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Erga Omnes and Countermeasures

Countermeasures by Non-Injured States in Response to Mass Atrocities

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ABBREVIATIONS

ARSIWA	DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS
ARSIWAC	COMMENTARY TO THE DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS
DRC	DEMOCRATIC REPUBLIC OF THE CONGO
ECTHR	EUROPEAN COURT OF HUMAN RIGHTS
GA	GENERAL ASSEMBLY OF THE UNITED NATIONS
ICJ	INTERNATIONAL COURT OF JUSTICE
ICISS	INTERNATIONAL COMMISSION ON INTERVENTION AND STATE RESPONSIBILITY
ICRC	INTERNATIONAL COMMISSION OF THE RED CROSS
ILA	INTERNATIONAL LAW ASSOCIATION
SC	SECURITY COUNCIL OF THE UNITED NATIONS
SG	SECRETARY-GENERAL OF THE UNITED NATIONS
UK	THE UNITED KINGDOM
UN	THE UNITED NATIONS
US	THE UNITED STATES OF AMERICA
WSOD	WORLD SUMMIT OUTCOME DOCUMENT

1 Introduction

The aim of this thesis is to clarify the status in international law of countermeasures by non-injured States in the enforcement of norms protecting fundamental community values. For this purpose it will address two sub-questions: First, whether and to what extent countermeasures by non-injured States as a response to violations of obligations *erga omnes* are tolerated in contemporary international law; second, their relationship with collective enforcement of obligations *erga omnes* through the United Nations (UN).

The subject covers a potentially wide array of obligations. For the purpose of analytical precision, the thesis will narrow the discussion to the obligations designed to prevent mass atrocities, namely the prohibitions on genocide, war crimes and crimes against humanity.

“[T]he concept of *toleration* [is] something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options. That an act might be ‘tolerated’ would not necessarily mean that it is ‘legal’, but rather that it is ‘not illegal’”.¹ The degrees of non-prohibition range from “‘tolerated’ to ‘permissible’ to ‘desirable’”.²

This notion of toleration is not something that is outside the framework of the legal system as considerations of what the law should be, but rather it seeks to grasp “the great shades of nuance that permeate international law”³ in its present state. In this sense, it addresses the legitimacy of certain acts that operate in the grey area of normativity of international law.

Employing this conception, the starting position in the evaluation of tolerable enforcement measures must be the character, protected values and importance within the international legal system of the norm that is to be enforced. For this purpose, Chapter II will seek to clarify the concept of obligations *erga omnes*. First, these obligations will be systemically contextualized as part of the historical shift from voluntarism to communitarianism in international law. In

¹ Kosovo Advisory Opinion (Declaration of Judge Simma) pp. 480-481 para. 9

² Ibid. p. 480 para. 8

³ Ibid. p. 481 para. 9

the next sections, the general concept of obligations *erga omnes* and the *erga omnes* character of the prohibitions on genocide, crimes against humanity and war crimes are discussed more in detail.

Further, the thesis will address three main recurring arguments against countermeasures in the general interest:

The first argument is concerned with whether the main actors in the legal system are prepared to allow for such means in the protection of fundamental norms. The claim is one of non-fulfilment of the conditions for the emergence of customary international law and is largely a product of the final position on the matter taken by the International Law Commission (ILC) in its work with the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Chapter 3 will critically examine the ILC's final position. The first section will examine the development from 1996 to 2001 in how the ILC conceived individual enforcement of obligations *erga omnes*. In the second section, the ILC's final position is contrasted with alternative assessments of State practice and *opinio juris*.

To understand the means of enforcement in question, the object, purpose and limits of countermeasures are presented in Chapter 4. This necessitates an evaluation of the second argument, which is concerned with the risks of undesirable outcomes involved in tolerating self-assertive enforcement. It relates specifically to the abuse of power, either in the shape of the misuse of countermeasures for nefarious purposes or as a reference to a risk of disproportionate measures. To further explore the limits of toleration, the last section is devoted to analysing the scope of States against which countermeasures might be taken and the legitimacy deficits connected with allowing individual enforcement against States aiding or assisting in the commission of the wrongful act or maintenance of the situation thereby created.

The shift to communitarianism in international law involved the creation of institutions for the protection of collective interests. The third argument operates from a public law ideal of international law and its basic assumption is that communitarian norms should be enforced by institutions representing the international community. Because countermeasures are a product of necessity in a decentralized legal system, Chapter 5 will address their relationship with centralized enforcement of obligations *erga omnes* through the UN. In the first sections, the

Responsibility to Protect (R2P) and its implementation is examined. The next section deals with the influence of the Security Council (SC) on States' competence to take separate individual measures and the complementary potential of individual measures to the R2P framework. Lastly, a possible role for the General Assembly (GA) in coordinating individual countermeasures is examined.

2 Obligations Erga Omnes

2.1 From Individual to Community Interests in International Law

2.1.1 Historical Overview

The Treaty of Utrecht from 1648 established a common European framework for peace by limiting exercise of power through the principle of sovereign equality. Apart from the absolute sovereignty of other States, the only binding force limiting States' freedom was the conditional auto-limitation of sovereignty through the establishment of binding relations with other sovereign entities through quasi-contractual procedures.⁴ According to liberal theories prevailing at the time, the binding nature of treaties was essentially justified by reference to States' self-interest.⁵ Entrenched in the notion of sovereign equality was the non-hierarchical ordering of values.⁶ The logical consequence of the domestic contractual analogy was the binary and symmetric structure of international legal rights and obligations. Leaving aside classical scholars' conceptual problem of harmonizing liberal freedom with international community order, the interests of self-serving States remained at the centre. In this respect, humanitarian law serves as a useful example: until the late 19th century, the 'humanization' of war was justified not by fundamental considerations of humanity, but mainly the self-interest of States in securing reciprocal treatment.⁷

As is evident in the Lotus case,⁸ consensualism reigned supreme in the 19th and well into the 20th century through the ideological purview of liberal positivism. However, the increase of diplomatic, economic and other relations⁹ triggered increasing trends of communitarianism, hereunder the legal acknowledgement of important common values:¹⁰ The preservation of

⁴ Ludwig Klüber's distinction between 'absolute' and 'conditional' rights and obligations was shared by Vattel, Martens and other scholars in the classical period (15th-19th century), see Koskenniemi (2005) pp. 106-156

⁵ Ibid. pp. 91-92, 114-115

⁶ Ibid. p. 94

⁷ Turns (2010) pp. 815-816

⁸ France v. Turkey p. 18, where the Court stated, *inter alia*, that because rules of international law emanate from the free will of States, "restrictions upon the independence of States cannot [...] be presumed".

⁹ Neff (2010) pp. 12-13, 20

¹⁰ Villalpando (2010) pp 392-394; Simma (1994), p. 235

peace within Europe became a collective, albeit political, interest, slave trade was abolished and humanitarian law gained its humanitarian justification.¹¹ In the inter-war period, increased attention to human rights and the regulation of the use of force and its institutional enforcement through the League of Nations provide further examples.¹² In an increasingly interconnected world, the promotion of certain public goods and values demanded concerted approaches; a development that took full speed after the Second World War, with increased use of multilateral treaties and coordinating efforts through the creation of a multitude of international organizations; most importantly, the United Nations.¹³ The shift from bilateralism for certain treaty and customary obligations (*erga omnes partes* and *erga omnes*) and the hierarchical superiority of certain customary norms (*jus cogens*), marked another hallmark; first, in that it acknowledged a community interest in individual States' compliance with certain norms; second, in that the morally grounded nature of *erga omnes* and *jus cogens* now evidenced a hierarchical order of values;¹⁴ third, in that the community interest in compliance with *jus cogens* norms override any possible individual interest in departing from it.¹⁵ Although Simma's ideal of a "re-conception [of international law] as a system of public law, proceeding from the axiom of social responsibility and accountability of its subjects"¹⁶ may not yet have materialized, community norms present a bold step in that direction.

Granting these and other developments, bilateralism still remains the "basis on which the new developments take place".¹⁷ Furthermore, while all *jus cogens* and *erga omnes* norms protect community interests, it is not necessary that all community interests take the shape of norms *erga omnes* or *jus cogens*.¹⁸ Before moving on to the ILC's incorporation of community interest norms into the ARSIWA, what is meant by 'community interests' should first be clarified.

¹¹ Neff (2010), p. 13, 20; Turns (2010) pp. 815-816; e.g. the Geneva Convention of 1906 and 1899 Hague Declarations I and II

¹² Neff (2010) pp. 22-23

¹³ Ibid. pp. 24-25

¹⁴ e.g. de Wet (2006) pp. 57-63; Simma (1994), p. 234

¹⁵ VCLT art. 53 and 64

¹⁶ Simma (1994), p. 234

¹⁷ Ibid. p. 230

¹⁸ See below, section 2.2.2.

2.1.2 Understanding community interests

Defining the concept of ‘international community’ is not an easy task. Under the traditional conception, one would regard States as its sole components. In the other extreme, one could take it to refer to the entirety of humanity. Restricting the concept to the actors with legal personality under international law (itself a somewhat contested subject) would not necessarily bring further clarity to the matter.¹⁹ In any event, even though the concrete interests “go far beyond the interests held by States as such”²⁰ it is clear that States remain at centre stage in the formation of international law. Leaving aside the question defining the ‘community’, identifying the community interests is far less cumbersome. As was made clear by the ICJ, “the existence of an ‘interest’ does not of itself entail that this interest is specifically juridical in character”.²¹ For our purposes, only interests that are “given juridical expression [and are] clothed in legal form”²² through the creation of primary norms of international law are relevant.²³ Clearly they include, *inter alia*, the maintenance of “international peace and security”;²⁴ respect for “human rights and [...] fundamental freedoms”;²⁵ environmental protection;²⁶ the right to self-determination;²⁷ the protection of peoples²⁸ and the prevention and prosecution of international crimes.²⁹ In more abstract terms, community interests can be understood as representing shared values by the international community, the protection of which demand cooperation and collective commitment, and the frustration of which are considered to be an issue that affects the community as a whole.

¹⁹ See Simma (1994) p. 246-249 for an overview of the different positions

²⁰ Ibid. p. 244

²¹ Ethiopia/Liberia v. South Africa p. 34 para. 50

²² Ibid. p. 34 para. 51

²³ de Hoogh (1996) p. 17

²⁴ UNC art. 1(1), reaffirmed, *inter alia*, in GA resolutions 5/377 and 37/10; WSOD paras. 69-72

²⁵ See e.g. UNC art. 1(3); UDHR, preamble; ICCPR, preamble; ICESCR, preamble; WSOD para. 120

²⁶ Hungary v. Slovakia p. 118 (Separate Opinion Judge Weeramantry); Rio Declaration, preamble; UNFCCC, preamble; CBD preamble; WSOD paras. 48-56

²⁷ Wall Advisory Opinion p. 199 para. 156

²⁸ WSOD paras. 138-139

²⁹ ICC Statute, preamble. Moreover, the preamble of the ICC Statute links the prosecution of international crimes to the maintenance of international peace and security. Clearly, it also serves the purpose of protecting fundamental human rights.

