Clarifying *Jus Cogens, Erga Omnes* and the Place of Third-party Countermeasures in International Law

Simon Mateus
https://orcid.org/0000-0002-9169-2799
University of Pretoria
simon.mateus98@gmail.com

Abstract

There is substantial support in literature of the idea that all norms of *jus cogens* are *erga omnes*, in that they produce obligations applicable towards all states. However, not all obligations *erga omnes* invariably flow from a *jus cogens* characterisation. Indeed, although this is the case, there is no simple criterion by which one can determine the extent of the overlap between *jus cogens* and *erga omnes*. This relationship is further complicated by questions relating to the kind of measures that states may be permitted to take in order to protect or ensure compliance with obligations *erga omnes*, bringing to light, the debates surrounding the concept and the place of third-party countermeasures regarding state responsibility. Against this backdrop, this article will assess the concept of obligations *erga omnes*, its relationship with *jus cogens* as well as the legal position and the place of third-party countermeasures in relation to the protection of obligations *erga omnes* and/or as a way of invoking state responsibility by reacting to breaches of international law obligations with *erga omnes* status.

Keywords:

Jus cogens, e*rga omnes*, *c*ountermeasures

Introduction

The International Court of Justice (ICJ), in its 1970 decision of the *Barcelona Traction* case, gave rise to the concept of obligations *erga omnes* in the realm of international law.[1] The ICJ made a distinction between, on the one hand, obligations *erga omnes* that a state has towards the international community and in whose protection all states have a legal interest, and, on the other hand, the obligations of a state *vis-à-vis* another state (obligations *erga omnes partes*).[2] Since its formal introduction into the corpus of international law, the concept of *erga omnes* has fascinated many international law scholars and has been the subject of multiple debates, however, its precise implications remain unclear to this day.[3]

Many international law scholars have placed reliance on defining the term '*erga omnes*' by reference to *jus cogens* norms. Because of this, the theoretical divergence which the two concepts—*erga omnes* and *jus cogens*—'have caused in the academy has yet to be fully traced.'[4] Although there are several important contributions by scholars with regard to the relationship between *jus cogens* and *erga omnes*, most of these contributions are made through the lens of *jus cogens*.[5] On one hand, legal literature has been receiving valuable contributions on the nature of *jus cogens*.[6] On the other hand,

1 See *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v *Spain)* Judgment, ICJ Reports (1970) 32 paras. 33–34; A Memeti and B Nuhija, 'The Concept of Obligations *Erga Omnes* in International Law' (2013) 14 New Balkan Politics 31–47; DW Christiani, 'The "Modern" Concept of *Erga Omnes* to Establish the Obligation of Impunity Eradication: Towards the Primacy Jurisdiction of the International Criminal Court' (2018) 5(2) Padjadjaran Jurnal Ilmu Hukum 214.

2 *Barcelona Traction* (n 1) 32.

3 Christian Tams, *Enforcing Obligations Erga Omnes in International law* (Cambridge University Press 2005) xiii; CM Bassiouni, 'International Crimes: *Jus Cogens* and Obligations *Erga Omnes*' (1996) 59 Law and Contemporary Problems 63–74; OM Arnardottir, 'Res Interpretata, *Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 EJIL 211; C Eggett and S Thin, 'Clarification: Obligations *Erga Omnes* in the Chagos Opinion' (2019) EJIL; see the reference to the *erga omnes* concept as 'unclear and ambivalent'; in a recent discussion; MJ Alarcon, 'Consequences of Recognizing Environmental Protection as an Emerging *Erga Omnes* Obligation in the ISDS Context' *Kluwer Arbitration Blog* (2021).

4 Tams (n 3) xiii.

5 See Bassiouni, *Law and Contemporary Problems* (Contemporary Problems 1996) 63–74; K Zemanek, 'New Trends in the Enforcement of *Erga Omnes* Obligations' (2000) 4 Max Planck Yearbook of United Nations Law 1–52; M Petsche, '*Jus Cogens* as a Vision of the International Legal Order' (2010) 29 *Penn State International Law Review* 233; E de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century: Progressive Developments Since *Barcelona Traction*' (2013) 38 SAYIL 5–9.

6 See a number of scholarly works substantively addressing the topic of *jus cogens* such as E Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61 AJIL 946; MW Janis, 'Nature of *Jus Cogens*' (1987) 3 Conn J Int Law 359; GA Christenson, '*Jus Cogens*: Guarding Interests Fundamental to International Society' (1987) 28 Va J Int Law 585; A D'amato, 'It's a Bird, it's a Plane, it's *Jus Cogens*' (1990) 6 Conn J Int Law 1; GM Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 EJIL 42; A Bianchi, 'Human

the amount of attention received by *erga omnes* in scholarly writing is brief compared to that received by *jus cogens*.[7]

In view of the paucity in scholarly writing with regards to *erga omnes*, this article seeks to fill in some of the gaps which exist in relation to the concept by assiduously clarifying the nature, scope and extent of obligations *erga omnes*. This author sets out that the lack of a fixed definition for the notion of obligations *erga omnes* without relying on *jus cogens* presents us with considerable difficulties in the identification and determination of obligations *erga omnes* that are not a result of *jus cogens*.

In the next section this article will assess the ICJ's jurisprudence surrounding the concept of *erga omnes*, in particular, the section will consider how the ICJ has avoided making references to *jus cogens,*[8] and has instead relied on *erga omnes* and how this trend has resulted in the conflation of the two concepts. As will be discovered below, the article will explore the possibilities of using the International Law Commission's (ILC) work, in particular, the Articles on State Responsibility (and their commentaries) in providing the starting points for analysing and synthesising obligations *erga omnes*. The article will also analyse state practice with respect to cases in which states not directly affected by an internationally wrongful act took 'countermeasures' without being held liable for a wrongful act themselves because the violations of international law to which the states were responding to where *erga omnes* in nature and therefore, allow third states certain rights of reactions. This is done because such an analysis might reveal factors that could be relevant to the identification of *erga omnes* obligations, especially since it is often hard to find a set criterion that is accepted for identifying *erga omnes* obligations.

Rights and the Magic of *Jus Cogens*' (2008) 19 EJIL 491–508; J d'Aspremont, '*Jus Cogens* as a Social Construct Without Pedigree' (2015) 46 Netherlands Yearbook of International Law 85; D Shelton, 'Sherlock Holmes and the Mystery of *Jus cogens*' (2015) 46 NYIL 23; S Kadelbach, 'Genesis, Function and Identification of *Jus Cogens* Norms' (2015) 46 NYIL 147; R Kolb, 'General Principles of Law, *Jus Cogens* and the Unity of the International Legal Order' in M Andenas and others, (eds), *General Principles and the Coherence of International Law* (Brill 2019) 60–64; A de Beer, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (Brill 2019); A Alexander, 'Ulf Linderfalk: Understanding *Jus Cogens* in International Law and International Legal Discourse' (2020) 41 Liverpool Law Review 1; U Linderfalk, 'The Emperor's New Clothes – What If No *Jus Cogens* Claim Can Be Justified?' (2020) 22 International Community Law Review 139; D Tladi, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Dispositions* (Brill 2021).

7 MM Bradley, 'Jus Cogens' Preferred Sister' in Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Dispositions* 194–195. Bradley generally refers to *erga omnes* as '*jus cogens'* preferred sister' in the history of the ICJ. Be that as it may, she also acknowledges that 'unlike its 'big sister' *erga omnes* has not received' much scholarly attention.

8 See *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark)*, Judgment, ICJ Reports (1969) 3.

Conflation of *Erga Omnes* and *Jus Cogens*

Erga omnes and *jus cogens* have often been conflated in international law.[9] Since there is no commonly accepted definition for *erga omnes*, multiple legal scholars have placed reliance on the concept of *jus cogens* in order to define *erga omnes*.[10] This follows as a result of the criterion to *jus cogens* in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) compared against the Court's characterisation of *erga omnes* in *Barcelona Traction*. On one hand, repeated verbatim, Article 53 of the VCLT provides that *jus cogens* is 'a norm accepted and recognized by the international community of States as a whole, and as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[11] On the other hand the court's description of *erga omnes* as 'obligations owed to the international community as a whole,' takes up the language used to define the concept of *jus cogens*, albeit without the reference to states.[12] This part of the article assesses the origins of the conflation between *erga omnes* and *jus cogens* by inspecting the jurisprudence of the ICJ in relations to *erga omnes*, as well as the ICJ's treatment of *erga omnes*.

Brief Overview of ICJ Cases

The term *erga omnes* has now appeared numerous times in the decisions of the ICJ. This section examines the use of the term in the numerous cases in which the term was employed in order to elucidate the concept and provide clarity on areas from which the conflation originates. The cases discussed here will be selectively examined, to the extent that they shed some light on the particular subject of this article.

