁸ In turn, this

²⁸ Arangio-Ruiz Gaetano, ‘Fourth Report on State Responsibility’ (1992) II(1) YbILC 6, 47; Riphagen Willem, ‘First Report on State Responsibility’ (1980) II(1) YbILC 107, 114; Barboza Julio, ‘Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?’ in Ragazzi Maurizio (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martnus Nijhoff 2005), 9;

²⁹ Stern, ‘La notion de préjudice juridique’ (n 25), 32.

³⁰ See Kawasaki Kyoji, ‘“Injured State” in the Law of State Responsibility’ (2000) 28 *Hitobashi Journal of Law & Politics* 17, 20; ILC, ‘Summary Records of the 16th Session’ (1967) I YbILC 1, 84 (Rosenne); *Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa (Naulilaa)* (Portugal v Germany) (Award) (1928) 2 RIAA 1011, 1028; *Air Services Agreement* (US v France) (Decision) (1979) 54 ILR 304, 443.

³¹ Stern, ‘La notion de préjudice juridique’ (n 26), 22; Weiss Edith Brown, ‘Invoking State Responsibility in the Twenty-First Century’ (2002) 96 *American Journal of International Law* 798, 803; Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 28), 45.

³² ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 117.

³³ Hunter William, *A Systematic & Historical Exposition of Roman Law* (Maxwell 1885), 146; Stern, ‘La notion de préjudice juridique’ (n 26), 5, 26; Villalpando, *La communauté internationale* (n 14), 293.

³⁴ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 119.

³⁵ Kawasaki, ‘Injured State’ (n 30), 22. See Stern, ‘La notion de préjudice juridique’ (n 26), 31

³⁶ ILC, ‘Report on the Work of the 53rd Session’ (2001) (n 1), 126.

³⁷ Barboza, ‘Legal Injury’ (n 28), 21; Stern, ‘La notion de préjudice juridique’ (n 26), 31.

³⁸ Fernandez Gemmo, ‘Revisiting the Concepts of Rights, Obligations, & Injury in the Invocation of State Responsibility in Inter-State Adjudication’ (2018) 91 *Philippine Law Journal* 832, 853 citing Kawasaki, ‘Injured State’ (n 30), 23.

allows every state to implement the wrongful state's responsibility through 'whatever means [...] available' such as invocation as in the case of judicial dispute resolution,³⁹ enforcement via unilateral measures including countermeasures.⁴⁰

Furthermore, contrary to the ILC and the majority of literature's claim, this thesis submits that the synallagmatic approach can accommodate the implementation of duties owed *erga omnes*. Arguably, the approach has been conflated with 'bilateral relations' and the 'bilateralisation' of multilateral relations. Yet, this is inaccurate.⁴¹ The 'exact correlation' between rights and duties,⁴² may be maintained even if the obligation involves multiple parties that are interrelated as in the case of solidary obligations,⁴³ and when the duties are indivisible as in the case of indivisible obligations.⁴⁴ Indeed, this thesis posits that all international multilateral obligations may be represented as synallagmatic relations. Obligations that impose duties *inter se* may be deemed joint obligations.⁴⁵ Interdependent obligations may be considered akin to joint indivisible obligations.⁴⁶ Lastly, obligations that impose duties owed *erga omnes* may be likened to a series of joint indivisible obligations.⁴⁷ Indeed, as shown in *Chapter 11*, obligations that impose duties owed *erga omnes* may be illustrated synallagmatically in the following manner: S_0 has a duty D_1 concerning object O_1 to S_1 ; S_0 has a duty D_1 concerning object O_1 to S_2 ; [...]; and S_0 has a duty D_1 concerning object O_1 to S_n .⁴⁸ The same goes for S_2 , [...], and S_n such that S_0 has a duty D_n concerning object O_n to S_1 ; S_0 has a duty D_n concerning object O_n to S_2 ; [...]; and S_0 has a duty D_n concerning object O_n to S_n . Thus, if S_0 breaches its duty D_1 concerning object O_1 owed to S_1 , it not only infringes S_n 's right but also that of S_2 , [...], and S_n . Thus, S_1 , S_2 , [...], and S_n are all 'injured' and may invoke S_0 's

³⁹ ILC, 'Report on the Work of the 53rd Session' (2001) (n 1), 117, 126–7.

⁴⁰ See Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 28), 47.

⁴¹ Nedeski Nataša, *Shared Obligations in International Law* (Cambridge University Press 2022), 65.

⁴² Hohfeld Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning & Other Legal Essays*, Cook Walter (ed) (Yale University Press 1919), 7, 36–8; Postema Gerald, *Legal Philosophy in the Twentieth Century: Common Law World* (Springer 2011), 102; Dworkin Ronald, *Taking Rights Seriously* (Harvard University Press 1977), 17;

⁴³ Pothier Robert Joseph, *Treaties on the Law of Obligations or Contracts*, vol I, Evans William David (tr) (Strahan 1806), 144, 146; Tolentino Arturo, *Commentaries & Jurisprudence on the Philippine Civil Code*, vol IV (Central 1991), 227; Hunter, *Roman Law* (n 33), 554.

⁴⁴ Hunter, *Roman Law* (n 33), 561; Pothier, *Law of Obligations* (n 43), 196, 198.

⁴⁵ Nedeski, *Shared Obligations* (n 41), 101; De Jesús Jose, 'Obligations Erga Omnes as Multilateral Obligations' (DPhil, University of Oxford 2012), 88, 110

⁴⁶ Nedeski, *Shared Obligations* (n 41), 70, 97; De Jesús, 'Obligations Erga Omnes' (n 45), 245–7.

