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The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility

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Abstract

The final version of the Articles on State Responsibility, adopted by the ILC in 2001, contains considerable advances over the previous draft of 1996. The ILC reconsidered the group of provisions dealing with the multilateral aspect of responsibility relations, and proceeded to 'decriminalize' international responsibility; to classify international obligations by taking into account the intrinsic nature and beneficiaries of the obligations breached; to differentiate the positions of individually injured states and not directly affected states; and to spell out the legal consequences of 'serious' breaches of obligations under peremptory norms and of erga omnes obligations. The present paper offers a critical analysis of the relevant provisions of the text on state responsibility by focusing on their interplay. Emphasis is also given to the question of countermeasures by not directly affected states.

The Articles on State Responsibility, as adopted by the International Law Commission (ILC) on a second reading in 2001,¹ have been thoroughly reworked from the earlier 1996 version.² The main changes concern the multilateral dimension of the relations which result from a breach of a number of international obligations, and the legal consequences attaching thereto. The multilateralization, or universalization, of the relations of responsibility has been a concern to the Commission since 1976, when it proposed the famous Article 19 on international crimes of states, and again when considering the 'content, forms and degrees of international responsibility'. However, aside from the many criticisms of the notion of 'State crime', the definition

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¹ See the ILC Report on the 53rd Session, UN Doc. A/56/10, 43 *et seq.* and the commentaries following it. The Articles in question also appear as an annex to Resolution A/RES/56/83, 12 December 2001. For a first commentary on the ILC's work that led to the adoption of its Draft on second reading, cf. Crawford, Bodeau and Peel, 'La seconde lecture du projet d'articles sur la responsabilité des Etats de la Commission du droit international. Évolutions ou bouleversement?', 104 *RGDIP* (2000) 911.

² See the ILC Report on the 48th Session, UN Doc. A/51/10, 125 *et seq.*

the definition of ‘injured States’ contained in Article 40 of the 1996 version similarly aroused numerous concerns.³ The same was also true for the legal consequences of the ‘crimes’, sometimes thought to be too timid and sometimes impracticable.⁴

To end the impasse and meet the criticisms of governments,⁵ the ILC had to rethink all the provisions relating to the multilateral dimension of relations of responsibility, as well as the multiple interactions between these Draft Articles, consideration of which had on each occasion been postponed until later. There was an impression that, because of the succession of Special Rapporteurs and the organization of its own work, the ILC had a compartmentalized view of these various groups of provisions, and the interaction between such groups was little studied, if at all. Taken literally, outside of the context of the special circumstances of their adoption, some Draft Articles led to incongruous conclusions most probably undesired by the Commission. For instance, Article 40(3), when read in conjunction with other provisions, suggested that in response to a ‘crime’ any state could on its own behalf assert all the possible consequences of the act, including the right to demand pecuniary compensation! More generally, the absence of a distinction in the text of Article 40 between states directly injured by a wrongful act and states not directly injured — a distinction that had been repeatedly called for since 1985 — led to an unacceptable widening not only of the consequences of ‘crimes’, but also of several ‘delicts’.

Given this position, and through the impetus given by the Special Rapporteur, Professor James Crawford, the ILC reconsidered this group of provisions on the multilateral aspect of responsibility relations, and proceeded to ‘decriminalize’ international responsibility (section 1 below); to classify international obligations (section 2 below); and to differentiate the positions of injured states and ‘other’ states (section 3 below). However, the codification of the consequences of ‘serious’ breaches of international law still displays certain ambiguities (section 4 below).

1 The ‘Decriminalization’ of Responsibility: The Abandonment of a Symbol

Despite the expectations generated by the dense commentary to the old Article 19 in the ILC Draft, the Commission never embarked on developing a full regime tailored to the international crimes of states. Instead, it contented itself with the so-called ‘delicts plus’ approach, according to which the commission of an international crime ‘entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in Articles 52 and 53’ of the Draft, as adopted

³ See *infra* note 23 and the associated text.

⁴ Cf. especially Tomuschat, ‘International Crimes by States: An Endangered Species?’, in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of E. Suy* (1998) 253.

⁵ Cf. especially the comments and observations of governments reproduced in UN Doc. A/CN.4/488, A/CN.4/492 and, more recently, in UN Doc. A/CN.4/515 and Add.1–3.

on first reading.⁶ Given the limited number and scope of these special consequences, the impression was given that the debate surrounding the notion of a crime of state for over 20 years had no more than symbolic or academic importance.