2.1.3 The Draft Articles on the Responsibility of States and community interests

Moving on to observe in what way community interest norms influenced the ILC's ARSIWA, focus will be on the provisions established outside the framework tailored for traditional contractual relations. As will be seen, the evolution and development of primary community interest norms in international law have also permuted the field of secondary norms in the field of State responsibility. ARSIWA Art. 54 and countermeasures by non-injured States are treated in Chapters 3-4.

2.1.3.1 As an absolute limit to circumstances precluding wrongfulness

Arts. 26 and 50(1) of ARSIWA restrict the scope of acts for which wrongfulness is precluded in the preceding provisions. In other words, breaches of the obligations encompassed in these two provisions are always wrongful. While art. 26 restricts itself to 'peremptory norms', a reference to *jus cogens* as codified in VCLT arts. 53 and 64, art. 50(1) narrows the scope of lawful countermeasures further by including community interest norms not necessarily of a *jus cogens* nature.³⁰

2.1.3.2 Additional obligations for serious breaches of peremptory norms

Chapter III of Part 2 in the ARSIWA is dedicated to serious breaches of obligations under peremptory norms. Although the earlier proposal by special rapporteur Ago of distinguishing between international delicts and crimes was discarded, the ILC nevertheless considered that certain consequences followed from the fundamental values that peremptory norms are designed to protect.³¹ The provisions in art. 41 are not exhaustive, and the ILC acknowledged the possibility of consequences not contained in the draft articles being lawful as well.³² Further, State practice supports that only serious – i.e. gross or systematic – breaches activate the additional duties enshrined in art. 41.³³ States have a duty to cooperate – by lawful means – to

³⁰ This is clear by the inclusion of "other" in art. 50(1)d the ILC acknowledged the *jus cogens* of certain norms contained in art. 50(1)b-c, but did not restrict art. 50(1)b-c to these norms; see ARSIWAC p. 132 para. 9.

³¹ ARSIWAC para. 7 to Chapter 3 of Part II and para. 3 to art. 40.

³² ARSIWA art. 41(3); ARSIWAC paras. 13-14 to art. 41

³³ ARSWA art. 40; ARSIWAC para. 7 to art. 40

bring the serious breach to an end. This is not limited to cooperation through international institutions.³⁴ The duty not to recognize the situation as lawful includes both formal and de facto recognition.³⁵ In addition, States are prohibited from rendering assistance in maintaining an unlawful situation.³⁶

2.1.3.3 Invocation of responsibility and claims

The ILC distinguishes between injured and non-injured States for the purposes of invocation of responsibility. Subject to the provisions in arts. 43-45, injured States are generally entitled to invoke the responsibility of another State. Non-injured States however, are not generally entitled to invoke such responsibility, unless the rule breached is either valid *erga omnes*³⁷ or *erga omnes partes*.³⁸ In the latter instance, non-injured States are entitled to claim cessation of the wrongful act and reparation in the interest of the injured State or beneficiaries.³⁹ Although the claim of reparation was part of the progressive development of international law, the ILC justified its inclusion with reference to the protection of the “community or collective interests at stake”.⁴⁰ The rights enshrined in art. 48 for non-injured States need not be spearheaded by an IO.⁴¹ The logical consequence would be that, although a State might lose its possibility of invoking responsibility under arts. 43-45,⁴² this has no consequence for other non-injured States also entitled to bring claims under art. 48.

³⁴ ARSIWA art. 41(1); ARSIWAC para. 2 to art. 41. Cooperation outside the auspices of IO’s however, was included as part of the progressive development of international law.

³⁵ ARSIWA art. 41(2); ARSIWAC para. 5 to art. 41

³⁶ ARSIWA art. 41(2)

³⁷ ARSIWA art. 48(1)b; ARSIWAC para. 8 to art. 48

³⁸ ARSIWA art. 48(1)a; ARSIWAC para. 6 to art. 48

³⁹ ARSIWA art. 48(2).

⁴⁰ ARSIWAC para. 12 to art. 48

⁴¹ ARSIWAC para. 4 to art. 48

⁴² ARSIWA art. 48(3)

2.2 The Concept of Erga Omnes

2.2.1 Introduction

This section is devoted to explore more thoroughly the notion of *erga omnes* obligations. As a starting point, the famous *obiter* delivered by the ICJ in the *Barcelona Traction* case is cited:

33. [...] In particular, 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*.

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. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.⁴³

As noted by Tams, the ICJ has not always employed a uniform usage of the concept of *erga omnes*. In the *Namibia* case⁴⁴ and the *Nuclear Weapons* advisory opinion⁴⁵, *erga omnes* was used to widen the scope of States bound by a GA resolution and a non-proliferation treaty. The same holds true for the references to the *erga omnes* concept before the *Barcelona Traction* case. In the *1996 Genocide* case,⁴⁶ *erga omnes* was taken to widen the scope of attribution under the Genocide Convention. In the *Nuclear Tests*⁴⁷ and *Nicaragua (jurisdiction)*⁴⁸

⁴³ Belgium v. Spain p 33, paras. 33-34

⁴⁴ South West Africa Advisory Opinion p. 56 para. 126

⁴⁵ Nuclear Weapons Advisory Opinion pp. 273-274 para. 23

⁴⁶ Bosnia v. Serbia 1996 p. 616 para. 31

⁴⁷ Australia v. France, p. 269 para. 51; New Zealand v. France, p. 474 para. 53

⁴⁸ Nicaragua v. US 1984 p. 416 para. 55

cases, *erga omnes* was used descriptively to interpret the scope of the unilateral declaration made by France and the US withdrawal of the optional clause declaration respectively.⁴⁹ In the paragraphs cited from the *Barcelona Traction* case, the Court used *erga omnes* as indicating the universal scope of States with legal interest in compliance with a primary obligation. As implied by the Court in the cited paragraphs in the *Barcelona Traction* case and the ILC in its distinction between injured and non-injured States, a right of enforcement of international obligations presupposes legal interest in protection. Therefore, it is the understanding employed in the last sense that will be examined in this section.

2.2.2 Criteria for the identification of obligations *erga omnes*

To understand the obligations *erga omnes*, the starting point is the dictum by the ICJ in the *Barcelona Traction* case. In the paragraphs cited above, the Court considered certain obligations to be universally opposable by virtue of their ‘nature’, i.e. the intrinsic value they protect, and contrasted them with obligations arising vis-à-vis another State in the field of diplomatic protection. In addition, the Court established a qualitative threshold in that the ‘rights involved’ must be of a certain ‘importance’. That they are ‘the concern of all States’, interpreted as a descriptive statement, suggests they are considered by the international community to be ‘important’ and that concerns of protection transcend an ordinary interest in compliance with international law. The questions that then remain to be answered relate to the nature and threshold of importance indicated by the Court.

Despite the last sentence in the last paragraph cited in section 2.2.1, the source of obligations *erga omnes* are in customary international law and must as such be contrasted with what is commonly referred to as obligations *erga omnes partes*, which are classically exemplified by human rights and environmental treaties.⁵⁰ The two categories are alike in that they express a collective interest in the protection of values and that they cannot be conceptualized within the framework of reciprocity. Furthermore, obligations *erga omnes partes* may serve as evidence of the existence of obligations *erga omnes*.⁵¹ The difference between the two lies not

⁴⁹ Tams (2005) pp. 106-115; similarly, Simma (1994) p. 299.

⁵⁰ The two are distinguished in ARSIWA art. 48(1)(a) and (b)

⁵¹ Tams (2005) p. 128

necessarily in substance, but in that the source of the obligation determines its scope and effects. Therefore, although a universal or quasi-universal treaty could yield the same reality, three factors distinguish them from obligations *erga omnes*; new States or States contracting out of the treaty would limit the scope of opposability;⁵² the contracting parties might confer opposability for obligations that are not opposable strictly in virtue of “the importance of the rights involved”;⁵³ the effects of breaches will be determined by the treaty itself.⁵⁴

In identifying what sort of obligations could meet the qualitative threshold of obligations *erga omnes*, commentators have used a variety of methods based on the examples given by the Court in its paragraph 34, where it listed the “outlawing of acts of aggression, and of genocide, [...] the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁵⁵ Later, the ICJ included “the rights of peoples to self-determination”.⁵⁶

Ragazzi summarizes his descriptive examination of the examples in the obiter of the Barcelona Traction case as follows: they are (1) narrowly defined obligations, (2) prohibitions, (3) obligations in the strict sense, (4) *jus cogens* obligations, and they (5) reflect basic goods or moral values.⁵⁷ The persuasiveness of the finding, and especially points (1)-(2) is convincingly criticized by Tams by its failure to encompass the positive right of self-determination of peoples,⁵⁸ and proposes instead comparative observations from *jus cogens*. His point is that there is evidence that, as Simma points out, *jus cogens* and *erga omnes* are “two sides of one and the same coin”,⁵⁹ observing the same primary obligation from different perspectives. The primary function of *jus cogens* is in the law of treaties – a treaty conflicting with an existing *jus cogens* norm or which conflicts with a *jus cogens* norm emerging after the conclusion of

⁵² VCLT art. 34

⁵³ Belgium v. Spain para. 33; Sicilianos (2002) p. 1136

⁵⁴ Tams (2005) pp. 126-127

⁵⁵ Belgium v. Spain para. 34

⁵⁶ Portugal v. Australia p. 102 para. 29; Wall Advisory Opinion p. 199 para. 156

⁵⁷ Ragazzi 2000 pp. 132-134.

⁵⁸ Tams (2005) pp. 128-129 footnote 56

⁵⁹ Simma (1994) p. 300

the treaty, is void.⁶⁰ The peremptory norms relevant are those that prohibit conduct that present, in the words of the ILC, a “threat [...] to the survival of States and their peoples and the most basic human values”⁶¹ – what Tams coins ‘substantive jus cogens’.⁶² Ragazzi presents similar views in that “universal opposability is [to be found] in the recognition of the universal validity of the basic moral values that these obligations are meant to protect”.⁶³

Undeniably, the partial identity between substantive *jus cogens* and obligations *erga omnes* seems persuasive; all the obligations *erga omnes* mentioned in the *Barcelona Traction* and *East Timor* cases are also widely recognized to be *jus cogens*.⁶⁴ If the “elementary considerations of humanity”,⁶⁵ which clearly imply that the nature of the value is not governed by a principle of reciprocity, is considered a concern for the “international community as a whole”,⁶⁶ then the vague criteria established by the ICJ in the *Barcelona Traction* case would seem to be met. Differences however, should not be overlooked; the Court did not set up a test-approach similar to VCLT art. 53, and consequently there is no formal approach to confirm the status *erga omnes* of an obligation. Also, although a substantive *jus cogens* norm necessarily entails *erga omnes* status, the opposite is not necessarily the case⁶⁷ leading commentators to speculate in possible dispositive candidates.⁶⁸ This would have consequence, *inter alia*, for the applicability of the rule of the persistent objector and the validity of conflicting treaties. The result would presumably be that the dispositive obligation *erga omnes*

⁶⁰ VCLT arts. 53 and 64.

⁶¹ ARSIWAC para. 3 to art. 40

⁶² E.g. Tams (2005) p. 147

⁶³ Ragazzi (2000) p. 183. This apparent moral utopianism is modified later in the same paragraph; “No State can elude the binding force of these obligations, not only because States recognize that it must be so [...]”