Barcelona Traction Case

A closer inspection of the court's decision in *Barcelona Traction* is warranted. The *Barcelona Traction* case concerned the exercise of diplomatic protection when Belgium brought a claim for reparations on behalf of its people who were shareholders in the Barcelona Traction Company, a Canadian company with its headquarters in Spain. The claim was brought against Spain for the expropriation of assets which belonged to the company. When assessing whether Belgium could submit a claim of this nature, the court held that:

9 See D Contreras-Garduno and I Alvarez-Rio, 'A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens' (2013) Social Science Research Network 4; P Picone, 'The Distinction between *Jus Cogens* and Obligations *Erga Omnes'* in Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 411.

10 See Tams (n 3) 139.

11 Vienna Convention on the Law of Treaties Art 53 (1969).

12 Tams (n 3) 140; see also A de Hoogh, 'The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective' (1991) 42 Austrian Journal of Public International Law 193; ID Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Intersentia 2001) 124.

> 33. ... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
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> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination … .

Despite the conflation caused by the definitions of the two concepts under study, the court causes another point of conflation when it identifies examples of *erga omnes* from norms which are recognised as *jus cogens*, especially since the court does not demonstrate the methodology by which it identifies these obligations. All the norms which the court identifies as examples of *erga omnes* in paragraph 34 belong to a group of norms accepted and named as key examples of *jus cogens* norms in the Vienna Conference.[13] Moreover, while the ICJ in its majority decision refrains from categorising the community interests in question as *jus cogens*, but rather terms them as *erga omnes*, Judge Ammoun, in his separate opinion, treated the same issue under the rubric of *jus cogens*.[14] Thus, although treated distinctly, it must be noted that these facts taken together, that is, first, the examples specifically referred to by the ICJ arising from *jus cogens*,[15] and second, the fact that the judgment of the Court when assessed with and opposite to the separate opinion of Judge Ammoun, seem to address *erga omnes* and *jus cogens* as if synonymous. As such, confusion is bound to occur in such instances.

Since 1970, the court has used the concept of *erga omnes* various times in its decisions,[16] advisory opinions, and has even heard arguments employing the term from states appearing before the court.[17] However, over fifty years later, the notion of *erga omnes*

13 See Tams (n 3) 140; see also E de Wet, '*Jus Cogens* and Obligations *Erga Omnes*' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 554–555; Bradley (n 7) 215.

14 See *Barcelona Traction* (n 1), Separate Opinion of Judge Ammoun 204–25; see also Tams (n 3) 140; A de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International 1996).

15 These were the outlawing of the unilateral use of force, genocide, the prohibition of slavery and racial discrimination.

16 See *Case concerning the Nuclear Tests (Australia v. France*) Judgment, ICJ Reports (1974) 253; *Case Concerning East Timor (Portugal v Australia)* Judgment, ICJ Reports (1995); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, ICJ Reports (2007) 43; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion, ICJ Reports (1971) 16; Maurizio Ragazzi, (1997) *The concept of international obligations erga omnes* 12, 164.

17 *Barcelona Traction* (n 1); *Case Concerning East Timor (Portugal v Australia)* Judgment, ICJ Reports (1995) para 29; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*

remains surrounded by a considerable lack of conceptual clarity and the concept is still often confused with other international legal concepts.[18]

Namibia Advisory Opinion

Sixteen months after the court pronounced on *Barcelona Traction*, it handed down its *Namibia Advisory Opinion*.[19] In that matter, the it had to consider the legal consequences that the continued presence of South Africa in Namibia had for South Africa, and it held that:

> … the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.

Here, the court espouses that all states have an international obligation *erga omnes* not to recognise as legal, South Africa's continued presence in Namibia and confirms that the nature of an *erga omnes* obligation is that it is applicable to all states, including non-member states to a particular treaty. Ragazzi is of the view that 'a possible explanation of the international obligation *erga omnes* not to recognise the legality of South Africa's continued presence in Namibia is related to the concept of *jus cogens*.'[20] This construction would mean that there is a duty on States not to recognise the situation in Namibia as legal because it amounts to a breach of an international norm with *jus cogens* status.[21] Ragazzi's comprehension acknowledges the fact that the ICJ does not itself refer to *jus cogens* at all in this matter, instead it relies on the concept of *erga omnes* and in so doing, he concludes, the court fails to show how the obligation not to recognise the legality of South Africa's continued presence in Namibia would be opposable *erga omnes*, and not binding only on member states of the United Nations.[22] For that reason,

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Judgment, ICJ Reports (2012) paras 66, 103; *Legality of the use by a State on Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organisation)* 1993; see also a list in Ragazzi (n 16) 12; Eggett and Thin (n 3).

18 As above.

19 *South West Africa cases* (n 16).

20 Ragazzi (n 16) 169. Ragazzi relies on J Crawford, *The Creation of States in international law* (Oxford University Press 1979) 123 that 'when the illegality invoked is substantial, and in particular when it involves a norm of *jus cogens*' then there is a duty of non-recognition that exists *erga omnes*.

21 Ragazzi (n 16) 169; T Christakis, 'L'Obligation de Non-reconnaissance des Situations Crees par le Recours Illicite à la Force ou d'Autres Actes Enfreignant des Regles Fondamentales' in C Tomuschat and J-M Thouvenin, *The Fundamental Rules of the International Legal Order* (Brill 2005) 127–166.

22 Ragazzi (n 16) 171.

he provides that the logical conclusion to follow is that the ICJ finds the United Nations as having 'the reservoir of necessary powers resulting in legal obligations opposable to all States when rules of *jus cogens* are involved,' meaning the rules involved in this case would qualify as *jus cogens*, hence they are opposable to and beyond member States of the United Nations.[23]

Although the passage from the *Namibia Advisory Opinion* remains relevant to the concept of *erga omnes*, its contribution to the mission of clarifying the concept is small—if anything, it allows for the further conflation of the concept with *jus cogens*.[24] In fact, similar references of *erga omnes* appear in the context of the *Nuclear Test* case,[25] *Bosnia Genocide*,[26] as well as *Nicaragua*,[27] however, none of them provide any useful modality by which to clarify the theoretical and practical understanding of the concept, especially beyond *jus cogens* and this is continuing.

East Timor

The case concerning East Timor relates to the right of peoples to self-determination. The case involved issues arising between Indonesia (a non-member State of the ICJ) as well as Portugal and Australia.[28] In 1991, Portugal had filed proceedings against Australia for certain activities conducted by Australia relating to East Timor and alleged that Australia had failed to observe the obligation to respect the duties and powers of Portugal as the Administering Power of East Timor and the right of the people of East Timor to self-determination. To that end, Portugal argued that Australia had incurred international responsibility to the people of East Timor and her Administering Power, Portugal. However, Australia objected to the matter, indicating that Indonesia, a non-member to the ICJ had a direct interest in the matter. Indonesia, rejected the compulsory jurisdiction of the ICJ and thus, devoid the Court of the jurisdiction to adjudicate on the matter. In paragraph 29, the court held that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' such that:

> whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*."

The same principle was confirmed by the court in its decision regarding the *Croatian Genocide Convention* when the court reiterated that the *erga omnes* nature of the obligation in question does not automatically give the ICJ the requisite jurisdiction to

23 ibid 170.
24 ibid.
25 *Nuclear Tests* (n 16) 253.
26 *Bosnia Genocide* (n 16) 43.
27 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Jurisdiction and Admissibility, Judgment, ICJ Reports (1984) 416–417.
28 *Case Concerning East Timor* (n 16 above) para 20; see also Bradley (n 7 above) 205.

adjudicate on the matter.[29] In summation, the contribution that the *Croatian Genocide Convention* case as well as *East Timor* may be considered to have in the academy, is the clarification that while *erga omnes* may grant a right of standing, it does not grant automatic jurisdiction to hear a matter. Nonetheless, the ICJ then also describes the right to self-determination as one of the 'essential principles of contemporary international law'[30] and having an *erga omnes* characterisation is very important as it appears to amount to its elevation as a norm of *jus cogens*.[31] Opinion is divided on the question whether indeed self-determination is a norm of *jus cogens*, however, most of the existing authority supports that conclusion.[32] Although the ICJ itself had not pronounced directly on this point, certain judges have for long described self-determination as a norm *jus cogens*.[33] Therefore, the existing debates surrounding the characterisation of self-determination as *jus cogens* must be considered when assessing this case, and when this is done, not only does the decision prove to have limited contribution towards the clarity of *erga omnes* beyond *jus cogens*, but it also facilitates the continued conflation between *erga omnes* and *jus cogens*.

Chagos Advisory Opinion

On a more recent matter, the ICJ handed down an Advisory Opinion concerning the *Legal Consequences of the separation of the Chagos Archipelago from Mauritius*.[34] The request for the advisory opinion was submitted by the United Nations General Assembly (UNGA) via a resolution.[35]

29 *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, ICJ Reports (2006) 6 para. 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* ICJ Reports (2015) 3 para. 88.

30 See *East Timor* (n 17) 102.

31 GJ Naldi, 'The East Timor Case and the Role of the International Court of Justice in the Evolution of the Right of Peoples to Self-determination' (1999) 5(1) Australian Journal of Human Rights 106.