The compromise reached in the 1996 version of the Draft — retention of the notion of crime with a simultaneous weakening of its practical consequences — was largely the outcome of the contradictory attitude of different groups of states at the United Nations. In fact, with a few rare exceptions, the Western states, especially the three permanent members of the Security Council, were reserved, not to say downright hostile, towards the notion of crime, maintaining — despite the explanations by Special Rapporteur Ago and the ILC itself⁷ — that this concept implied a ‘criminalization’ of state responsibility. Despite this, the Western states on several occasions adopted countermeasures against prominent breaches of international law.⁸ The former socialist states and non-aligned states, for their part, were as a general rule favourable to the notion of crime, since it enabled them to denounce the ‘vestiges of colonialism’ and the maintenance of apartheid in South Africa. These same states, however, had reservations when it came to drawing the legal consequences from the commission of a crime, particularly in relation to countermeasures. In short, Article 19 of the Draft combined with Articles 51–53 — which remained evasive on countermeasures though without excluding them — constituted a ‘package deal’ more or less acceptable to everyone.

But this scheme, though adopted on first reading in 1996, in fact reflected the concerns of states in the Cold War era. While history continues to prove that states certainly can commit ‘crimes’,⁹ it is clear now that, since the end of the colonial period, the dismantling of apartheid and the historical upheavals of the late 1980s, the notion of ‘State crime’ as such hardly interests anyone any longer. The particularly favourable welcome given by states to the disappearance of the concept from the second version of the ILC Draft¹⁰ seems explicable at least in part by the new

⁶ Article 51 of the Draft adopted on first reading, *supra* note 2.

⁷ The Special Rapporteur and the ILC had in fact clearly distinguished between state responsibility and individual criminal responsibility in international law. Cf. R. Ago, Fifth Report on State Responsibility, *ILC Yearbook* (1976), vol. II, Part 1, 24 *et seq.*, and the commentary on the old Article 19 in the Draft, *ibid.*, Part Two, 96 *et seq.*, notably paras 21, 44 and 59. Faithful to this approach by its former Special Rapporteur, the ILC recently excluded from the scope of application of the Articles on State Responsibility ‘any question of the individual responsibility under international law of any person acting on behalf of a State’ (Article 58, UN Doc. A/56/10, at 363). For an overall survey of recent developments concerning the criminal responsibility of individuals in international law, cf. Yokaris, ‘Le système répressif international’, 55 *Revue hellénique de droit international* (2002), forthcoming.

⁸ For a survey of this practice, cf. ILC Report, UN Doc. A/56/10, Commentary on Article 54 of the text on State Responsibility, 351 *et seq.*; J. Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507/Add.4, paras 391 *et seq.*; see also the commentaries of L.-A. Sicilianos, *Les réactions décentralisées à l’illicite: des contre-mesures à la légitime défense* (1990) 156 *et seq.*; G. Carella, *La responsabilità dello Stato per crimini internazionali* (1985) 192 *et seq.*; Dupuy, ‘Observations sur la pratique récente des “sanctions” à l’illicite’, 87 *RGDIP* (1983) 505.

⁹ Cf. Pellet, ‘Can a State Commit a Crime? Definitely, Yes!’, 10 *EJIL* (1999) 425.

¹⁰ See the thematic summary of the debate held by the Sixth Committee of the General Assembly at its 55th Session, UN Doc. A/CN.4/513, paras 89 *et seq.* A still more favourable attitude in this connection emerged in the Sixth Committee debate at the 56th Session, UN Doc. A/C.6/56/SR.11–SR.16.

circumstances that transformed the highly symbolic content of the concept of a 'State crime' into a corpse devoid of political interest.

This does not, though, mean that the shortcomings in the definition of the notion of crime did not themselves also bear heavily on the throwing of the concept into the dustbin of history of international law. When highlighted shortly after the adoption of Article 19,¹¹ these weaknesses induced Professor Crawford to characterize this provision as having the 'appearance of a rule', and (as from his first report) to consider other possible approaches.¹² Replacing the term 'crime' by the notion of 'an exceptionally serious wrongful act' had been contemplated by the ILC in a note accompanying the former Article 40.¹³ This change was aimed at avoiding the criminal connotation of 'crime' and at the same time circumventing the whole debate on the nature (criminal, civil or *sui generis*) of state responsibility. It was, however, a makeshift solution, an ill-disguised reference to the notion of crime, a terminological contrivance of a descriptive nature, with no real normative scope. One may wonder what objective criterion could be taken as the basis for calling a breach 'exceptionally serious'. Renaming the notion of 'crime' was accordingly no panacea.

It was, however, just as impossible to establish a single responsibility system applicable without differentiation to every breach of international law. This approach would have almost ignored the manifold developments in this branch of law during the twentieth century, while essentially removing the multilateral dimension of certain responsibility relations, though this dimension is well rooted in positive law. It is, in fact, significant that even the states most stubbornly opposed to the notion of 'crime' did not propose such a unified approach to breaches of international law and the associated consequences.

The ILC consequently found itself faced with multiple conceptual requirements: first, it had to get rid of a symbol which had become useless, and which was additionally — rightly or wrongly — perceived as suggesting the existence of the criminal responsibility of states, something unknown to international law; it was necessary at the same time to retain the main idea underlying the former Article 19, namely, the distinction between different types of wrongful acts according to their seriousness; finally, it was important to link this distinction to a well-circumscribed set of norms capable of highlighting not just the 'quantitative' aspect — the seriousness of the breach — but also the 'qualitative' aspect — the importance to the international community — of the distinction.