⁶⁴ cf. e.g. *Nicaragua v. US* 1986 pp. 100-101 para. 190 (use of force); *Reservations Advisory Opinion* p. 23 (genocide); *DRC v. Rwanda* pp. 31-32 para. 64 (genocide); *DALTC* para. 3 to draft art. 50 of the VCLT (use of force, genocide, slave trade); ARSIWAC paras. 4-5 to draft art. 40 (acts of aggression, genocide, slave trade, self-determination, racial-discrimination, torture, humanitarian law)

⁶⁵ *UK v. Albania* p. 22

⁶⁶ VCLT art. 53

⁶⁷ Tams (2005) pp. 152-153; Simma (1994) p. 300;

⁶⁸ Ragazzi (2000) explores areas such as human rights and development and environmental protection.

could be “owed to a group of States”, thus blurring even the theoretical lines between *erga omnes* and *erga omnes partes*.⁶⁹

In sum, obligations *erga omnes* and *jus cogens* norms are to a large degree two sides of the same coin; if a fundamental norm protecting basic human values cannot be derogated from, then the interest in ensuring compliance with the norm lies with the international community as a whole. Although formal criteria for the identification of obligations *erga omnes* cannot be given, the intrinsic moral ‘nature’ which underlies the norm is a necessary component. In the clear examples given by the ICJ, the protected values are all essential for the protection of human life, dignity and integrity. It could therefore be argued that the threshold of importance would easier be met if a norm were designed to protect these values. The notion that obligations *erga omnes* are restricted to prohibitions cannot be maintained as a formal criterion.

2.3 Instantiations of obligations erga omnes

In this section, the focus shall be to clarify the content of certain primary obligations and their status *erga omnes*. The obligations selected are those enumerated in the 2005 World Summit outcome document⁷⁰ (WSOD), namely the content of the prohibitions against genocide, war crimes and crimes against humanity. ‘Ethnic cleansing’, because it is void of legal significance and partially encompassed within the three former categories,⁷¹ will not be treated.

2.3.1 Genocide

Under the 1948 Genocide Convention, State parties recognize genocide “whether committed in time of peace or [...] war, is a crime under international law which they undertake to prevent and to punish”.⁷² For our purposes, only the duty to prevent will be examined. The duty

⁶⁹ ARSIWA art. 48(1)(a)

⁷⁰ WSOD para. 138

⁷¹ Amnéus (2013) p. 24; Strauss (2011) pp. 49-50

⁷² Genocide Convention art. 1

to prevent incorporates a negative obligation to refrain from the acts enumerated in art. III⁷³ and a positive duty to prevent acts of genocide.⁷⁴

The negative duty implies a duty to ensure that organs of the State, individuals exercising authority of State or being directed or under the overall control of the State⁷⁵ or that otherwise might be attributed to it do not act in contravention of art. III of the Convention. The positive duty implies a duty to, by all means reasonably available to the State, prevent genocide⁷⁶ within and outside of its territory.⁷⁷ The extent of acts incumbent on the State under the positive duty is not fixed, but must be determined *in concreto* based on the State's "capacity to influence effectively the action of persons likely to commit, or already committing, genocide".⁷⁸ The obligation for the State to act is effective from the time the State "learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".⁷⁹ The breach by omission of the positive duty to prevent and consequent responsibility incurs only when acts of genocide actually are carried out.⁸⁰

What then is the legal status of these obligations? In its 1951 advisory opinion, the ICJ held that, "the principles underlying the Convention are [...] binding on States, even without conventional obligation",⁸¹ thus suggesting the principles in question at least pertain to the corpus of customary international law. As already mentioned, the negative obligation is of peremptory status owed *erga omnes*. In the cited paragraph of the *Barcelona Traction* case, the Court's example given was the "outlawing [...] of genocide", presumably referring only to the negative obligation. In a more recent case the Court stated that the "rights and obligations en-

⁷³ These are "(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

⁷⁴ *Bosnia v. Serbia* 2007 p. 222-223 para. 432

⁷⁵ See ARSIWA Part I Chapter II

⁷⁶ *Bosnia v Serbia* 2007 p. 221 para. 430.

⁷⁷ *Bosnia v. Serbia* 1996 p. 616 para. 31

⁷⁸ *Bosnia v. Serbia* 2007 p. 221, para. 430

⁷⁹ *Ibid.* p. 222 para. 431

⁸⁰ *Ibid.* p. 222 para 431

⁸¹ *Reservations Advisory Opinion* p. 23

shrined by the Convention are rights and obligations *erga omnes*”,⁸² thus seemingly also referring to the positive obligation to prevent. The *erga omnes* character of the positive obligation to prevent would not harmonize well with Ragazzi’s conception of obligations *erga omnes* as only narrowly defined prohibitions.⁸³ However, as noted by Tams, the ICJ awkwardly used the *erga omnes* concept to widen the scope of attribution, a characteristic typical of *jus cogens*.⁸⁴ Others have argued that the Court should instead have made reference to *jus cogens*.⁸⁵ Granting a *jus cogens* status also to the positive duty to prevent would necessarily imply that it is opposable *erga omnes*.⁸⁶ Even if this were not the case, the Court showed awareness of the special importance also to the positive obligation to prevent. The protected value underlying the prohibition on genocide – “the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law”⁸⁷ – seems therefore strongly to suggest that both compliance with the negative and the positive obligations are the concern of the international community as a whole – that they are opposable *erga omnes*.

2.3.2 War Crimes and crimes against humanity

As expressed by the ICTY Appeals Chamber in the *Tadic* case,⁸⁸ an act, to constitute a *war crime*, must be a serious violation of a rule of international humanitarian law protecting important values, involving grave consequences for the victim and which entails individual criminal responsibility for the perpetrator.⁸⁹ This holds true both for international and internal armed conflict.⁹⁰

⁸² Bosnia v. Serbia 1996 p. 616 para. 31

⁸³ See above section 2.2.3

⁸⁴ Tams (2005) pp. 110-112

⁸⁵ Ibid, p. 110 references in footnote 61

⁸⁶ For a similar view, see Amnéus (2013) p. 17

⁸⁷ Reservations Advisory Opinion p. 23

⁸⁸ The Prosecutor v. Tadic

⁸⁹ Ibid. para. 94; Cassese (2008), p. 81; Similarly, the ICC Statute art. 8, restricts war crimes to “grave”(art.8(2)(a)) or “serious” (art.8(2)(b)) breaches of humanitarian law.

⁹⁰ Cassese (2008) p. 81

Crimes against humanity are “widespread or systematic attacks directed against any civilian population”.⁹¹ The prohibition applies both in times of peace and war.⁹² The classes of offences⁹³ are intimately connected with the protection of fundamental human rights and dignity.

In the *Nuclear Weapons* and the *Wall* advisory opinions, the court stated that some rules of international humanitarian law “are so fundamental to the respect of the human person and ‘elementary considerations of humanity’” that they constitute “intransgressible principles of international customary law”,⁹⁴ suggesting they are peremptory norms.⁹⁵ The *jus cogens* and *erga omnes* status of the prohibition against crimes against humanity and at least the more egregious instances of war crimes constituting grave breaches⁹⁶ are therefore logically entailed in that their nature is to protect the fundamental rules of international human rights and humanitarian law.⁹⁷ What then of the duties on the part of States?

Within the framework of the 1949 Geneva conventions,⁹⁸ common art. 1 imposes a duty on States to “respect and ensure respect” the conventions “in all circumstances”. The status of common arts. 1 and the applicability of common arts. 3 for internal conflicts were confirmed in the *Nicaragua* case to be representations of customary international law.⁹⁹ The duty to “respect” implies that States or any entities attributable to them are prohibited from breaching international humanitarian law. To “ensure respect” implies a wide range of positive obligations, including the duty to ensure that humanitarian law is complied with within the jurisdiction of the State.¹⁰⁰ This clearly applies in respect to war crimes. As to crimes against humani-

⁹¹ ICC Statute art. 7(1); Statute of the Special Court for Sierra Leone art. 2.

⁹² Cassese (2008) p. 99

⁹³ ICC Statute art. 7; Cassese (2008) pp. 109-114

⁹⁴ Nuclear Weapons Advisory Opinion p. 257, para. 79; Wall Advisory Opinion p. 199 paras. 155 and 157

⁹⁵ ARSIWAC para. 5 to art. 40

⁹⁶ See Geneva I art. 50; Geneva II art. 51; Geneva III art. 130; Geneva IV art. 147; AP1 arts. 11 and 85; ICC Statute art. 8(2)(a)

⁹⁷ This position seems generally accepted; Bellamy (2011) p. 91-92; Kadelbach (2006) p. 39; Strauss (2011) p. 49

⁹⁸ Geneva Conventions (I)-(IV)

⁹⁹ *Nicaragua v. US* 1986 p. 114, para. 220

¹⁰⁰ Bellamy (2011) p. 94; Amnéus (2013) pp. 20-21

ty under general international law, somewhat equivalent obligations can be derived from the principle of effectiveness in the field of human rights and the corresponding duty of due diligence to prevent violations of human rights by non-State actors.¹⁰¹ The question then to be answered is whether there also exists a positive extraterritorial duty to ensure respect.

The 2005 ICRC study on customary international humanitarian law concludes that the duty to ensure respect entails a positive extraterritorial obligation to prevent.¹⁰² Others are more cautious.¹⁰³ Although a definitive answer to the question cannot be given, a general feature of *jus cogens* norms is that they impose greater burdens on States to ensure compliance. This is evident, *inter alia*, from the duties outlined by art. 41 in ARSIWA as affirmed by the ICJ.¹⁰⁴ Although the ICJ in the *Application of the Genocide Convention* case reserved the effects on the duty to prevent to the Genocide Convention,¹⁰⁵ the Court considered that the “nature of the acts to be prevented”¹⁰⁶ generally influence the content of a duty to prevent. The judgment, in light of universal policy developments to protect populations from mass atrocities and the fundamental nature of the crimes encompassed in R2P, could be interpreted as an indicator of a nascent international extraterritorial obligation to prevent war crimes and crimes against humanity.¹⁰⁷ The similarity and importance of the values protected by these two obligations and the close analogy to the justification for the prohibition on genocide support the argument that the extraterritorial duty should be applied also to serious war crimes and crimes against humanity.

¹⁰¹ Rosenberg (2011) p. 168-169

¹⁰² ICRC Rule 144; Similarly, Brollowski (2012) p. 103 derives a comparable duty from the Geneva Conventions common art. I; Amnéus (2013) p. 31

¹⁰³ e.g. Rosenberg (2011) p. 192 and Chhabra (2012) p. 57

¹⁰⁴ Wall Advisory Opinion p. 200, para. 159.

¹⁰⁵ Bosnia v. Serbia 2007 pp. 220-221 para. 429

¹⁰⁶ Ibid. p. 220 para. 429

¹⁰⁷ Rosenberg (2011) p. 192

3 Non-injured States and Individual Countermeasures – the ILC

3.1 Introduction

State A invades State B to annex part of its territory. To ease the forcible transfer of people from the territory in question, State A massacres part of the inhabiting civilian population causing fear and terror. As is clear from the preceding chapter, State A is clearly in violation of community interest norms; the prohibition on acts of aggression and crimes against humanity. From the perspective of State B however, the situation can be understood within traditional bilateralism.¹⁰⁸ The same is true of State C, whose affected nationals were working and living in State B's territory. But what of State E, who is now burdened by a massive influx of refugees?