32 See *Western Sahara,* Advisory Opinion, ICJ Reports (1975) 25–26; I Brownlie, *Principles of Public International Law* (1990) 513; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 133–140; J Dugard, *International Law: A South African Perspective* (Juta 1994) 76; M Dixon, *Textbook on International Law* (Oxford University Press 1996) 35; J Sebutunde, 'Is the Right to Self-Determination *Jus Cogens* Reflections on the Chagos Advisory Opinion' in editor? *Disquisitions and Dispositions* (Brill 2021)generally. For contrary views, see M Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (publisher 1982) Ch IX; J Crawford, *The Creation of States in International Law* (Clarendon Press 1979) 81.

33 See *Barcelona Traction* (n 1), Separate Opinion of Judge Ammoun 304; *South West Africa cases* (1970) 73–75; Judge Weeramantry stated that the right to self-determination, which he agreed was also a right *erga omnes*, "constitutes a fundamental norm of contemporary international law, binding on all States" in *East Timor* 1995 Dissenting Opinion of Judge Weeramantry 197.

34 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) ICJ Reports (2019) 95.

35 See United Nations General Assembly Resolution 71/292 (2017).

The court had to decide the legal outcomes of the United Kingdom's ongoing control of the Archipelago. This raised a question about the right to self-determination and the consequences if that right is violated. At paragraph 180, the court acknowledges the *erga omnes* character of the obligation to respect self-determination and finds that 'there exists an obligation, binding on all States, to cooperate with the UN to complete the decolonisation of Mauritius.'[36] The court held:

> Since respect for the right to self-determination is an obligation [owed] *erga omnes*, all States have a legal interest in protecting that right […]. The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect**.** As recalled in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:
>
> Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle … .(references omitted).

Eggett and Thin are of the opinion that paragraph 180 of the *Chagos* Opinion seems to provide for a potential source of confusion between *erga omnes* and *jus cogens*.[37] They argue that the specific *erga omnes* obligation referred to in paragraph 180 to cooperate with the UN towards the decolonisation of Mauritius arises from a self-standing customary rule of international law in relation to decolonisation which is reflected in Resolution 2625 of the General Assembly as cited by the Court in its Advisory Opinion, and not as a rule of *jus cogens*.

These scholars base their conclusion on the fact that in the Advisory Opinion, the court had made an oblique reference to General Assembly Resolution 1514 (XV) having 'a declaratory character with regard to the right to self-determination as a customary norm.'[38] Accordingly, they conclude that since the court did not explicitly recognise that the right has evolved into a peremptory norm of international law (*jus cogens*) from which no derogation is permitted and the breach of which has consequences not just for the administering power concerned, but also for all states,[39] it cannot be said that the candidate norm is *jus cogens*—but merely, a rule of customary international law similarly giving rise to obligations *erga omnes*.[40]

36 Eggett and Thin (n 3); see also the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Reports (2004).
37 Eggett and Thin (n 3); see also Bradley (n 7) 210.
38 Chagos Advisory Opinion (n 34) paras. 152–153.
39 Sebutunde (n 32) 386–412.
40 Eggett and Thin (n 3).

Although this nuance seems correct at face value, it has received criticism from the Special Rapporteur on peremptory norms of general international law (*jus cogens*). In his commentary to the blog article, Tladi is of the view that 'the customary international [law] duty itself, has, by virtue of its general connection with a peremptory norm (the right to self-determination), been elevated to the status of [a] peremptory norm.'[41] Tladi concludes that the duty to cooperate is simply an application of the consequences of the peremptory status of self-determination.[42]

Tladi further notes that while the ICJ does not itself use the words peremptory norms or *jus cogens* in its Advisory Opinion, several judges do,[43] with none of the judges challenging the assumption that the right to self-determination is a norm *jus cogens* giving rise to obligations *erga omnes*. Moreover, in the course of the proceedings, several States[44] as well as the African Union representing fifty-five states,[45] also referred to the peremptory status of the right to self-determination, still, not a single State challenging this submission.

Seen from this perspective, the court's application of Article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) is correct.[46] Deductively, if self-determination produces *erga omnes* obligations and it is not a norm related to common spaces,[47] then a conclusion can be reached that it is *jus cogens*.[48] In this respect, the court's application of Article 41 to the breach of the obligation *erga omnes* arising out of the peremptory norm (self-determination) is appropriate,[49] and for

41 ibid, commentary on the blog article.

42 See generally S Kadelbach, '*Jus Cogens*, Obligations *Erga Omnes* and other Rules: The Identification of Fundamental Norms' in C Tomuschat and JM Thouvenin, (eds), *The Fundamental Rules of the International Legal Order* (Brill 2005).

43 In my view, Tladi's analysis seems more apt than the first. Nonetheless, it is regrettable that the court failed to explicitly recognise the peremptory nature of the right to self-determination and this opens the floor for speculation as to whether *jus cogens* and *erga omnes* mutually coincide in all cases. See Chagos Advisory Opinion (1965) Separate Opinion of Judge Cançado Trindade; Separate Opinion of Judge Sebutinde para 11; Separate Opinion of Judge Robinson.

44 See Statements of States <https://www.icj-cij.org/en/case/169> accessed 18 April 2022; Written Statement of Belize (30 January 2018) 11; see also Written Statement submitted by the Republic of Cyprus (12 February 2018) 4, 11; Written statement of the Kingdom of the Netherlands (27 February 2018) 2, 4, 8, 9, 18, 19; Written Statement submitted by the Republic of Serbia (27 February 2018) paras 30, 32; Written Statement submitted by the Federative Republic of Brazil (1 March 2018) para 15; Written Statement submitted by the Government of the Republic of South Africa (1 March 2018) 4.

45 Written Statement of the African Union (1 March 2018) 17, 66.

46 *Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001 (hereafter referred to as ARSIWA or 'Articles on State Responsibility' unless otherwise indicated).

47 Tladi is of the view that the only norms capable of producing *erga omnes* obligations outside the realm of *jus cogens* are norms arising in terms of common spaces.

48 See Sebutunde (n 32) 387–388.

49 See *Chagos Advisory Opinion* (n 34) Separate Opinion of Judge Sebutunde 270–202, as well as Sebutunde (n 32) 386–412; *Chagos Advisory Opinion* (n 34) Separate Opinion of Judge Cançado Trindade 193.

Tladi, this confirms what the court is reluctant, 'perhaps because it is unnecessary,' to say expressly.[50]

It is worth noting that the ICJ has for a long time avoided using the term '*jus cogens*' and has instead placed reliance on using the term '*erga omnes*' to describe obligations arising from certain norms and/or community interests.[51] The first time the term *jus cogens* is mentioned expressly in the jurisprudence of the ICJ was in the *North Sea Continental Shelf* judgments of 1969.[52] Even that reference was completely irrelevant as the reference was made in passing without attempting to address any questions or issues relating to *jus cogens*.[53] However, following this, there was a decline in the use of the term by the court. Even in some circumstances where the court was particularly presented with an opportunity to appropriately discuss and use this notion at length, it has been extremely cautious.[54] Krivenko's analysis of the court's practice indicates that the term *jus cogens* was 'mentioned three times in the *Nicaragua* judgment on merits;[55] once in the *Nuclear Weapons* advisory opinion[56] and once in the *Gabčíkovo-Nagymaros* case (as well as two more references to peremptory character as a synonym of *jus cogens*).'[57]

Krivenko's analysis of the specific cases he refers to is crucial as from that analysis, he correctly points out the court's failure to engage the notion of *jus cogens* in detail, and thus, causing its confusion with *erga omnes*.[58] The court used the term simply to respond to the arguments made by the parties, 'mostly affirming that there was no need to consider the notion.'[59] Since then, the limited manner in which the ICJ engages with the concept of *jus cogens* has continued to the present day and this continues to lead the conflation between *jus cogens* and *erga omnes*.[60] Of course, this is not to say that the

50 See commentary on Eggett and Thin (n 3); see *Chagos Advisory Opinion* (n 34) Separate Opinion of Judge Robinson 308 para 49 where it is remarked that the Court's reluctance to address the *jus cogens* character of the right to a peoples self-determination is an interesting feature of the Advisory Opinion in light of the fact that 'a high number of participants in the proceedings argued that the right to self-determination is a norm of *jus cogens*.'

51 Bradley (n 7) generally.

52 *North Sea Continental Shelf* (n 8) 41–42.

53 As above.

54 EY Krivenko, 'The ICJ and *Jus Cogens* through the Lens of Feminist Legal Methods' (2017) 28(3) EJIL 959–974.

55 *Nicaragua* (n 27) 100, para. 190.

56 *Case Concerning the Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports (1996) 258 para. 83.

57 *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* Judgment, ICJ Reports (1997) 62, para. 97, see also paras 50, 112.

58 See Krivenko (n 54).

59 ibid; *Nicaragua* (n 27) 100 para. 190.