⁴⁷ See Nedeski, *Shared Obligations* (n 41), 68; De Jesús, 'Obligations Erga Omnes' (n 45), 110; Villalpando, *La communauté internationale* (n 14), 249;

⁴⁸ See De Jesús, 'Obligations Erga Omnes' (n 45), 110, 174, 186; Nedeski, *Shared Obligations* (n 41), 100.

responsibility.

The synallagmatic approach's utility lies in its orderly implementation of duties owed *erga omnes*. It dispenses with the problematic examination of the importance of the interest that a norm safeguards, or the commonality of states' interest in the observance or performance of the duties the norm imposes. To determine if a duty is owed *erga omnes*, one only needs to examine the obligation itself and the legal relations that states intended to create.⁴⁹ Furthermore, the approach also 'facilitates [the] precise identification of who has a right, [...] against whom, and who may [implement] it'.⁵⁰ If a duty owed *erga omnes* is breached, every state's right is infringed and all are 'injured'.⁵¹ Every state may implement the wrongful state's responsibility by relying on its right, instead of a 'legal interest', and in its capacity, rather than on behalf of the community.⁵² Moreover, it permits the 'reunification of the concept of responsibility' by eliminating the 'laborious distinction' between 'injured states', 'specially affected states', and 'states other than an injured state'.⁵³

This thesis stresses that this is more than an intellectual exercise. The implementation of duties owed *erga omnes* under the synallagmatic approach does not rely on premises that may not be present in the current legal order. It does not require states to owe duties to or act as a trustee of an 'ill-defined' community. Nor does it depend on the concept of public interest standing which the present order may not accommodate. Instead, it recognises the current legal system's realities and limitations—decentralisation, lack of cohesion and solidarity, and division.⁵⁴ It employs the traditional conception of responsibility, one that states had already accepted,⁵⁵ and extends this to cover duties owed *erga omnes*. Crucially, the approach addresses states' concerns on the implementation of duties owed *erga omnes*. It shows that states, even if

⁴⁹ Hillgruber Christian, 'Right of Third States to Take Countermeasures' in Tomuschat Christian & Thouvenin Jean-Marc (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2006), 271–2; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 13), 37; Voeffray, *L'actio popularis* (n 22), 328. See Weil, 'Towards Relative Normativity' (n 20), 421.

⁵⁰ Weiss, 'Invoking State Responsibility' (n 31), 801; Stern, 'La notion de préjudice juridique' (n 26), 32–3. See Eleftheriadis Pavlos, *Legal Rights* (Oxford University Press 2008), 72.

⁵¹ Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) (n 28), 45; De Jesús, 'Obligations Erga Omnes' (n 45), 186–7; Nedeski, *Shared Obligations* (n 41), 100.

⁵² De Jesús, 'Obligations Erga Omnes' (n 45), 121; De Hoogh, *Obligations Erga Omnes & International Crimes* (n 13), 46; Villalpando, *La communauté internationale* (n 14), 242.

⁵³ Stern, 'La notion de préjudice juridique' (n 26), 30.

⁵⁴ See Kolb, *Theory of International Law* (n 16), 271.

⁵⁵ See Focarelli Carlo, 'International Law & Third-Party Countermeasures in the Age of Global Instant Communication' (2016) 29 *Questions of International Law* 18, 466; Villalpando, *La communauté internationale* (n 14), 240.

not ‘directly affected’ by the breaches of duties owed *erga omnes*, may implement the wrongful state’s responsibility.⁵⁶ It also shows that the implementation of these duties need not depend on collective decisions as states are vindicating their individual rights.⁵⁷

That said, this thesis does not claim that states would readily accept the competence of states that have been ‘injured’ but have not suffered ‘material damage’ to implement responsibility. There are other factors that influence states’ acceptance of this competence.⁵⁸ For instance, it is acknowledged that permitting all states to implement duties owed *erga omnes* may open the ‘floodgates’ to litigation,⁵⁹ and enforcement measures.⁶⁰ Of course, certain measures may be put in place to guard against the risk of abuse posed by the general competence of states to implement duties owed *erga omnes*.⁶¹ However, even if these safeguards were to be introduced, it would still be up to states if they would accept this prerogative.⁶² Nonetheless, by addressing the relevant questions *of* law and questions *concerning* law, this thesis submits that the synallagmatic approach resolves some of the barriers to states’ recognition of this competence. ■

⁵⁶ Arangio-Ruiz, ‘Fourth Report on State Responsibility’ (1992) (n 28), 45.

⁵⁷ Villalpando, *La communauté internationale* (n 14), 249; De Jesús, ‘Obligations Erga Omnes’ (n 45), 119–21.

⁵⁸ Hofer, ‘Adoption & Contestation of Sanctions’ (n 5), 24.

⁵⁹ Ruys Tom, ‘Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?’ (2021) 20 *Chinese Journal of International Law* 457, 488; Tams Christian, ‘Individual States as Guardians of Community Interests’ in Fastenrath Ulrich, *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 382

⁶⁰ Hakimi Monica, ‘Unfriendly Unilateralism’ (2014) 55 *Harvard International Law Journal* 105, 117; Weiss, ‘Invoking State Responsibility’ (n 31), 805; Craven Matthew, ‘For the ‘Common Good’: Rights & Interests in the Law of State Responsibility’ in Fitzmaurice Malgosia & Sarooshi Dan (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart 2004), 125; Hillgruber, ‘Third States & Countermeasures’ (n 49), 265.

⁶¹ Proukaki Elena Katselli, *Problem of Enforcement in International Law: Countermeasures, Non-Injured State & Idea of International Community* (Routledge 2010), 72.

⁶² Hillgruber, ‘Third States & Countermeasures’ (n 49), 271.

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