Depending on how the boundaries between 'injured' and 'non-injured' are drawn, the scope of States with full rights under the law of State responsibility may vary greatly. In this chapter, the first section will compare the distinction in the draft articles by the ILC from 1996 to 2001 and their consequences for the scope of States entitled to take countermeasures. In the second section, the ILC final position will be contrasted with alternative conceptions on whether States tolerate enforcement by way of countermeasures in the general interest.

3.2 The ILC distinction between injured and non-injured States

The notions of injury and legal interest are interconnected, however, they are not interchangeable.¹⁰⁹ While both injured and non-injured States might have a legal interest in cessation and reparation¹¹⁰, the status has consequence for the scope of measures available as a result of the breach.

¹⁰⁸ Cf. ARSIWA art. 42(b)(i)

¹⁰⁹ See art. 48; ARSIWAC para. 2 to Chapter I of Part III; That injury does not affect legal interest in compliance, is evident from *Spain v. Belgium* para. 34

¹¹⁰ ARSIWA arts. 43 and 48; ARSIWAC para.1 to art. 54

Under the draft articles adopted on first reading in 1996, ”’injured State’ means, if the internationally wrongful act constitutes an international crime, all other States”.¹¹¹ International crimes were serious breaches¹¹² of obligations ”essential for the protection of fundamental interests of the international community”.¹¹³ These types of breaches are now encompassed within ARSIWA art. 40. Thus, in 1996 the understanding of ‘injury’ in cases of international crimes was a purely legal one, abstracted from the causal effects of the breach. The consequence was that, in case of an international crime, the international community as a whole was entitled to resort to countermeasures.¹¹⁴

By the year 2000, the ILC had moved away from the notion of international crimes, and instead replaced the notion with that of “serious breaches of essential obligations to the international community”.¹¹⁵ Despite additional changes narrowing the definition of the injured State to those States “specially affected” by the breach of communitarian norms,¹¹⁶ non-injured States were still not precluded from taking countermeasures for serious breaches of obligations *erga omnes* provided that the responses were coordinated.¹¹⁷

The condition of “specially affected” in art. 42(b)(i) in the final 2001 draft makes clear that it restricts the scope of injury with reference to the causal effects of the breach. For breaches of obligations *erga omnes*, all States are injured in the moral sense that they “shock the conscience of mankind”.¹¹⁸ The intention of the ILC however, was to distinguish the category of ‘specially affected’ from the generality of States.¹¹⁹ The example given – of pollution of the high seas with only specially affected coastal States experiencing the effects pollution considered ‘injured’ – and the reference to art. 60(2)(b) of the VCLT indicate that the condition is an

¹¹¹ ARSIWA 1996 art. 40(3)

¹¹² See ARSIWA 1996 art. 19(3)

¹¹³ ARSIWA 1996 art. 19(2)

¹¹⁴ ARSIWA 1996 art. 47(1);

¹¹⁵ Simma (2001) pp. 195-196

¹¹⁶ Ibid. p. 198

¹¹⁷ Ibid. pp. 204-205

¹¹⁸ Reservations Advisory Opinion p. 23

¹¹⁹ ARSIWAC para. 12 to art. 42

analogy to the reciprocal framework outlined in ARSIWA art. 42(a) and consequently that the threshold is high.¹²⁰ Because obligations erga omnes often protect extra-State values, the normal scenario will include few or no injured States, e.g. where the effects of the breach are confined within the territory of the wrongdoer and to its own population.

To the extent that injury in the 2001 draft is a condition right to resort to countermeasures¹²¹ it constitutes a cautious step back towards bilateralism in that the notion of ‘specially affected’ preconditions prejudice to the interests of States themselves, contrary to the universal values protected by the primary obligations. Because the subject of countermeasures by non-injured States was left out entirely,¹²² the question then to be answered is what enforcement measures are envisaged for non-injured States.

Overall and as expected, the Draft Articles seem to prefer collective enforcement of communitarian norms.¹²³ Apart from mentioning existing institutional mechanisms, the ILC specified neither what collective nor individual enforcement means are available for non-injured States.¹²⁴ As to individual enforcement for non-injured States under the general provision in art. 54 the most prominent example of a ‘lawful measure’ is retorsion. Ironically, because the ILC’s distinction between injured and non-injured is irrelevant for non-formal claims and diplomatic unfriendliness,¹²⁵ art. 54 would seem redundant to make this point.¹²⁶

In sum, the final 2001 ARSIWA seems to be a step back in the enforcement of fundamental norms in comparison with the ILC’s 1996 draft. In addition ARSIWA leaves open a great deal of questions regarding alternative enforcement measures of communitarian norms. As a

¹²⁰ ARSIWAC para. 12 to art. 42

¹²¹ ARSIWA art. 49

¹²² ARSIWAC para. 8 to Chapter II of Part III

¹²³ e.g. ARSIWA arts. 41(1) and art. 59

¹²⁴ ARSIWA arts. 41(1) and 54; ARSIWAC para. 3 to art. 40

¹²⁵ ARSIWAC para. 2 to art. 42

¹²⁶ ARSIWAC para. 3 to Chapter 2 of Part III defines retorsion as “unfriendly conduct which is not inconsistent with any international obligation [...] even though it may be a response to an internationally wrongful act”, thus indicating that they essentially are within the discretion of States

commentator put it, the reference to “legal” and “lawful” means in arts. 41(1) and 54 are “of an ambivalence worthy of the Pythian oracle”.¹²⁷

3.3 State Practice and *Opinio Juris*

The last section revealed that the ILC veered from what seemed to be a steady course of acknowledging countermeasures by non-injured States for serious breaches of fundamental norms. This warrants a critical examination of the reasons given by the ILC for the exclusion in the final 2001 draft.

First, the ILC considered State practice relating to countermeasures to be “scanty”,¹²⁸ “sparse and involving a limited number of States”.¹²⁹

Three factors are essential in the assessment on whether the conduct of States is sufficient for the formation of customary international law: The virtual uniformity, extensiveness and representativeness of the practice.¹³⁰ As to uniformity, minor departures from practice are not necessarily detrimental. The requirement is both that the individual practice of a State is consistent¹³¹ and that there are no substantial discrepancies in the collective practice of States.¹³²

As to ‘extensiveness’ and ‘representativeness’ requirements, although no precise threshold can be set, practice must at least include those States that are specially affected.¹³³ However, in respect of countermeasures by States that are not ‘specially affected’, this requirement does not fit. In addition, the formation of primary and secondary rules should be distinguished; reactions to breaches of international law will depend on a high variety of factors, including that only States with legal relationships with the wrongdoer can take countermeasures.¹³⁴

¹²⁷ Sicilianos (2002) p. 1142

¹²⁸ Crawford (2002) p. 884

¹²⁹ ARSIWAC para. 6 to art. 54

¹³⁰ Germany v. Denmark/Netherlands p. 44 para. 74; ILC (2000) Statement 12(i) on p. 20

¹³¹ ILC (2000) Statement 13 pp. 21-22

¹³² ILC (2000) pp. 22-23

¹³³ Germany v. Denmark/Netherlands p. 44 para 74; ILC (2000) Statement 14 pp. 23-25

¹³⁴ Alland (2002) p. 1239 for a similar view

Various commentators¹³⁵ consider the many instances of countermeasures taken by non-injured States to constitute a settled practice. In response to serious violations of peremptory norms, the practice is consistent¹³⁶ and stretches from at least the 1970's.¹³⁷ The practice is not restricted regionally, nor limited to a few States.¹³⁸ From the 1970's to the 1990's, the G77 and socialist countries' supported liberation movements in contravention of the rule of non-interference in the international affairs of States. Prior to the SC resolution in 1990, Japan, Australia, EC Member States, the US and Czechoslovakia imposed economic sanctions on Iraq. In 1996 trade boycotts were taken by Kenya, Rwanda, Uganda and Tanzania against Burundi in violation of WTO law, in response to inter-ethnic terror and coup d'état resulting in a humanitarian catastrophe.¹³⁹

As to *opinio juris*, subjective beliefs and consent of States play their main role to compensate for lacking or ambiguous practice or to prevent a certain practice from developing into customary law.¹⁴⁰ In other words, opposition can have the effect of blocking the emergence of customary international law.

The separate article on countermeasures in the general interest was discarded during the ILC's work in 2000, because of strong opposition by some States.¹⁴¹ However, as Tams has shown, in virtually all the cases where countermeasures were taken, they were justified by violations of fundamental norms.¹⁴² In these cases States other than the target State did not voice opposition to the legal basis.¹⁴³ With the exception of three States, all States were positive to the rule

¹³⁵ Alland (2002) p. 1239; Sicillianos (2002) p. 1143; Tams (2005) p. 231

¹³⁶ Tams (2005) pp. 230, 234-235

¹³⁷ The US Uganda Embargo Act in 1978 in contravention of GATT 1947 in response to Idi Amin's reign of terror, see *ibid.* p. 210

¹³⁸ *Ibid.* pp. 235-236.

¹³⁹ See *Ibid.* pp. 212, 219 and 221

¹⁴⁰ ILC (2000) Statements 16-18 pp. 32-40; Tams 2005 p. 238

¹⁴¹ Crawford (2002) p. 884

¹⁴² Tams (2005) p. 239

¹⁴³ *Ibid.* pp. 236-237

on countermeasures by non-injured States in the 1996 draft.¹⁴⁴ There was some opposition to art. 54 in the 2000 draft.¹⁴⁵ However, the vast majority of States did either did not oppose or were positive to the proposal.¹⁴⁶

In sum, the ILC and prominent scholars have reached diametrically opposed conclusions based largely on the same set of facts. To say the least, the factual basis for the legality of countermeasures by non-injured States in response to serious breaches of peremptory norms does not exclude its potential status as customary international law. As to toleration, the consistency and time lapse of practice, the diversity of States taking part in it and the opinions of States strongly suggest that countermeasures by non-injured States in response to serious breaches of peremptory norms are not prohibited under international law.

¹⁴⁴ The opposing States were, Japan, France and the Czech Republic (Ibid. p. 244). As mentioned, Japan had already taken part in the practice. Ironically, the same year France imposed a flight ban of Yugoslavian airlines in breach of its obligations, see Ibid. p. 223.

¹⁴⁵ Ibid. p. 246

¹⁴⁶ Ibid. pp. 247, 249

4 Countermeasures

4.1 Introduction

Countermeasures are a form of private justice and who find their “*raison d’être* in the failure of institutions; they intersect with and affect the responsibility that they may serve, but are not an emanation of it”.¹⁴⁷ Although their exculpatory character is confined within the law on responsibility,¹⁴⁸ their coercive character is wider and relates to decentralized enforcement of compliance with obligations arising out of breaches of international law.

This chapter will address two subjects: The first two sections provide a concise examination of the content and limits of countermeasures. Emphasis will be placed on the principle of proportionality in order to tackle the second argument listed in the introduction. The second section will examine legal arguments for extending the scope of States targeted by countermeasures to include States aiding or assisting in the breach of norms protecting fundamental community interests.