60 See Krivenko (n 54); perhaps the following cases are some of the limited cases fitting for an exception to the content of this paragraph: *Case Concerning the Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* Judgement ICJ Reports (2012) 99, as well as the *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) *(Democratic*

court has abandoned discussing the concept of *jus cogens* at all. There have been other instances where the court referred to the term such as in *Jurisdictional Immunities*,[61] *Belgium v Senegal*,[62] *Armed Activities*,[63] as well as in the *Kosovo Advisory Opinion*.[64]

Erga *Omnes* Through the Lens of the International Law Commission and its Articles on State Responsibility

The general point of departure regarding state responsibility is that where there has been a breach of an obligation by a state, such a breach must be attributed to the state, principally by the injured state.[65] Article 42 of the Articles on State Responsibility provides that the implementation of state responsibility is in the first place an entitlement of the 'injured state.'[66] However, *erga omnes* allows us to depart from this position as it permits any party in the international community to invoke state responsibility, even if not directly injured or affected by such a breach.[67] In other words, being described as obligations which are owed to the international community of states as a whole, *erga omnes* obligations impose special duties on any state that may violate international obligations which 'go beyond the bilateral reparation scheme which applies in reciprocal legal relationships.'[68] Since state responsibility flowing from the breach of an *erga omnes* obligation entails the right of states not directly affected by an internationally wrongful act to invoke the responsibility of the delinquent state, such a state, may be invoking the responsibility of the delinquent state on their own behalf, on behalf of subjects of international law who are unable to bring a claim themselves, or merely as members of the international community of states.[69]

Noori and Louyeh are in agreement that the principal 'rules and obligations that hold an *erga omnes* status are not [merely] prioritized over ordinary commitments, but are also accompanied by a stronger enforcement mechanism, and therefore, a more severe responsibility regime.'[70] *Erga omnes* status suggests that for certain obligations (obligations which are owed to the international community as a whole), the right of

Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports (2006) 6; see De Wet (n 13); Kadelbach (n 42) 63–74.

61 See *Jurisdictional Immunities of the State* (n 60) 99.

62 *Questions relating to the Obligation to Prosecute or Extradite* (n 60) 422.

63 *Armed Activities on the Territory of the Congo* (n 60) 6.

64 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports (2010) 437.

65 See art 42 of the Articles on State Responsibility; see discussion of Article 42 in the *Report of the International Law Commission on the work of its fifty-third session* (2001) 117 para 1.

66 As above.

67 Article 48 (1) (b) and the commentaries thereto, De Wet (n 13); Kadelbach (n 42) 26.

68 Kadelbach (n 42); I Scobbie 'The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law' (2002) 13(5) EJIL 1204.

69 As above.

70 SM Noori and SE Louyeh, 'When Environmental Obligations Collide with State Sovereignty: An International and Sharia Law Perspective' Consensus (2020) 3–4

enforcement belongs to all states. Some commentators propose a rather restrictive interpretation of the court's description of *erga omnes* as being owed 'towards the *international community as a whole*.'[71] These scholars propose that 'the enforcement of obligations *erga omnes* requires a collective response,'[72] in other words, individual states do not possess the requisite standing to enforce obligations *erga omnes* on their own.[73] However, upon closer scrutiny, this argument does not hold out. Dawidowicz reveals that although the court described obligations *erga omnes* as being owed 'towards the international community as a whole' without the reference to 'all States,' the 'international community as a whole' is in fact equated to all states.[74] Furthermore, the ILC also explains in its commentary that the use of 'any State' in Article 48 of the Articles on State Responsibility is meant to clear any confusion that these states must act collectively.[75]

Therefore, any state can 'invoke the responsibility of a State which is in breach of an *erga omnes* obligation before an international [judicial organ] without having any legal pitfalls as regards to *locus standi*.'[76] Notwithstanding the significant step taken by the ICJ to create a multilateral dimension of state responsibility by affirming obligations *erga omnes*, the ICJ did not provide the means by which obligations *erga omnes* could be enforced under the international law of state responsibility. This raises the question whether a third state could respond to breaches of obligations by way of third-party countermeasures in order to ensure the compliance of obligations *erga omnes* and protect rights flowing from norms with *erga omnes* status. This question is explored in detail below. While this is so, an analysis of third-party countermeasures, will also assist us in the quest to establish the criteria to be used to identifying *erga omnes* obligations beyond *jus cogens*.

Incidentally, while on the subject of state responsibility in respect of breaches of obligations *erga omnes*, it is worth mentioning that there is general agreement in legal literature that the most authoritative and comprehensive codification of the law of state responsibility is contained in the ILC's Articles on State Responsibility.[77] In 2001, the ILC adopted a complete text of the Articles on State Responsibility. The Articles make clear that whether the relevant obligation is owed to an individual state, several states or to the international community as a whole, the legal consequences for violating

71 See M Dawidowicz, *Third-party Countermeasures in International Law* (Cambridge University Press 2017) 49.

72 ibid.

73 In effect, these scholars suggest that collective standing is necessary for the invocation of obligations *erga omnes*.

74 See Dawidowicz (n 71) 51.

75 See Commentary to Article 48, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) 126 para 4.

76 Noori and Louyeh (n 70) 4; T Meron, 'On a Hierarchy of International Human Rights' (1986)80 AJIL 11–12.

77 TM Ndiaye and R Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Martinus Nijhoff Publishers 2007) 38.

international law norms are the same.[78] Consequently, a violating state must (1) cease the violation,[79] (2) offer necessary assurances of non-repetition,[80] and (3) make full reparation for the injury suffered.[81]

However, for all other matters not concerning the breach of obligations owed *erga omnes*, Brunnée is of the view that the collective interest questions become a vital point of consideration when issues regarding the invocation of responsibility by any state other than the injured state; the remedies available, and the countermeasures which may be taken by such non-injured state to induce the responsible state's compliance, are at play.[82]

An assessment of Articles 42 and 48 of the Articles on State Responsibility reveals that the ILC makes a general distinction between injured and non-injured states in order to maintain the delicate balance between bilateral relations that exist between states as well as protect the collective interest of states.[83] The latter is done to ensure that the important collective interests of states are afforded the appropriate significance in the regime of state responsibility.[84] This means, that a non-injured state, much like the injured state itself, has the requisite standing to invoke the responsibility of the delinquent state for the breach of an obligation which is owed *erga omnes* (thus protected collectively), and this has been codified in Article 48 of the Articles on State Responsibility, which provides us with the starting point through which we can analyse and synthesise obligations *erga omnes*.

The Articles on State Responsibility provide an avenue through which *erga omnes* status can impact the enforcement of obligations.[85] In particular, Article 48 establishes a regime of state responsibility for violations of international obligations towards the international community as a whole (*erga omnes*). More specifically, under paragraph (1) (b), the provision stipulates that states *other than the injured state* may invoke the responsibility of a state in breach if the obligation being breached is owed to the international community as a whole.[86] The ILC has highlighted that this provision is specifically intended to 'give effect to the ICJ's statement in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to

78 ibid 38–39.
79 ARSIWA 2001 art 30,.
80 ibid.
81 ibid art 31.
82 Ndiaye and Wolfrum (n 77) 39.
83 See provisions and commentaries to arts 42 and 48, *Draft Articles with commentaries*, 2001.
84 See Ndiaye and Wolfrum (n 77) 39; see also M Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2001)72 BYIL 348–349.
85 De Wet (n 13).
86 ARSIWA (n 79) art 48(1)(b).

particular States and those owed "towards the international community as a whole."'[87] In other words, this means that the nature of an obligation *erga omnes* changes or influences the regime of State responsibility—from being a bilateral one, to a multilateral duty.[88]

Fittingly, a four-fold conclusion follows here.[89] First, that a state has standing to invoke the responsibility of an offending state as an 'injured' state for the breach of an obligation that was owed to it individually.[90] Second, that an injury can also result from the breach of an obligation owed to a group of states, subsequently giving standing to any of the members of states to whom the obligations are owed (*obligations erga omnes partes*).[91] Third, that any state may have standing to invoke the responsibility of another state for violations of international law if such violation specifically affects such a state, or the breach radically changes the position of the states to which the obligation is owed.[92] Finally, that 'when a violation affects only a State's legal interest in the upholding of collective concern obligations,'[93] such a state can only invoke the offending state's responsibility as a 'non-injured' state, and this places limitations on what such a state can claim from the responsible state and what measures it can take to ensure compliance.[94]

Perhaps the most obvious efforts made by the ILC to strengthen the collective interest elements of the state responsibility regime may be perceived in Articles 40 and 41 of the Articles on State Responsibility regarding the treatment of 'serious breaches' of peremptory norms of international law.[95] Although the Articles mainly address the ordinary consequences of a violation of international law norms, they also set-out special duties that must be observed by other states when an international law norm has been breached. For example Article 41 paragraphs (1) and (2), indicate that third states

87 See Draft Articles with commentaries, 2001 127 para 8; ILC Report, UN Doc A/56/10 (August 2001) <https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility> accessed 19 April 2022.