As a response to mass atrocities, countermeasures and other ways in which the international community may respond must be viewed from the perspective of the duty to prevent and the positive obligation to ensure respect (treated in Chapter 2). However, States’ “capacity to influence effectively”¹⁴⁹ the commission of mass atrocities through countermeasures will vary depending on the legal relationship between them and the target State, and hence also the degree that one could speak of a duty to take countermeasures.

4.2 The General Content of the Law on Countermeasures

4.2.1 Defining Countermeasures

In the *Naulilaa* arbitration, the tribunal spelled out the general rules of the now outdated institution of reprisals some of which remains relevant for our purposes. Reprisals were acts of

¹⁴⁷ Alland (2002) p. 1226

¹⁴⁸ ARSIWA art. 22

¹⁴⁹ Bosnia v. Serbia 2007 p. 221 para. 430

self-justice by one State in response to a prior act in contravention of international law by another State. It had the effect of temporarily suspending the observation of a particular rule of international law in the relationship between the two disputing States.¹⁵⁰ In the *Air Service Agreement* arbitration, the tribunal affirmed that countermeasures are “contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed”,¹⁵¹ now also expressed in ARSIWA art. 49(2). Stated succinctly, if State A violates an obligation owed to State B, State B is entitled to suspend an obligation owed to State A. This excludes countermeasures impairing the rights of third-States. Furthermore, because countermeasures are acts of self-justice, they are per definition unilateral and their taking is fully within the discretion of the State. Lastly, the State taking the countermeasures bears the risk that the claim of wrongful conduct by the target State is consistent with the facts.

Countermeasures must be taken in order “to induce that State to comply with its obligations”.¹⁵² The ‘obligations’ referred to are those of cessation and reparation.¹⁵³ Inherent in their instrumental aim is the condition that they may only be taken in response to a wrongful act.¹⁵⁴ It may be argued that the ‘suspension’ of international obligations and the instrumentality of countermeasures imply that the measures imposed must be temporary. This was answered in the affirmative by the ICJ,¹⁵⁵ but is stated conditionally in ARSIWA art. 49(3). As the ILC example of suspension of the duty to notify makes clear, the condition is not absolute.¹⁵⁶ The distinction between punitive measures and countermeasures and the final effects of countermeasures is addressed in detail below (section 4.3.2.)

¹⁵⁰ Portugal v. Germany p. 1026

¹⁵¹ US v. France para. 84 p. 444

¹⁵² ARSIWA art. 49(1); Hungary v. Slovakia pp. 56-57 para. 87; similarly in Portugal v. Germany p. 1026, where function of reprisals were a means to return to legality or secure reparation

¹⁵³ See ARSIWA arts. 43(2) and 48(2)

¹⁵⁴ Hungary v. Slovakia p. 55 para. 83; Portugal v. Germany p. 1026; ARSIWAC art. 49(1)

¹⁵⁵ Hungary v. Slovakia pp. 56-57 para. 87

¹⁵⁶ ARSIWAC para. 9 to art. 49

Up and until the general outlawing of the threat or use of force in the UN Charter¹⁵⁷ reprisals were not limited to non-forcible measures. However, as was clearly pointed out in the *Air Service Agreement* arbitration, the prohibition on the use of force had since limited the scope of measures available to States in response to unremedied breaches of international obligations, provided that the prior unlawful act did not qualify for use of force in self-defence.¹⁵⁸ The concept of reprisals has since been limited to action taken in time of international armed conflict equivalent to the now strictly limited notion of belligerent reprisals.¹⁵⁹ In the example given above, this implies that State B may not suspend its obligation to refrain from the use of force. Thus, as far as the G77 and socialist countries' support for national liberation movements against colonial regimes between the 1970's to the 1990's involved arming opposition groups in breach of the prohibition against use of force, they were outside the scope of lawful countermeasures.¹⁶⁰

4.2.2 Conditions and procedural limitations

Prior to taking countermeasures, States must call for cessation of the wrongful act.¹⁶¹ In addition, ARSIWA proposes a duty to notify of the intention to take countermeasures, except in cases of urgency.¹⁶² Because countermeasures in the first instance are based on a subjective assessment on the part of any State taking countermeasures, the limitation loses some of its constraining force. This is especially so in respect to mass atrocities, where urgency is the normal state of affairs.

The permissibility of taking countermeasures does not relieve the parties from attempting – at least to a minimum degree – to reach an amicable solution.¹⁶³ This duty derives from the prin-

¹⁵⁷ Art. 2(4)

¹⁵⁸ *US v. France* p. 443 para. 81; UNC art. 51; ARSIWA art. 50(1)(a); also affirmed in the Declaration on Friendly Relations (GA 25/2625), First Principle

¹⁵⁹ ARSIWAC para. 3 to Chapter II of Part III

¹⁶⁰ Tams (2005) pp. 211-212

¹⁶¹ *Hungary v. Slovakia* p. 56 para. 84; ARSIWA art. 52(1)(a)

¹⁶² ARSIWA art. 52(1)(b) and 52(2)

¹⁶³ de Hoogh (1996) p. 236

ciple of peaceful settlement of international disputes codified in the UN Charter art. 33.¹⁶⁴ As to the ILC proposal establishing a duty to negotiate,¹⁶⁵ it is neither elaborated on in the commentaries nor is it mentioned in judicial awards, and its status as a general condition seems to be in the spirit of progressive development of international law. The right to take countermeasures does not relieve the parties from engaging each-other, including by resort to compulsory dispute settlement. In this situation, ARSIWA outlaws countermeasures if the wrongful act has ceased, binding dispute settlement is pending and the responsible State is acting good faith.¹⁶⁶ In this sense, the ARSIWA does not harmonize well with the Air Service Agreement arbitration¹⁶⁷ and the legal status of the provision is therefore unclear.¹⁶⁸

4.3 Limits to Countermeasures

4.3.1 Absolute limits

4.3.1.1 Hierarchy of international law – peremptory norms

ARSIWA arts. 50(1)(d) and 26 limit restrict the permissibility of countermeasures with reference to peremptory norms. The situation envisaged is clear: State A imposing countermeasures on State B is not entitled to enslave nationals of State B in the territory of State A as a countermeasure to genocidal acts on the part of State B.

4.3.1.2 Limits based on fundamental human rights and humanitarian law

Many of the rights encompassed in ARSIWA art. 50(1)d will also constitute fundamental human rights under ARSIWA art. 50(1)b. Although no catalogue of rights is offered, the general reference to non-derogable rights¹⁶⁹ and analogies to humanitarian law¹⁷⁰ indicate that the ILC did not intend them to be restricted to rights of peremptory status. Despite the vagueness

¹⁶⁴ US v. France para. 91 p. 445

¹⁶⁵ ARSIWA art. 52(1)(b)

¹⁶⁶ ARSIWA art. 52(3) and 52(4)

¹⁶⁷ See US v France para. 91 p. 445

¹⁶⁸ de Hoogh (1996) p. 238

¹⁶⁹ ARSIWAC para. 6 to art. 50; ICCPR art. 4(2); ECHR art. 15; ACHR art. 27

¹⁷⁰ ARSIWAC para. 7 to art. 50; AP1 art. 54(1), which also falls under the category of ARSIWA art. 50(1)(b) (ARSIWAC para. 7 to art. 50)

of the category, the human rights in question are those safeguarding fundamental considerations of humanity.¹⁷¹

The limitation in art. 50(1)(c) refers to the humanitarian law on reprisals against protected categories of persons and objects. Those prohibitions are codified among others in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, the Geneva Conventions (I)-(IV) and their Additional Protocol I.¹⁷²

4.3.2 Proportionality

4.3.2.1 The Principle of Proportionality

Already in the context of reprisals, international law recognized a loose proportionality requirement in that clearly disproportionate reprisals were unlawful.¹⁷³ The central feature of the principle of proportionality is that the countermeasure must have “some sense of equivalence with the alleged breach”.¹⁷⁴ In the examination of the alleged breach, not only the injury actually suffered but also the importance of the questions of principle arising from the alleged breach must be taken into account.¹⁷⁵ In the *Gabcikovo-Nagymaros* case, the ICJ affirmed that the countermeasure must be “commensurate to the injury suffered, taking account of the rights in question”¹⁷⁶ – a clear reference to the principle of proportionality.

In responding to mass atrocities, the situation will often involve balancing incommensurable values. It would therefore pose the challenge of quantifying (in most cases) a non-quantifiable value; when do the adverse effects of trade restrictions outweigh the prevention of further massacres?

¹⁷¹ Portugal v. Germany p. 1026; ARSIWAC para. 5 to art. 50

¹⁷² ARSIWAC para. 8 to art. 50

¹⁷³ Portugal v. Germany p. 1028; Nolte, (2010) pp. 249-250; ARSIWAC para. 2 to art. 49

¹⁷⁴ US v. France para. 83 p. 443

¹⁷⁵ US v. France para. 83 p. 443

¹⁷⁶ Hungary v. Slovakia para. 85 p. 56

Some have argued that the correct approach to proportionality, thus avoiding incommensurability, is to assess whether the measure taken in fact induces compliance.¹⁷⁷ This approach is not supported either by the case law cited above or the ILC, which correctly considers the injury suffered, importance of the interests protected by the rule breached and the effects on the right of the target state to be essential.¹⁷⁸ Additionally, determining the proportionality of a measure with reference to its success in inducing the target State towards compliance would make proportionality fully dependent upon the actions of the target State, potentially leading to “a spiral of more numerous or more severe countermeasures”.¹⁷⁹

The precise threshold of proportionality cannot be stated in abstract, but must be assessed in light of specific facts.¹⁸⁰ However, de Hoogh, following Arangio-Ruiz, considers that, in respect of international crimes (now serious breaches of peremptory norms) even extreme economic coercion would not amount to disproportionality.¹⁸¹ The rationale is obvious; non-occurrence of serious breaches of fundamental rules is essential for the proper functioning of international law. On the other hand, if either retorsion or countermeasures have the direct or indirect causal effect of depriving the population of the responsible State of its fundamental human rights, they would not be disproportional, but outright unlawful.¹⁸²

The general risk of disproportionate abuse associated with self-assertion was noted by the ICJ in *Corfu Channel*, where, in response to the UK’s unilateral minesweeping operations in the territorial waters of Albania, the Court stated that the right to intervention was a manifestation of a “policy of force, such as has, in the past, given rise to most serious abuses” and that it therefore could not be accepted.¹⁸³ Especially in instances where violations of *erga omnes* obligations do not damage State interests, “the danger of abuse will be great, as will be the lack of any regularity, objectivity and evenhandedness”.¹⁸⁴ However, current State practice

¹⁷⁷ White (2010) pp. 539-540

¹⁷⁸ ARSIWAC para. 6 to art. 51

¹⁷⁹ de Hoogh (1996) pp. 267-268

¹⁸⁰ ARSIWAC para. 6 to art. 51

¹⁸¹ de Hoogh (1996) p. 269 with references.

¹⁸² ARSIWA art. 50(1)(b); Portugal v. Germany p. 1026; de Hoogh (1996) pp. 260-261

¹⁸³ UK v. Albania p. 35

¹⁸⁴ Simma (1994) p. 319

shows that countermeasures imposed generally are of a far more trivial magnitude, often limited to severing air links and temporary economic embargoes.¹⁸⁵

4.3.2.2 The Relationship to Punitive Measures and Economic Coercion

These measures will usually involve a combination of retorsion and countermeasures in large scale. The ILC notes that the concept of sanctions is vague and restricts its meaning to measures taken within the auspices of international organizations.¹⁸⁶ Within the ILC itself, the notion of countermeasures evolved from the earlier concept of punitive sanctions.¹⁸⁷

Some commentators insist on making a strict distinction in that “countermeasures are instrumental while [non-forcible] reprisals are punitive”.¹⁸⁸ It is true that “reprisals are illegal if imposed with the purpose of punishment or coercion of the sovereign will of the target State”.¹⁸⁹ However, “evidence of the existence of punitive intent on the part of the injured State would appear to be present only to the extent that the injured State did not abide by the rules on (dis)proportionality”.¹⁹⁰ Because of these evidentiary circumstances, the final, non-temporary effects, the punitive and exemplary character of measures should be seen as elements in the proportionality analysis and not as a means to distinguish punitive from instrumental measures. This seems also to be acknowledged by the ILC.¹⁹¹

The same applies to instances of extreme economic coercion (e.g. the US economic blockade of Cuba).¹⁹² Clearly, these cases will usually involve several *prima-facie* breaches and they may, by their magnitude, ultimately incapacitate fully the target State to the severe detriment of its population. Whether or not they constitute lawful retorsion depends on whether the measures are contrary to international law; whether they ultimately are unlawful must be de-

¹⁸⁵ Tams (2005) p. 229; Tams (2011) p. 392

¹⁸⁶ ARSIWA para. 3 to Chapter II of Part III

¹⁸⁷ Alland (2002) pp. 1223-1224

¹⁸⁸ White (2010) pp. 546-547

¹⁸⁹ Ibid. p. 548

¹⁹⁰ de Hoogh (1996) p. 217

¹⁹¹ ARSIWAC para. 9 to art. 49 and para. 7 to art. 51

¹⁹² Commented on in White (2010) pp. 546-547

terminated on the basis of absolute limits on the right to take countermeasures and the more flexible principle of proportionality.

4.3.3 Lex Specialis and Self-Contained Regimes

Despite the duty to prevent and ensure respect and the arguments for its hierarchical status, the means to comply with the obligation is largely within the discretion of States.

The notion of ‘self-contained regime’ referred to in this subsection is a narrow one denoting a subsystem of law with an exhaustive list of secondary rules excluding the general legal consequences of wrongful acts.¹⁹³ The secondary rules of general international law are generally derogable¹⁹⁴ and the legality of suspending a specific obligation is therefore also dependent on the regime to which it pertains. A clear example of a self-contained regime is diplomatic law.¹⁹⁵ This sub-section will examine the area of non-fundamental human rights.

4.3.3.1 International Human Rights Outside the Scope of Fundamental Human Rights

The strict limitation in subsection 4.3.1.1 does not include the observance of ‘non-fundamental’ human rights. This would imply, inter alia, that restrictions on the freedom of movement and the right to property¹⁹⁶, but also the freedom of speech and assembly, of private life and non-discrimination of other reasons than racial could be suspended in case of countermeasures taken by State A against State B directed at State B’s nationals in State A.

De Hoogh argues that, because of the fact that most human rights treaties do not include express prohibitions on reprisals, the whole bulk of non-fundamental human rights are not off limits to countermeasures.¹⁹⁷ This view seems to be too formalistic.

¹⁹³ Koskenniemi (2006) p. 66 para. 124

¹⁹⁴ ARSIWAC para. 6 to art. 55

¹⁹⁵ US v. Iran para. 86 p. 40

¹⁹⁶ de Hoogh (1996) p. 262

¹⁹⁷ Ibid. pp. 261-263

In the *Nicaragua* case the Court noted that when human rights are protected by international conventions, the proper procedures for ensuring respect are those enshrined in the conventions themselves.¹⁹⁸ Although the Court referred to use of force, Koskenniemi interprets the judgment to express that reciprocal breaches of human rights are generally impermissible, and suggests that it might constitute a self-contained regime.¹⁹⁹ First, it might be noted that in the case of responsibility for genocide, crimes against humanity and egregious war crimes, these acts will necessarily also constitute breaches of human rights, and therefore fall within the framework of universal human rights instruments thus excluding reciprocal breaches. Second, even in cases where the target State is not a party to the human rights instrument (e.g. a regional human rights treaty), human rights instruments seek to enhance protection. To generally allow suspension of human rights for groups of people as a response to gross human rights violations would seem to be contrary to the general purpose of human rights regimes.

A more nuanced view would be to require limitations on non-fundamental rights to be in conformity with the human rights regime itself due to their character *lex specialis*. Whether this allows for countermeasures remains to be seen. It may be noted that within the ECHR regime, the ECtHR has in a series of cases concerning immunity shown awareness in the interests of States in complying with obligations under international law,²⁰⁰ and allowed for those extensions of immunity beyond what was strictly prescribed under international law²⁰¹ that are proportionate²⁰² to “the legitimate aim of complying with international law”.²⁰³

4.4 Countermeasures Against States Other Than the Principally Responsible One(s)

The situation in this section is not where there are several States either in isolation or through cooperation committing serious breaches of obligations erga omnes, but rather where one or more States provide aid or assistance to the breach or the maintenance of the situation created

¹⁹⁸ *Nicaragua v. US* 1986 p. 134 Paras. 267-268

¹⁹⁹ Koskenniemi (2006) p. 66 para. 125

²⁰⁰ See e.g. *Al-Adsani v. UK* para. 55

²⁰¹ *Fogarty v. UK*, para. 37; *McElhinney v. Ireland* para. 38

²⁰² *McElhinney v. Ireland* para. 36

²⁰³ *Ibid.* para. 35

by the breach. The question is whether non-injured States would have legal grounds for taking countermeasures in response to such acts against the aiding or assisting States.

To illustrate the point of this subsection, we begin with a semi-hypothetical example:

Due to geopolitical interests in the region, certain States are providing arms and other material to different parties to the on-going conflict in Syria. The parties gradually take control of different regions within the territory.²⁰⁴ It is clear that all parties to the conflict are responsible for serious breaches of humanitarian law committed prior to and after the delivery of material. As to the delivery of arms, this could constitute use of force in contravention of art. 2(4) of the UN Charter.²⁰⁵ In addition, States supplying weapons and other material may be responsible for providing aid or assistance and failing to comply with the extraterritorial duty to prevent and ensure respect.

The general rule is that countermeasures cannot affect the rights of third States not responsible.²⁰⁶ As Tams notes, condoning grave or systematic breaches of obligations erga omnes will “usually not give rise to obligations erga omnes”.²⁰⁷ The alternative, aid or assistance²⁰⁸ is of a different nature involving wrongful acts that facilitate breaches of international law. It therefore presupposes greater involvement on the part of the third State in the wrongful act committed and, although aiding or assisting will imply condoning, the opposite is far from necessary.

Under art. 16, as recognized under international law,²⁰⁹ States may incur international responsibility for aiding or assisting in the commission of an internationally wrongful act. *First*, a distinction should be made between cases where the aid or assistance is necessary for the act to take place and cases where the aid or assistance is only incidental for the act. In the first as opposed to the second instance, the State aiding or assisting may be principally responsible

²⁰⁴ See ARSIWA art. 9

²⁰⁵ Nicaragua v. US 1986 p. 119 para 228

²⁰⁶ ARSIWA art. 49(1); ARSIWAC para. 4 to art. 49

²⁰⁷ See above, section 4.2.1; Tams (2005) footnote 160 on p. 230

²⁰⁸ ARSIWA art. 16 and similarly art. 41(2)

²⁰⁹ ARSIWAC para. 7 to art. 16; Crawford (2013) p. 401; Bosnia v. Serbia 2007 p. 217 para. 420

along with the State directly committing the wrongful act.²¹⁰ In our example, the supply of arms and material was merely incidental for the commission of the subsequent wrongful acts and not at all relevant for the wrongful acts already committed. *Second*, responsibility will only be relevant if the aid or assistance facilitates the commission of the wrongful act.²¹¹ Responsibility presupposes that the State has actual knowledge of the circumstances of the internationally wrongful act. The *Application of the Genocide Convention* case might be interpreted to the effect that the knowledge must also include the intent of the perpetrator to commit the wrongful act.²¹² The question is whether the State must have intended to facilitate the commission of the wrongful act. The ILC's position seems to be that the requirement is subjective/psychological.²¹³ However, an objective/factual requirement would seem to harmonize better with UNGA practice,²¹⁴ the wording of art. 16(a)), and with the general law in that responsibility for acts (as opposed to omissions) generally does not presuppose fault.²¹⁵ The assumption is therefore that the intent of States is manifested in their acts. In our example, strengthening geopolitical influence in the region, and not the breach of fundamental rules, motivated the aid. However, because it is highly unlikely that the aiding States would be unaware of the unlawful conduct by all parties to the conflict and the serious risk of further unlawful conduct, the case for responsibility for the aiding States is strong.

Suppose further that a secular liberation movement, having established its own administration in the northeast of Syria, and constituting a secular front against religious armed opposition-groups, takes control over border towns in the northern Iraq and subjects them to its own permanent administration. The liberation movement's military capability is maintained with the help of aiding States seeking to halt the expanding power of religious armed groups in Syria. In this example, the material-providing States may be responsible for aiding or assisting in maintaining the situation created by the unlawful annexation of territory through acts of aggression.

²¹⁰ ARSIWAC para. 10 to art. 16

²¹¹ ARSIWA art. 16(2)

²¹² *Bosnia v. Serbia* 2007 pp. 218-219 paras. 422-423

²¹³ ARSIWAC para. 9 to art. 16; Crawford (2013 p. 407) argues that the passages in *Bosnia v. Serbia* 2007 paras. 422-423 translate into a requirement of positive intent also for the aiding or assisting State.

²¹⁴ As restated in ARSIWAC para. 9 to art. 16

²¹⁵ Crawford (2010) pp. 457-458

The prohibition on providing aid or assistance in maintaining a situation²¹⁶ that constitutes a breach of obligations *erga omnes* is universally valid and in itself opposable *erga omnes*.²¹⁷ In this case, the aiding State is effectively maintaining the unlawful situation created by the liberation movement's use of force against the territorial integrity of Iraq.

The examples exacerbate the legitimacy deficit connected with self-assertion in two ways: first, in that it would substantially widen the scope of potential States against which countermeasures may be imposed; second, in that the factual scenario is less obvious in these cases than for the principally responsible State. In consequence, the stability of international relations may be compromised. It also shows the challenges of international law in balancing the legality of self-assertion with the legal constraining of political power.

As a matter of legal consistency however, if legal interest on the part of non-injured States first is acknowledged, it would seem to follow logically that breaches of obligations *erga omnes* through aiding or assisting in the commission or maintenance of serious breaches of obligations *erga omnes*, clearly undermining the duty to prevent, entail a legal interest for the international community as a whole in enforcing compliance against aiding or assisting States. Nevertheless, it should be stressed that this issue is far from clear. In State practice so far, countermeasures by non-injured States seem to have been directed against principally responsible States only.²¹⁸

4.5 Conclusion

International law is by now well familiarized with the institution of countermeasures. Individual countermeasures by non-injured States governed by a clear legal regime of absolute and flexible limits within which States mostly navigate.