88 A Pigrau, 'Reflections on the Effectiveness of Peremptory Norms and *Ega Ones* Obligations Before International Tribunals, Regarding the Request for an Advisory Opinion from the International Court of Justice on the Chagos Islands' (2018) 55 QDI 131–146.

89 Although this section draws four conclusions for each of the types of grounds upon which a state can claim standing to invoke the responsibility of another state, in practice, these Articles established two types of legal standing: (i) standing derived from *injury* (Article 42) and (ii) standing derived from *common interests* (Article 48) (own emphasis).

90 Ndiaye and Wolfrum (n 77) 38–39.

91 ARSIWA art 48(1)(a) 2001.

92 ibid art 42(b).

93 Ndiaye and Wolfrum (n 77) 38–39; ARSIWA (n 79 Art 48(1)(b).

94 Ndiaye and Wolfrum (n 77) 39.

95 ARSIWA (n 79) arts 40 and 41.

must cooperate to end a serious breach through lawful means, and may not recognise a situation created by a serious breach or assist in maintaining that situation.[96]

The question that then looms large is what measures a third state may take to protect collective interests flowing from obligations *erga omnes*. In particular, this begs the question as to whether third states may take third-party countermeasures to ensure compliance with obligations *erga omnes*. This question is addressed below.

Third-party Countermeasures

Dawidowicz is of the view that the underlying concept of countermeasures, that is, those traditionally concerned with bilateral situations of responsibility arising between the injured state and the responsible state, has been firmly grounded in international law for a long time now.[97] In other words, the concept is traditionally understood to concern itself with bilateral relations of responsibility, where an injured state takes actions against the responsible state to invoke compliance from the responsible state.[98] By contrast, the notion of third-party countermeasures is a remarkably new development in international law, albeit widely connected with an extensive record of discourse concerning 'the possible invocation of responsibility for breaches of communitarian norms.'[99] The use of third-party countermeasures is one of the most controversial issues in the law of state responsibility.[100] Within the body of international law, the notion of third-party countermeasures is recognised as 'the use of countermeasures by one State against another in response to a breach of an international obligation owed to the international community as a whole (ie obligations *erga omnes*),[101] and are taken in defence of some common interest of the international community.'[102] Although their legal position remains largely uncertain, the use of third-party countermeasures is an increasingly common phenomenon in international relations.[103] As a result, some scholars consider that a right to third-party countermeasures seems to be emerging under customary international law, as a possible means for implementing state responsibility

96 See for example the *Wall Advisory Opinion* (n 36) para. 159; see also the *Chagos Advisory Opinion* (n 34) para. 180.

97 See Dawidowicz (n 71) 16–31.

98 ibid 31; International Law Commission Report, Part Three, Chapter II (fifty-third session 2001) 128–137.

99 Dawidowicz (n 71) 31.

100 A Bills, 'The Relationship Between Third-party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations Erga Omnes in International Law' (JURM02 graduate thesis, Lund University Faculty of Law 2019), 8; G Gaja 'The Concept of an Injured State' in J Crawford and others (eds) *The Law of International Responsibility* (2010) 957, 962; Tams (n 3) 198–251.

101 *Barcelona Traction* (n 1) para 33; Dawidowicz (n 71) 52–53.

102 See Bills (n 100) 8–9, see D Alland, 'Countermeasures of General Interest' (2002) EJIL 1229.

103 International Law Commission (n 98) 138–139; Dawidowicz (n 71) generally.

for violations of obligations *erga omnes* in terms of Article 48 of the Articles on State Responsibility.[104]

The recent attention received by collective interests in international law has made the Security Council to place emphasis on 'its own enforcement competences for breaches of community interests such as obligations *erga omnes* or peremptory norms of international law.'[105] The Security Council has incorporated the relevant violations of international law among its resolutions of what constitutes a threat to peace under Article 39 of the UN Charter. This inclusion allows the Council to rely on an extensive body of interpretations of its mandate for the maintenance of international peace and security and allows it the opportunity to provide a collective or institutionalised response to breaches of collective interest norms.[106] On the other hand, third-party countermeasures have the potential to guarantee the protection of the common interests of the international community.[107] However, some fear that the aftermath of recognising a right to third-party countermeasures carries with it the potential disruption of the institutional stability created under the UN Charter and that such recognition may enable powerful states to have an excuse for power politics and unnecessary interventions under the pretence of lawful countermeasures.[108]

Thus, when the subject of third-party countermeasures came to the attention of the ILC, it was met with a great degree of polarisation.[109] Opponents suggested that third-party countermeasures might put world peace at risk,[110] whereas the supporters suggested that third-party countermeasures are a possible 'saving grace for international law.'[111] Notwithstanding the concerns regarding this subject, it must be pointed out that in 2000,

104 J Charney, 'Third States Remedies in International Law' (1989) 10 Michigan Journal of International Law 57–101; Bills (n 100) 9; Dawidowicz (n 71) 282—284; EK Proukaki *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (2010) 201–209.

105 Bills (n 100) 9; V Gowlland-Debbas *et al United Nations sanctions and international law* (2001) 1–28; UNSC, The Congo Question Res 161 (1961) (); UNSC South Africa Res 418 (1977) 4.

106 See Bills (n 100) 8, 9.

107 ibid); J Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law' (1994) RCADI 423; A Orakhelashvili, *Peremptory Norms in International Law* (2006) 272; Alland (n 102) 1239; Proukaki (n 104) 201—209; Tams (n 3) 158.

108 Dawidowicz (n 71) 8–13.

109 Alland (n 102) 1221–1239.

110 These states were of the view that third-party countermeasures may be used in an abusive fashion by powerful states purporting to act in the interest of the international community. However, practice at the time of adoption, albeit limited, demonstrated that third-party countermeasures had not been used in any abusive fashion by a state said to be acting to protect the interests of the international community.

111 Dawidowicz (n 71 5–13.

when the Special Rapporteur on State responsibility proposed the idea of third party-countermeasures, the proposal was met with a significant level of approval.[112]

This did not get rid of the extreme controversies regarding the topic, which ultimately prompted the ILC to reserve its position on third-party countermeasures when it adopted the Articles on State Responsibility in 2001.[113] In its 'reservation,' the ILC reduced Article 54 from a substantive clause, to a 'savings clause'[114] on the matter. The provision seeks to find a balance between the competing legal and policy considerations.[115] The provision reads as follows:

> This chapter [i.e. on countermeasures taken by States other than the injured State] does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.[116]

The ILCs commentary to the Articles on State Responsibility clarifies that at the time of adoption, state practice was simply 'limited and rather embryonic' to adopt a provision allowing states a right to take third-party countermeasures in the circumstances contained under Article 48 of the Articles on State Responsibility.[117] Crawford suggests that it would not have been appropriate for Article 54 of the Articles on State Responsibility to employ an affirmative language as 'no clearly recognised entitlement' to take third-party countermeasures under international law seemed to have materialised at the time.[118] For that reason, the ILC adopted the text in Article 54 to neither endorse nor preclude that a right to third-party countermeasures may arise as a result of the further development of international law and the formation of customary international law.[119]

There are debates around whether state practice supports the conclusion that third-party countermeasures are allowed in international law. Currently, there are contrasting interpretations to various decisions taken by the ICJ, which may elucidate on the matter. For example, on the one hand, paragraph 126 of the *Namibia* opinion[120] of the ICJ is

112 ILC 'Report of the ILC on the Work of its 52nd Session' (1 May–9 June and 10 July–18 August 2000) UN Doc A/55/10, 62, para 385.

113 M Dawidowicz 'Third-party countermeasures: A progressive development of international law?' (2016) 29 QDI 3–15; Dawidowicz (n 71) 93–110.

114 J Crawford 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96(4) AJIL 875, 881; Bills (n 100) 34.

115 Dawidowicz (n 71) 13.

116 ARSIWA 2001 art 54.

117 ibid commentary, Article 54 paras. 3–7; Crawford (n 114) 875–881.

118 Crawford (n 114) 875–881; see also Report of the ILC on the Work of its 52nd Session 139 para 6.

119 ARSIWA commentary 2001 art 54 para 7.

120 *South West Africa cases* (1970) 56 para 126.

often interpreted by others as an indirect endorsement of third-party countermeasures.[121] On the other hand, others believe that the court did not, whether directly or indirectly, endorse third-party countermeasures. In fact, Dawidowicz argues that the court simply endorsed what later became Article 41(2) of the Articles on State Responsibility.[122] However, whatever the import of the *Namibia* opinion is in respect of collective interests, what is clear is that, on its terms, it does not address the issue of third-party countermeasures.

Amongst others, one should, as a starting point, consider the *Tehran Hostages* case which by implication provides some, albeit limited, guidance on third-party countermeasures.[123] In that case, a group of protesting students took the United States embassy in Tehran by force. The Tehranis police/security did nothing to prevent the situation or to address it. Consequently, the United States (US) claimed that Tehran infringed obligations under both the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations.[124] While the matter was before the United Nations Security Council and pending before the ICJ, the United States adopted a number of measures against Iran, including countermeasures by way of freezing all of its assets held in the country. In its decision, the ICJ failed to condemn the United States in taking countermeasures. Schachter considers that this 'silence is noteworthy'[125] and implies that the court indirectly accepted that 'the existence of treaty based enforcement mechanisms, notably in the form of judicial proceedings, does not as such exclude recourse to [third-party] countermeasures.'[126] This interpretation seems supported by Judge Morozov in his dissenting opinion.[127]

Nonetheless, perhaps the court addressed the issue of third-party countermeasures more directly in the *Nicaragua* decision.[128] In that case, Nicaragua had instituted proceedings against the US for the responsibility of military and paramilitary activities taken by the US in and against Nicaragua. Nicaragua alleged that the US had been in violation of the principles of non-use of force and non-intervention under customary international law. It further alleged that the US violated the Friendship, Commerce and Navigation (FCN) Treaty when it imposed a general trade embargo as part of the coercive measures it had adopted against Nicaragua. In its response, the US submitted that it used force against

121 Dawidowicz (n 71) 58; see L-A Sicilianos 'Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense' (1990) *Librairie générale de droit et de jurisprudence* 151–152.

122 Dawidowicz (n 71) 61; art 41(2), ARSIWA 2001.

123 *Case concerning United States Diplomatic Consular Staff in Tehran (United States of America v Iran)* (1980) Dissenting Opinion of Judge Morozov ICJ Reports 1980, 53.

124 See Dawidowicz (n 71) 49.

125 O Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 RCADI 173–174.

126 Dawidowicz (n 71) 63; Tams (n 3) 297; Schachter 1982 *RCADI* 173 – 175.

127 *Legal Consequences for States of the Continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) Dissenting Opinion of Judge Morozov, ICJ Reports 1971, 52–53.

128 *Nicaragua* (n 27).

Nicaragua in its exercise of the right to collective self-defence in response to requests made by neighbouring states of Nicaragua against Nicaragua's armed aggression.

The court held that it did not consider Nicaragua responsible for the most serious breaches of the use of force (armed attack), and as such, the US was not qualified to take forcible measures as an armed attack in the exercise of the right to collective self-defence. In effect, the court endorsed that 'third-party countermeasures could only be taken—if at all—in response to serious breaches of obligations *erga omnes*.'[129] Various scholars diverge from this conclusion, as according to them, although the court was applying customary international law and not treaty law, it is clear that the court based its assessment of customary international law on the UN Charter and its contents, which together with the Friendly Relations Declaration[130] provide for collective self-defence. From this viewpoint, the court did not base its conclusions on third-party countermeasures.[131]

For example, Crawford suggested that the court unequivocally rejected the arguments that the US regarded itself as having taken action in the form of third-party countermeasures in response to obligations *erga omnes*.[132] However, in paragraph 249 of its decision the court merely stated that 'the acts of which Nicaragua is accused … could only have justified proportionate countermeasures on the part of the State which had been the victim'[133] and that they could therefore not justify forcible third-party countermeasures. This cannot be interpreted to support the inadmissibility of third-party countermeasures as the court did not address concerns about non-forcible third-party countermeasures taken by a third state in response of a breach on an obligation *erga omnes*. The court specifically addressed the use of force taken by the US under the guise of third-party countermeasures and rejected that specific argument. This leads to a conclusion that 'the Court also seemingly did not exclude the possibility that third-party countermeasures might be permissible in order to enforce obligations *erga omnes (partes)* to the extent that treaty-based mechanisms of enforcement are ineffective.'[134]

State Practice on Third-Party Countermeasures[135]

State practice on the question of third-party countermeasures was not examined in great detail during the adoption of Article 54 of the Articles on State Responsibility.[136] The

129 Dawidowicz (n 71) 64–70.
130 The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States UNGA Res 2625 (1970).
131 D Alland, *Justice Privée et Ordre Juridique International: Étude Théorique des Contre-mesures en Droit International Public* (1994) 337–338.
132 J Crawford, *Brownlie's Principles of Public International Law* (2012) 586–589.
133 *Nicaragua* (n 27) 127, para. 249.
134 Dawidowicz (n 71) 67.
135 Dawidowicz 111–238.
136 ILC, Third report on State Responsibility by James Crawford Special Rapporteur (2000) 102 para 390–393.

ILC had merely considered six instances of state practice on the subject of third-party countermeasures and then came to the conclusion that there was insufficient or sparse state practice to make a conclusive determination on the matter, hence Article 54 was adopted as an open clause.[137] However, the relevant instances involving state practice on the question of third-party countermeasures had already exceeded the limited examples which were identified by the ILC in its work and has simply continued to grow over the years.[138] This section will consider a vast deal of state practice in an attempt to establish whether there is support or resistance to the idea of third-party countermeasures in response to a breach of obligations *erga omnes* in international law.

From as early as the 1960s, one can already deduce the position of states in respect of third-party countermeasures. For example, in response to the actions of the apartheid South African police forces who had fired at a crowd, and killing a large number of black protestors at Sharpeville, some states in the international community imposed a trade embargo against South Africa. Even before then, some developing states had adopted numerous unilateral coercive measures against South Africa and its unlawful apartheid policies.[139] In 1962, when the United Nations General Assembly (UNGA) adopted Resolution 1761, it condemned South Africa's disregard of its obligations under the UN Charter and requested member states to individually or collectively take unilateral and coercive measures against South Africa.[140]

In 1963, in response to the requests made by UNGA in the resolution, the UNSC called upon all states to impose an arms embargo against South Africa.[141] Dawidowicz makes specific references that states such as Ghana, Malaysia, Indonesia, Kuwait, Nigeria, Pakistan, Sierra Leone, Tanzania and Uganda reacted by imposing a trade embargo against South Africa.[142] Although these states were party to the General Agreement on Tariffs and Trade (GATT) with South Africa, and did not place embargoes on the country by virtue of the security exceptions provided for in the treaty, they did not consider their actions illegal, whether justified by general international law or not.[143] From this, Dawidowicz draws the conclusion that these states relied on the concept of third-party countermeasures to respond to serious breaches of obligations owed *erga omnes* (obligations concerning the abandonment of apartheid; crimes against humanity

137 As above. The ILC considered instances between 1978 and 1998, as listed in the report: *United States – Uganda* (1978); *Certain Western countries – Poland and the Soviet Union* (1981), *Collective measures against Argentina* (1982), *United States – South Africa* (1986), *Collective measures against Iraq* (1990) and *Collective measures against the Federal Republic of Yugoslavia* (1998); See Dawidowicz (n 71) 240.

138 Dawidowicz (n 71) 111.

139 ibid 113, 114.

140 The Policies of the Apartheid Government of the Republic of South Africa' UNGA Res 1761 (XVII) (1962) para 4.

141 UNSC, Res 181 (1963) <https://digitallibrary.un.org/record/112181?ln=en> accessed 28 May 2022.

142 Dawidowicz (n 71) 115, 116.

143 Dawidowicz 116.

and the right to self-determination), all of which give rise to *important* obligations.[144] This conclusion is supported by Dugard, who suggests that there is evidence in state practice supporting the existence of third-party countermeasures such as when states imposed 'sanctions against South Africa, which in fact violated agreements they had with [South Africa].' Dugard suggests that states did not act on the basis of or place reliance on the UN Charter, but on the concept of countermeasures.[145]

Similarly, when Colonel Papadopoulos and his army seized control in Greece and oversaw numerous violations of fundamental human rights and freedoms, the Consultative Assembly of the Council of Europe adopted a resolution condemning the appalling human rights violations in Greece and calling upon member states to the European Convention on Human Rights (ECHR) to either individually or jointly, refer the situation in Greece to the European Commission on Human Rights.[146] Subsequently, numerous states, including Denmark, Norway, Sweden and the Netherlands instituted complaints against Greece before the commission for flagrant violations of the ECHR.[147] The commission found Greece responsible for the alleged violations. Subsequently, in view of Greece's continued violations of various human rights, member states of the European Community suspended the Agreements establishing an Association between the European Economic Community and Greece, in particular, member states suspended the financial assistance obligations they owed to Greece.[148] Although the obligation to provide financial assistance under the Association Agreement was not subject to compliance with human rights obligations, and no reasonable notice was provided to Greece to indicate such suspension as required under customary international law, Dawidowicz concludes the *prima facie* unlawful suspension of financial assistance by the member states is justified under the concept of third-party countermeasures.[149]

The same conclusion can be drawn from the US's response to the egregious violations of international law perpetuated by Uganda under the leadership of General Idi Amin and his army. In that case, the United States and member states of the European Community took unilateral coercive measures against Uganda to put pressure on the government of Uganda to end the heinous crimes against humanity. While the US was party to the GATT under which it owed Uganda trade obligations, the US nonetheless imposed a trade embargo against Uganda and considered this justified under general international law through third-party countermeasures.[150] Comparably, the European

144 ibid 116–117.