Furthermore, the chapter has sought to assess the arguments referring to the risk of abuse of power. Evidentiary circumstances will most often preclude any meaningful assessment on

²¹⁶ ARSIWA art. 41(2)

²¹⁷ South West Africa Advisory Opinion p. 56 para. 126

²¹⁸ Tams (2005) p. 230

underlying motivations for taking countermeasures, even in the case of injured States. Although it must be acknowledged that the inherent nature of countermeasures make disproportionate responses a risk, the analysis so far has suggests that the threshold of disproportionality of countermeasures in response to mass atrocities must be high. Even under these circumstances, practice suggests that States generally adopt modest measures.

Lastly, chapter has sought to extend the discussion beyond measures against the principally responsible State(s). Although international law provides a solid framework for allowing countermeasures against aiding or assisting States, the extension reveals some concerns of legitimacy in allowing self-assertion, as the responsibility of the target State often will be factually unclear.

5 The Responsibility to Protect and Individual Countermeasures by Non-injured States

5.1 Introduction

In a narrative where the international community is developing towards constitutionalism, self-assertion would be the obscene²¹⁹ remnant of pre-institutionalized states of affairs.²²⁰ The emergence of a commitment to collective effort in combating mass atrocities manifested in the R2P project poses the question of the need for countermeasures in the general interest.

This chapter will focus on the 2005 WSOD paras. 138-139 and subsequent developments, and will first introduce the basic content of R2P and the implementation of its pillar three, namely timely and decisive response; second, examine in what way Security Council acting under art. 41 of Chapter VII of the UN Charter can influence the right of individual States to take countermeasures and whether R2P leaves room for individual non-forcible measures as a response to mass atrocities; third whether the General Assembly could take a more prominent role in recommending and coordinating measures.

5.2 The Responsibility to Protect Introduced

R2P is the political framework for action adopted by UN Member States in 2005²²¹ based on the international legal obligations for the international community to prevent genocide, crimes against humanity and war crimes²²² through a three-pronged non-sequential pillar system,

²¹⁹ “Whatever is anachronistic is obscene. As a (modern) divinity, History forbids us to be out of time.” - Barthes (1978) p. 178

²²⁰ de Wet (2006) p. 75

²²¹ WSOD paras. 138-139; reaffirmed in the 2009 GA 63/308

²²² Zyberi (2013) p. 512; Amnéus (2013) p. 14; Strauss (2011) pp. 84-85; Bellamy (2011) p. 83; Brunnée (2011) pp. 74-77; SG 2009 para. 3; SG 2012 para. 59

each of equal importance for the overall framework of protection.²²³ In accordance with international law, R2P applies both in and outside the context of armed conflict.

The first pillar reiterates the responsibility of the individual State to “protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.²²⁴ Under R2P, the duty of protection entails a responsibility to prevent the crimes themselves and their incitement through “appropriate and necessary means”.²²⁵ The concrete implementation of R2P was left to further consideration.²²⁶ Although this pillar is the one with the clearest foothold in pre-existing international law,²²⁷ the subsequent SG reports go much further in urging States to take a wide number of preventive measures. They include, inter alia, to create legal, economic and political platforms for inclusion of marginalized groups,²²⁸ implement accountability measures,²²⁹ strengthen the security sector and the rule of law,²³⁰ to secure human rights protection and monitoring,²³¹ to enhance information sharing²³² through peer review procedures and partnerships with other States,²³³ and create mechanisms for identifying the existence of risks of mass atrocities.²³⁴

The second pillar²³⁵ establishes a commitment on the part of the international community to “encourage and help”²³⁶ States to comply with their protection responsibilities and to cooperate to provide assistance in capacity building,²³⁷ strengthening the rule of law,²³⁸ post-trauma

²²³ SG 2012 para. 2

²²⁴ WSOD para. 138 first sentence

²²⁵ WSOD para. 138 first sentence

²²⁶ WSOD para. 139 third sentence

²²⁷ Bellamy (2011) p. 85; See above, section 2.3

²²⁸ SG 2013 paras. 45, 61, 63

²²⁹ SG 2009 paras. 19, 27; SG 2013 paras. 41-42

²³⁰ SG 2013 paras. 44, 47

²³¹ SG 2009 paras. 16-17; SG 2013 paras. 49, 71

²³² SG 2009 para. 22

²³³ SG 2013 paras. 69-71

²³⁴ Ibid. paras. 60, 71

²³⁵ WSOD para. 138 last sentence and para. 139 last sentence

²³⁶ WSOD para. 138 last sentence

²³⁷ WSOD para 139 last sentence

peacebuilding²³⁹ and otherwise to assist the relevant State to meet its commitments under pillar one.²⁴⁰

The third pillar establishes a responsibility to react.²⁴¹ For this purpose WSOD distinguishes between coercive²⁴² and non-coercive²⁴³ measures. Among the non-coercive measures are dispute settlement procedures under UNC art. 33,²⁴⁴ monitoring and observer missions,²⁴⁵ referral to the ICC,²⁴⁶ and regional arrangements under the UN Charter Chapter VIII. If peaceful means prove inadequate and the State manifestly fails to protect its population, the community is committed to take timely and decisive action through the SC under the Charter Chapter VII. Timely and decisive action is to be determined on a case-by-case basis and its execution in cooperation with regional organizations as appropriate.²⁴⁷ As to sanctions, the SG 2012 report stressed the need for them to be targeted so as to secure that those responsible are the ones that are affected by them. Under the third pillar, the GA is also recognized a role through the ‘Uniting for Peace’ procedure.²⁴⁸

For individual States, the legal status on the duty to cooperate on the part of the international community relevant for pillars two and three is still somewhat unclear.²⁴⁹ This thesis has argued that the core of the duty to react under pillar three has a basis in pre-existing international law.²⁵⁰

²³⁸ SG 2009 para. 47

²³⁹ Ibid. para. 48

²⁴⁰ Ibid. para. 28

²⁴¹ WSOD para. 139

²⁴² WSOD para. 139 second sentence

²⁴³ WSOD para. 139 first sentence

²⁴⁴ SG 2012 para. 22

²⁴⁵ Ibid. para. 28

²⁴⁶ Ibid. para. 29

²⁴⁷ WSOD para. 139 second sentence

²⁴⁸ UNC arts. 10-12, 14-15; GA 377/5 para. 1; SG 2009 para. 63; Zyberi (2013) p. 519

²⁴⁹ Vashakmadze (2012) p. 1228 considers it to have developed into customary international law

²⁵⁰ See above, Section 2.3

Within the R2P framework, non-coercive prevention is most important.²⁵¹ This is an expression of the policy function of R2P, seeking to minimize the occurrence of mass atrocities and hence the need for reaction under pillar three.²⁵² With respect to carrying out the duties under all three pillars, procedures for early warning and assessment of risks are “essential for the effective, credible and sustainable implementation” of R2P.²⁵³

In sum, R2P envisages multi-layered implementation involving participation by the UN’s principal and subsidiary organs, regional and sub-regional organizations and States. NGO’s and civil society are likewise considered to play key roles.²⁵⁴ The comprehensive approach of R2P is based on the realization that the complexity in combating mass atrocities demand informed, concerted, flexible and context-sensitive measures.²⁵⁵

Whilst pillars one and two are still in formation, the implementation of pillar three has developed most rapidly.²⁵⁶ Under pillar three, the accomplishment of R2P thus far has not been as a “rallying call” to international action.²⁵⁷ Instead, the effects of R2P are in the internalization of its rationale; protecting populations from mass atrocities is seen to be in the interests of States themselves, thereby increasing the likelihood of action in R2P situations.²⁵⁸

In respect of art. 39 of the UN Charter, R2P may represent a rationale for conceptualizing mass atrocities more easily as one of the categories of art. 39.²⁵⁹ The SC has made express reference in resolutions to R2P several times since 2006.²⁶⁰ However, the SC is lagging behind in considering grave violations of human rights in and of themselves as threats to the

²⁵¹ Evans (2008) p. 79; SG 2009 para. 56

²⁵² Bellamy (2010) pp. 163-164

²⁵³ SG 2010 para. 19; See WSOD para. 138 last sentence

²⁵⁴ e.g. SG 2009 para. 59; SG 2012 paras. 38-48; SG 2013 paras. 53-54

²⁵⁵ This is expressed throughout the reports, e.g. SG 2009 para. 48; SG 2012 para. 20; SG 2013 para. 74

²⁵⁶ Luck (2012) p. 105

²⁵⁷ Bellamy (2013) p. 352

²⁵⁸ Ibid.

²⁵⁹ Vashakmadze (2012) p. 1231

²⁶⁰ e.g. SC Resolutions 1674 (2006), 1706 (2006), 1894 (2009), 1973 (2011) and 2109 (2013)

peace, in absence of a risk of armed conflict.²⁶¹ Furthermore, the unprecedented action in Libya with express mention of R2P²⁶² and paralysis in the case of Syria have been taken as symptomatic of inconsistent and context-dependent effectiveness of SC reaction.²⁶³

5.3 The Security Council and individual measures

5.3.1 The Security Council and its influence on States' competence to take individual measures

The SC has the “primary responsibility to protect the maintenance of international peace and security”,²⁶⁴ including the responsibility to protect populations from the crimes under R2P.²⁶⁵ Decisions by the SC, including measures under arts. 40 and 41, are legally binding upon members of the UN and possibly upon non-members alike.²⁶⁶

The wording of art. 41 is non-exhaustive, and permits the SC to decide on any measure short of the threat or use of force, including countermeasures proper.²⁶⁷

Turning back to the binding nature of SC decisions under art. 41, a first set of limitations stems from the Charter itself. This implies, as a general matter, that a SC decision must have legal basis in the UN Charter and that it cannot derogate from the rules contained therein.²⁶⁸

Art. 103, granting prevailing effect of the Charter in case of conflict, applies to the decisions by the SC.²⁶⁹ This implies, *inter alia*, that the limitation for States in respect of self-contained regimes does not apply when acting under the banner of a permissive SC decision, and, although the SC in principle is bound by customary international law,²⁷⁰ this does not apply to

²⁶¹ Krisch (2012b) p. 1287

²⁶² SC Resolution 1973 (2011)

²⁶³ Gill (2013) pp. 103-105; on contextual circumstances influencing reaction, see Bellamy (2013) pp. 342-343

²⁶⁴ UNC art. 24

²⁶⁵ Peters (2012a) p. 766

²⁶⁶ UNC art. 25; Peters (2012b) pp. 795, 800; Krisch (2012c) p. 1310

²⁶⁷ Krisch (2012c) p. 1311

²⁶⁸ Peters (2012b) p. 828-829

²⁶⁹ *Ibid.* pp. 850-851

²⁷⁰ *Ibid.* p. 819

emergency measures under Chapter VII.²⁷¹ In these cases art. 103 derogates from the bulk of customary international law also for the Member States.²⁷² In addition, the principle of proportionality is less strict than for individual countermeasures.²⁷³ Despite art. 103, the duty to carry out the decisions of the SC is not unqualified. This brings us to the second set of limitations: First, inasmuch as it conflicts with *jus cogens*, the SC decision is null and void.²⁷⁴ Second, albeit controversial, it might be argued that the power to derogate does not extend to all the bulk of human rights and humanitarian law that are not of *jus cogens* status.²⁷⁵ In such a case, the extent of permissible derogations is determined by the relevant human rights instruments themselves,²⁷⁶ whilst mere restrictions are governed by a loose principle of proportionality.²⁷⁷ With the exception of *jus cogens* and in cases where the SC decision is blatantly illegal, the presumption of legality will in any event soften the aforementioned operational limitations for Member States.²⁷⁸

In consequence, the binding nature of a SC decision under Chapter VII may either limit or extend the rights of States to take countermeasures in response to mass atrocities. Subject to the limits mentioned in Chapter 4, there is no legal impediment for individual States to take countermeasures that reach further than expressly permitted by a SC decision, unless expressly limited by the decision itself.