145 See Statement by John Dugard on ILC Yearbook (2001) (1) 44 para 17 <https://www.un-ilibrary.org/content/books/9789211561579/read> accessed 26 May 2021.

146 Dawidowicz (n 71) 117.

147 See 'Greek case,' (*Denmark, Norway, Sweden and the Netherlands v Greece*) Yearbook of the European Commission on Human Rights (1969) 1 para. 3.

148 See Dawidowicz (n 71) 118.

149 ibid 119; for a similar conclusion see Tams (n 3) 91.

150 Dawidowicz (n 71) 121.

Community member states decided to review development assistance owed to Uganda under the Lomé I Convention,[151] subsequently, only five per cent of the assistance owed to Uganda was actually paid out. Tams and Dawidowicz are agreed that this substantial reduction, evidently constituted a *de facto* suspension of development assistance owed to Uganda under the Convention. Although such conduct was not justifiable under the Lomé I Convention, and in the absence of treaty-based justification, it is conceivable that the States placed reliance under third-party countermeasures.[152]

By the same token, when Colonel Bokassa seized control in the Central African Republic and commenced with a series of human rights violations, the European Community member states responded by suspending the allocation of development assistance owed to the Central African Republic under the Lomé I Convention. The only way in which this could be explained, is through placing reliance on the doctrine of third-party countermeasures.[153] A fair assessment reveals that even during the time that the issue of third-party countermeasures had to be considered by the ILC, there was quite recent state practice on the issue that the ILC had not considered. For example, in 1983, Sudan was 'engulfed in a protracted civil war between the Government of Sudan and the Sudan People's Liberation Army.'[154] Ten years later, the UNGA in its Resolution 48/147 condemned the various egregious human rights violations in Sudan and called for their cessation.[155] Notwithstanding its repeated condemnations, it would take Sudan's involvement in the assassination attempt on the then President of Egypt, Hosni Mubarak, while in Ethiopia 'to propel the Security Council into action against Sudan.'[156] It was on this breath that the UNSC adopted a resolution strongly deploring Sudan's conspicuous violations of international law, including posing a threat to the peace and security of Ethiopia.[157]

In view of Sudan's support to terrorist activities in the neighbouring states which had, by then, caused acts of cross-border violence,[158] the UNSC called on Sudan to desist from aiding and abetting terrorist activities.[159] Sudan did not comply, leading to further action by the UNSC and warnings to take even further measures against Sudan should

151 ibid 121; Lomé I Convention, 1976.
152 See Tams (n 3) 210–211; Dawidowicz (n 71) 123.
153 Dawidowicz (n 71) 125 – 126; Proukaki (n 104) 132–133.
154 Dawidowicz (n 71) 176.
155 UNGA Resolution 48/147 Situation of human rights in the Sudan (1993). The UNGA continued to condemn Sudan in other resolutions, see for example UNGA Res 51/112 of December 1993 where the UNGA not only condemns Sudan for the grave violations of human rights, but also calls for Sudan's compliance with its human rights obligations under numerous human rights treaties.
156 Dawidowicz (n 71) 177.
157 UNSC Resolution 1044 Condemning assassination attempt against President Mubarak of Egypt and calling upon the Government of Sudan to comply with OAU requests (1996) S/RES/1044 (1996).
158 Sudan was deemed to have been responsible for the breach of the principles of non-use of force as well as non-intervention.
159 UNSC Resolution 1044 (1996).

the violations be sustained.[160] Notwithstanding these measures and warnings, Sudan's non-compliance continued. In 1997, the US adopted a number of coercive measures against Sudan, including a trade embargo and freezing all Sudanese government assets within its jurisdiction.[161] On one hand, since Sudan was not a member state to the GATT or the World Trade Organisation, the trade embargo could be categorised as an act of retorsion, while on the other, the asset freeze required some legal justification. The conclusion here, has been that the actions of the US in relation to the asset freeze must be understood as a third-party countermeasure.[162]

With all this in mind, the question that arises is whether third-party countermeasures are in fact permissible under international law. This begs the question as to whether there is *sufficient* state practice on the subject to develop a rule of customary international law which entitles states to take third-party countermeasures in defence of obligations *erga omnes*. The independent studies undertaken by Tams and Dawidowicz favour the conclusion that third-party countermeasures have evolved into a customary rule of international law.[163] Indeed this is an apt conclusion as both the elements of state practice and *opinio juris* appear to be fulfilled when properly examining the question at hand. However, before venturing into a succinct assessment of these elements, it is worth noting the existing debates regarding the 'instant' formation of customary international law. This conception stems from the fact that no particular duration is required for the formation of customary international law. However, while this is correct, it is suggested that some degree of time must always pass, and that assertions of a rapid emergence of customary international law rules are to be treated with caution.[164]

Although the assertation regarding the instant formation of custom has been debated for over fifty years now,[165] scholarly opinion vastly differs on the subject. For example on one hand, Scharf and Mejía-Lemos are of the opinion that certain factors may accelerate the development of customary international law rules and thus support the idea of instant formation of custom.[166] On the other hand, other scholars argue that the term 'instant' is actually only a technical term used to draw attention to those customary rules of law

160 On Sanctions against Sudan UNSC Res 1054 (1996); see also On imposing of air sanctions against the Sudan UNSC Res 1070 (1996).

161 See Dawidowicz (n 71) 179.

162 ibid.

163 See Tams (n 3) 198–251; see also Dawidowicz (n 71) 239–255.

164 O Sender and SM Woods, 'Between '"Time Immemorial" and "Instant Custom": The Time Element in Customary International Law' (2021) 42(2) Grotiana 229–251.

165 B Cheng, 'United Nations Resolutions on Outer Space: Instant International Customary Law' 5 (2005) IJIL 23–48.

166 MP Scharf, 'Accelerated Formation of Customary International Law' (2014) Case Western Reserve University School of Law Scholarly Commons 310; DG Mejía-Lemos 'Some Considerations Regarding "Instant" International Customary Law, Fifty Years Later"' (2015) 55 IJIL 85–108.

that have emerged very quickly, but not instantaneously. These scholars, deny the possibility of customary law rules being formed virtually immediately.[167]

However, whatever the import of the discussions surrounding the instant formation of custom may be, what is clear is that the conclusion whether third-party countermeasures are custom is not prejudiced, as the assessment relied upon below satisfies both the heavier test (which requires an established state practice and *opinio juris*) as well as the weaker test which relies on the instant formation of custom without an extensive evaluation of state practice.[168]

Sufficiently Widespread and Representative State Practice

The purpose of this article, and in particular, this section is not to—in and of itself—an attempt to determine the existence of a right to third-party countermeasures under customary international law by assessing individual state practice on the subject, but rather to highlight the vast number of states that have supported the idea of third-party countermeasures and show examples where appropriate, that have been investigated in previous studies. The ICJ made it clear in its 1969 *North Sea Continental Shelf* case, that the existence of a rule of customary international law requires a settled practice, together with *opinio juris*.[169]

At the beginning of this section, the study noted that the ILC's consideration as to whether the principle of third-party countermeasures was equivalent to a rule of customary international law that resulted in a negative conclusion. The ILC, after considering just six examples of state practice, concluded that there was rather limited and embryonic state practice on the matter to assess whether there is a rule of customary international law in favour of third-party countermeasures. However, this conclusion cannot be confirmed as apt, especially not in today's world. Tams and Dawidowicz, have conducted extensive assessments of a wide range of examples of state practice which strongly suggest that there is sufficient state practice in favour of third-party countermeasures.[170] The preliminary observation made in this study is that third-party countermeasures have been taken in response to various breaches, most which amounted to breaches of *jus cogens*, and by effect, clearly identifiable obligations *erga omnes*.[171]

From the studies conducted by Tams and Dawidowicz's, we learn that states such as Albania, Bahrain, Bosnia, Botswana, Brazil, Bulgaria, Chile, China, Costa Rica,

167 See for example B Krivokapic, 'On the Issue of So-called "Instant" Customs in International Law' Danubius Universitas Acta, Administratio 310.

168 Cheng (n 165).

169 *North Sea Continental Shelf* (n 8); see also ILC Fifth report, by Special Rapporteur M Wood on Identification of Customary International Law (70th session 2018).

170 Tams (n 3) 198–251; see also Dawidowicz (n 71) 111–238.

171 See Bills (n 100), who lists examples of situations including apartheid, acts of genocide, self-determination claims, use of force and even the practice of torture.