5.3.2 The residual and complementary role of individual measures

The heading of this sub-section draws on Simma's view of individual reactions as residual to institutional responses.²⁷⁹ The question is therefore whether R2P makes individual non-forcible coercive measures unnecessary. This is an empirical question regarding the imple-

²⁷¹ Krisch (2012a) p. 1257. For a contrary position, see Peters (2012b) p. 833

²⁷² Krisch (2012a) p. 1262; Peters (2012b) p. 853 is cautiously sceptical to this position

²⁷³ Krisch (2012a) p. 1260

²⁷⁴ Peters (2012b) pp. 852-853; Krisch (2012a) p. 1259; Krisch (2012c) p. 1314

²⁷⁵ Peters (2012b) pp. 821, 827, 853-854; Krisch (2012a) p. 1258

²⁷⁶ Peters (2012b) p. 825

²⁷⁷ This is consistent with the practice of the SC, see Krisch (2012c) pp. 1316, 1318; Human rights bodies grant a wide margin of appreciation in respect to SC decisions, see Peters (2012b) p. 826

²⁷⁸ Wall Advisory Opinion p. 152 para. 35; Peters (2012b) pp. 843-846

²⁷⁹ Simma (1994) pp. 310-311

mentation of R2P. Because of the complexity and context-dependent nature of situations where mass atrocities occur, no general definitive answer can be given. This section will therefore present broader considerations.

First it must be noted that States cannot free themselves from the responsibility to prevent and ensure respect by delegating action efforts to international organizations in the case that these institutions fail to respond or respond inadequately.²⁸⁰ This is supported by the *Application of the Genocide Convention* case, where the ICJ held that the duty to prevent was not limited to calling upon relevant organs of the UN.²⁸¹ Second, it must be noted that States have not expressed their legal intent through R2P not to make use of individual coercive measures not prohibited under general international law.²⁸²

As mentioned, coercive measures under the R2P framework are clearly intended to be exercised by the Security Council or, exceptionally, by the GA in form of recommendations. Most of the discussion of individual responses has since been confined to that of humanitarian intervention, of which there is limited practice and which might be interpreted to be implicitly excluded by the emergence of the doctrine of R2P.²⁸³ Although individual reaction by non-injured States is given no mention in WSOD,²⁸⁴ the ICISS report was permissive and a later report acknowledged a positive contribution by individual non-forcible coercion in response to mass atrocities.²⁸⁵ This seems to suggest that individual countermeasures are potentially compatible with R2P. The question then is in which cases individual countermeasures by non-injured States could complement the R2P doctrine.

First, sanctions more effective at the beginning of conflicts to deter further escalation.²⁸⁶ In this respect, it might be noted that the threshold for acting under R2P – “manifestly fails”²⁸⁷ –

²⁸⁰ See above, section 2.3.

²⁸¹ *Bosnia v. Serbia* 2007 pp. 219-220 paras. 226-227

²⁸² In this sense, R2P is not ‘hard law’, see Luck (2012) p. 86; Vashakmadze (2012) p. 1230

²⁸³ E.g. Amnéus (2013) p. 14; SG 2012 para. 32

²⁸⁴ Probably because of the scepticism surrounding humanitarian intervention, see Bilková (2012) pp. 294-295

²⁸⁵ ICISS 2001 para. 4.1, see Bilková (2012) p. 294; SG 2012 paras. 40-41

²⁸⁶ SG 2009 para. 57

²⁸⁷ WSOD para. 139; The vagueness of the concept is noted in Vashakmadze (2012) p. 1230

not necessarily is interchangeable with “serious violation”.²⁸⁸ It might therefore be that the right and duty to prevent and ensure respect could be engaged at an earlier stage than at the point where a State has ‘manifestly failed’ to protect its population. In this respect, individual countermeasures might serve as temporary measures.²⁸⁹

Second, if the collective response system is deadlocked in a “vicious cycle of hesitation and finger-pointing in the face of unfolding atrocities”,²⁹⁰ as is likely to occur in geopolitically contested regions,²⁹¹ individual countermeasures might serve a compensatory function.²⁹² However, in an on going conflict with evidence of large scale mass atrocities and complete disregard for international reputation, the effects of targeted countermeasures against the principally responsible State may be meagre.

Third, in cases where measures do not go far enough, individual countermeasures might serve to complement action by the SC.²⁹³ An example would be a SC decision against the principally responsible State, with countermeasures against third States fuelling the conflict through the providing of aid or assistance.

In these situations, countermeasures by non-injured States would *prima facie* be residual and complementary to collective action through the UN system. This is supported by State practice, where countermeasures by non-injured States often are taken in conjunction with UN condemnation of mass atrocities.²⁹⁴

²⁸⁸ ARSIWA art. 40

²⁸⁹ Also noted in Bílková (2012) p. 300

²⁹⁰ SG 2009 para. 60

²⁹¹ Brookings Policy Paper 2014 p. 28; the problem of selectiveness is also noted elsewhere, see e.g. Vashakmadze (2012) pp. 1221-1222 and Bellamy (2013) pp. 342-343

²⁹² Bílková (2012) p. 300

²⁹³ *Ibid.*

²⁹⁴ Tams (2011) p. 392

5.4 A More Prominent General Assembly?

R2P adds nothing new to existing competences of the GA.²⁹⁵ In respect to the crimes enshrined in WSOD para. 138, art. 2(7) does not limit the powers of discussion and decision-making of the GA.²⁹⁶

Although the legality of the Uniting for Peace procedure somewhat settled, the scope of legality remains contested and must be determined by reference to the Charter.²⁹⁷ The purpose of the procedure is to shift the responsibility for the maintenance of peace and security to the GA in the event that the SC fails to function, and in this way it reveals the secondary responsibility of the GA in the maintenance of international peace and security.²⁹⁸ In such a case, the GA can, if the conditions of art. 39 are met; recommend collective coercive measures including the use of force to restore international peace and security.²⁹⁹

Outside the scope of the ‘Uniting for Peace’ procedure, a resolution by the GA does not normally create legally binding rights or obligations *per se*.³⁰⁰ This does not preclude the GA from recommending coercive enforcement measures concerning international peace and security under arts. 10 and 11(2).³⁰¹ Referral to the SC is necessary only if ‘binding’ decisions are needed.³⁰² Even under art. 12(1), practice by the GA has drastically narrowed the procedural limitation for the GA to recommend enforcement measures.³⁰³ In light of the Uniting for Peace Resolution, a veto blocking a SC resolution may be sufficient to exclude the limitation in art. 12(1) – the SC would no longer be “exercising [its] functions”.³⁰⁴

²⁹⁵ Vashakmadze (2012) pp. 1233-1234

²⁹⁶ This is evident by the peremptory nature of the prohibitions; Nolte (2012) p. 297

²⁹⁷ Peters (2012a) pp. 768-769; Ryangert (2013) p. 118

²⁹⁸ Compare with UNC art. 24

²⁹⁹ GA 5/377 para. 1.

³⁰⁰ Klein (2012a) pp. 481, 486-487

³⁰¹ Klein (2012a) pp. 473-476; Klein (2012b) p. 501

³⁰² Klein (2012a) p. 475; Klein (2012b) p. 501

³⁰³ Klein (2012c) pp. 511-512, 516

³⁰⁴ UNC art. 12(1); Klein (2012c) pp. 512-513; Ryangert (2013) p. 116

The consequence would seem to be that, even outside the ‘Uniting for Peace’ procedure, recommendations are a potentially useful tool for coordinating countermeasures by non-injured States and securing broader legitimacy. Because resolutions by the GA outside the ‘Uniting for Peace’ procedure are not creative of rights, coercive measures must be in conformity with pre-existing international law. Because they are not binding, compliance with the recommendation remains within the discretion of States.

5.5 Conclusion

R2P would seem to be a step closer towards a true ‘international community’ by safeguarding the interests of the community through collective action. However, as pointed out by Edward Luck, R2P is still in its infancy and is likely to be a work in progress for quite some time.³⁰⁵ Given the limited success so far of R2P as a rallying call, the practical importance of unilateral countermeasures in response to mass atrocities is therefore not exhausted with the emergence of R2P. Subject to the competences of the Security Council, the General Assembly could assume a more prominent role in recommending and coordinating non-forcible coercion against actors responsible for mass atrocities in order to strengthen the legitimacy of the measures, in virtue of its residual responsibility for the maintenance of peace and security.

³⁰⁵ Luck (2012) p. 85

6 Conclusion

International law recognizes the fundamental nature of certain primary norms. This is expressed, in the law of treaties, in that they override the will of individual States; in the law of State responsibility, in that all States have a legal interest in their protection. The prohibition on genocide, crimes against humanity and serious war crimes are instances fundamental norms *erga omnes* with *jus cogens* status. Furthermore, all States are under an extra-territorial obligation to prevent genocide and there is evidence that the extraterritorial duty applies also to the prevention of war crimes and crimes against humanity. This prompts the question of whether non-injured States are entitled to take countermeasures in order to prevent mass atrocities.

Countermeasures are a means of private-justice that evolved from the earlier doctrine of reprisals. They are governed by a set of absolute and flexible limitations, hereunder the principle of proportionality. Because the proportionality of the measure is determined by the importance of the rule breached and the norms in question are of a fundamental nature, the threshold for disproportionality is high. In spite of this, States generally resort to modest measures. Combined, these factors substantially weaken the argument against countermeasures by non-injured States.

State practice on countermeasures by non-injured States in response to serious violations of obligations *erga omnes* span over four decades and have been taken in connection with virtually every major instance of serious breaches of fundamental norms since. Even if one is cautious to comment on their legality, the inclination of the international community to tolerate them as a non-prohibited necessity is now hardly disputable.

International law does not prohibit countermeasures against aiding or assisting States. Although the same is true for countermeasures by non-injured States in response to mass atrocities, the assessment of responsibility will often be based on a complex and equivocal factual scenario. In these cases, the risk of abuse is more clearly present and there is thus a greater need to justify the response.

In respect of mass atrocity prevention, R2P is the culmination of community concern with the universal values of humanity from which the prohibitions on genocide, crimes and humanity

and war crimes emanate. Because implementation of R2P is still under development, it does not make individual responses superfluous. To the contrary, it has been shown that countermeasures by non-injured States can complement collective action in harmony with the overall purpose of R2P. In addition, where the SC is deadlocked and there is need to coordinate responses or secure democratic legitimacy, the GA is competent to assume a role in recommending countermeasures in the general interest.

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