Croatia, Czech Republic, Democratic Republic of Congo, Egypt, Estonia, Gabon, Gambia, Georgia, Ghana, Guinea-Bissau, Herzegovina, Honduras, Hungary, Iceland, India, Indonesia, Kenya, Kuwait, Latvia, Lichtenstein, Lithuania, Macedonia, Malaysia, Malta, Moldova, Montenegro, Nigeria, Norway, Pakistan, Poland, Romania, Russia, Rwanda, Serbia, Sierra Leonne, Slovakia, Slovenia, South Africa, South Korea, Tanzania, Turkey, Uganda, Ukraine, Zambia and Zimbabwe, adopted third-party countermeasures or at least strongly supported their adoption when they were imposed in the form of trade embargoes against delinquent states that had violated *important* obligations owed to the international community.[172] The same can be said for the United States, the United Kingdom, the European Community member states and the Arab League member states.[173]

The preceding paragraph confirms that not only is state practice on this matter sufficiently widespread, but it is also representative. Although Western states still dominate practice on the matter, Dawidowicz's survey on the practice of the states regarding third-party countermeasures shows that the practice is sufficiently diverse and representative.[174] In his words 'the sheer volume and diversity of practice is striking.'[175] As such, to conclude this section, state practice appears more widespread and representative than the ILC had assumed. To that end, it seems safe to conclude that the threshold laid down by the ICJ in *North Sea Continental Shelf* cases for state practice has been met as there is a substantial body of state practice on third-party countermeasures, one that appears to be accompanied by the appropriate elements of *opinion juris* for that matter.[176]

Notwithstanding, this conclusion, there has been arguments that state practice must also be consistent. The ILC justifies the position it took in relation to third-party countermeasures based of the conclusion that practice on the matter was too selective and inconsistent.[177] Even Sir Michael Wood suggests that state practice must be virtually uniform.[178] However, state practice is 'rarely (if ever) uniform in any absolute sense.'[179] Accordingly, practice relating to third-party countermeasures is not deviant from this assessment.[180] In other words, it is not required that practice on the matter be wholly uniform, minor deviations are acceptable.[181] Indeed, practice on the issue of third-party countermeasures reveals some divergent opinions, however, these divergent opinions

172 For detailed discussions on the conduct taken by each of these States, see Tams (n 3) 204–225 and Dawidowicz (n 71) 242.
173 ibid.
174 ibid 243.
175 ibid.
176 See Tams (n 3) 198–251; Dawidowicz (n 71) 382–385.
177 See J Crawford (n 136) para 396(b); see also Dawidowicz (n 71) 245.
178 Crawford (n 136).
179 Dawidowicz (n 71) 248.
180 ibid.
181 ibid; see also *Fisheries Case* (*United Kingdom v. Norway*) Judgment, ICJ Reports (1951) 138; see further *Nicaragua* (n 27) 98.

are largely inconsequential as actual practice is 'far more nuanced than the debate in the Sixth Committee taken in isolation would otherwise suggest.'[182]

For example, although states such as Argentina and Costa Rica were against the adoption of a third-party countermeasures in relation to the Falklands crisis situation, because they thought of them as an instrument of abuse for powerful states, which undermine the authority of the Security Council under Chapter VII of the UN Charter, they still found the concept acceptable during the Sixth Committee.[183] In fact, notwithstanding its stance regarding the Falklands crisis, Costa Rica later expressed its support towards the adoption of third-party countermeasures against the Federal Republic of Yugoslavia[184] and Burma.[185] Similarly, States like Botswana, Cameroon and Tanzania were against the idea of third-party countermeasures in the Sixth Committee, but still supported the idea that they be adopted against Nigeria, Burundi and Zimbabwe.[186] In fact, Tanzania went on to adopt third-party countermeasures itself against South Africa and Burundi.[187] There are more examples of situations which show conflicting practice relating to the issue of third-party countermeasures, however, when properly scrutinised, the plausible conclusion to follow is that there is 'a "virtually uniform" practice in support of a permissive rule of third-party countermeasures' in circumstances where states react against breaches of important obligations or norms of international law owed to all states.[188]

The Existence of *Opinio Juris* in Support of Third-Party Countermeasures

At the beginning of this section it was noted that the ILC, during the adoption of the saving clause, Article 54, had indicated that it was unclear whether third-party countermeasures were accepted as law in practice. Indeed, the concept of *opinio juris* is very difficult to establish, especially 'in view of the manner in which international relations are conducted.'[189] It is extremely difficult to get clear evidence of *opinio juris* because practice reveals itself in a manner that is too close to politics than it is to the law.[190] According to Lauterpacht,[191] a politically motivated practice is nevertheless open to legal scrutiny and assessment, and can therefore, still amount to 'valuable evidence

182 Dawidowicz (n 71) 248.
183 Statements made by states during the Sixth Committee UN Docs A/C 6/55/SR 15, 10 para 66 (Argentina); A/C.6/55/SR.17, 11, para 63 (Costa Rica); A/C.6/56/SR.15, 8 para 53 (Argentina); see also Dawidowicz (n 71) 248 – 249.
184 Dawidowicz (n 71) 249; UNSC Resolution 1199, The situation in Kosovo (1998) S/RES/1199 (1998); UNSC Resolution 1203, Kosovo (1998) S/RES/1203; UN Doc S/PV.3930 (1998).
185 See UN Do. S/PV 6161 (2009) 17 (Costa Rica); see also Dawidowicz (n 71) 201, 249.
186 See Dawidowicz (n 71) 249.
187 See UN Doc A/C/55/SR.14 (2001) 9 paras 46–47 (Tanzania).
188 Dawidowicz (n 71) 250.
189 Dawidowicz (n 71) 252.
190 Report of the Summary Records of the Meetings by Special Rapporteur, C Rodriguez (Fifty-second Session 1 May–9 June and 10 July–18 August 2000) ILC Yearbook Vol 1333 para 20.
191 L Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1958) 380.

of a rule of custom.'[192] As such, the overlap between the law and politics in so far as third-party countermeasures are concerned, does not impair the creation of a rule of custom.

Sir Michael Wood highlights that in so far as practice is not solely motivated by extra-legal considerations, then the creation of custom is not vitiated by the fact that state practice is not wholly based on legal grounds.[193] In other words, it is a difficult task to gather explicit evidence of *opinio juris* since states hardly explicitly refer to the concept of third-party countermeasures as a basis for their conduct. Notwithstanding these considerations, Dawidowicz is of the view that 'States have adopted *prima facie* unlawful unilateral coercive measures based on an explicit legal rationale; namely, the enforcement of obligations *erga omnes*' and this 'neatly corresponds to third-party countermeasures as a legal category.'[194] Although there is a dearth of explicit statements expressing *opinio juris* on third-party countermeasures, such statements nevertheless do exist.[195] There appears to be considerable support towards the conclusion that the right to third-party countermeasures has over time, crystallised into a norm of customary international law.[196]

Conclusion

This article set out to review the contribution of the ICJ towards the development of, and conflation between the notions of *erga omnes* and *jus cogens*. It concludes that although often conflated, the concepts of *jus cogens* and *erga omnes* are distinct.[197] The article set out to assess whether obligations *erga omnes* can be synthesised through the lens of the Articles on State Responsibility. In particular, the article considers that Article 48 establishes a regime of state responsibility for serious violations of international obligations towards the international community as a whole (*erga omnes*) and implies that third states may invoke the responsibility of a state in breach of an obligation *erga omnes*. The assessment of obligations *erga omnes* through the Articles of State Responsibility invited questions regarding the invocation of responsibility for breaches of communitarian norms, which in turn, allowed the article to set out what, and whether states are allowed to take third-party countermeasures to ensure compliance with obligations *erga omnes*, during that assessment, the article uncovered that the quest for identifying obligations *erga omnes* requires an assessment of obligations which may be considered 'important' in international law. This will be discussed in more detail in

192 Dawidowicz (n 71) 252.

193 ILC Second Report on Identification of Customary International Law by of the Special Rapporteur M Wood (70th Session 2014) 46–47, 56 para 61.

194 See Dawidowicz (n 71) 252.

195 ibid 254; see also for example, the European Union's Statement to impose third-party countermeasures as autonomous sanctions, released by the Council of the EU, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' (2004) paras 3, 6.

196 See Dawidowicz (n 71) 255.

197 See Kadelbach (n 42) 28; De Wet (n 13) 555; see also De Wet (n 5) 9.

the next article as it identifies the modality to be used in identifying *erga omnes* without relying on *jus cogens*, hence minimal attention was paid to the proposed 'importance requirement' in this article.

The article concludes by accepting the position advanced by Tams and Dawidowicz, that third states have the right to take third-party countermeasures under customary international law. Be this as it may, this conclusion, although being more expansive of the contextual scope of *erga omnes*, does not get rid of the confusion between *erga omnes* and *jus cogens*. Still, various inevitable uncertainties of *jus cogens* hinder the attempt to clarify *erga omnes*. For example, *erga omnes* is conceived on the basis of the importance of a right being protected by and within the international community of states as a whole. However, *jus cogens* is also conceived with the idea that norms endowed with this status are important. Although the degree of importance to each of these notions remains beyond the scope of this article, what is clear so far, is that there is a great overlap between the two notions—causing various grounds for the conflation between the concepts.

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