However complex it may at first sight have seemed, the solution to this problem had in fact been suggested in the commentary to the old Article 19 itself, which repeatedly referred to breaches of obligations resulting from norms of *jus cogens* or obligations

¹¹ Cf. Dupuy, 'Action publique et crime international de l'Etat. A propos de l'article 19 du projet de la CDI sur la responsabilité des Etats', 25 *AFDI* (1979) 539. For a more recent critique of the 'circular' definition of international crime, cf. Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility', 9 *EJIL* (1998) 163, at 167.

¹² J. Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490/Add.3, paras 76 *et seq.*

¹³ ILC Report, *supra* note 2, at 141.

erga omnes.¹⁴ Looked at more closely, indeed, the famous ‘international crime’ in fact amounted to the serious breach of such obligations. But the notions of peremptory norms and obligations *erga omnes* have been well accepted in international law since at least the 1960s and the early 1970s respectively.¹⁵ Without seeking to review the history of the emergence and progressive consolidation of these concepts in the international legal system, suffice it to note here that the Western states — traditionally hostile to the notion of ‘crime’ — have for over two decades and to date repeatedly been referring to the breach of ‘absolute’, ‘essential’, ‘fundamental’ or *erga omnes* obligations in order to justify their collective countermeasures.¹⁶ The concept of *jus cogens* of course finds application over and above the law of treaties,¹⁷ extending to the area of state responsibility and particularly the area of its implementation.

It was accordingly quite natural that, in deciding to drop the weighty concept of an ‘international crime’, the ILC should have recourse to the notions of obligations *erga omnes* and peremptory norms in order to stress the qualitative aspect of ‘serious’ breaches of international law. One ought, nonetheless, to underline the Commission’s hesitation regarding the choice of one or other of these concepts. It will be noted that, in the text of the Draft Articles contained in the ILC report for 2000, Chapter III of the part on the ‘Content of International Responsibility of a State’ was entitled ‘Serious Breaches of Essential Obligations to the International Community’¹⁸. This reference to obligations *erga omnes* appeared (almost) consistently in a series of provisions in the Draft relating to the content and ‘implementation of State responsibility’.¹⁹ In the finalized 2001 version, by contrast, the heading of the corresponding chapter and Articles 40 and 41 refer to ‘Serious Breaches of Obligations Under Peremptory Norms of General International Law’, whereas the following provisions continue to appeal to obligations owed to the international community as a whole.²⁰

This duality of language was according to the ILC to be explained by the fact that the two groups of obligations ‘substantially overlap’.²¹ This leads us to consider the classification of international obligations made by the Commission, so as to encompass the multilateral dimension of responsibility relations in its entirety.

¹⁴ *Supra* note 7, paras 10, 16–18, 48, 61, 62, 67 and 73.

¹⁵ Concerning the emergence of the notion of *jus cogens*, it suffices to recall here Articles 53 and 64 of the Vienna Convention on the Law of Treaties. On the genesis of *jus cogens* and the various theories relating to its establishment, cf. R. Kolb, *Théorie du jus cogens international* (2001) 33 *et seq.* Concerning the appearance of the notion of obligations *erga omnes*, one will recall the famous *obiter dictum* of the ICJ in the *Barcelona Traction* case, Judgment of 5 February 1970, ICJ Reports (1970) 3, at paras 32 and 33. On the emergence of this last concept, cf. M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997) 1 *et seq.*

¹⁶ For a consideration of this practice, cf. the authors cited *supra* note 8.

¹⁷ Cf. Gaja, ‘Jus Cogens Beyond the Vienna Convention’, 172 *RdC* (1981-III) 271.

¹⁸ Cf. ILC Report, 52nd Session, UN Doc. A/55/10, 134.

¹⁹ Cf. Articles 41, 42, 43(1)(b) and 49(1)(b). Cf. also Article 54 which referred to Article 49(1)(b), *ibid.*

²⁰ Cf. Articles 42(1)(b), 48(1)(b) and 54, which refers to Article 48(1)(b), UN Doc. A/56/10.

²¹ *Ibid.*, at 281, para. 7.

2 The Classification of International Obligations

According to the initial approach to the structure of the Draft Articles on State Responsibility, the first part, on the origin of responsibility, was conceived in terms of obligations, whereas the second part, on the content, forms and degrees of responsibility, was focused on the rights of the injured state. This structure derived from the conception of Roberto Ago, according to whom it was ‘perfectly legitimate in international law to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective right of others’.²² The old Article 40 defining the notion of ‘injured State’ acted as a bridge between the first and second part of the Draft: it set out in paragraph 1 the correlation between obligations and rights, then paragraph 2 gave a non-exhaustive list of the states whose rights would be affected by the breach of a given obligation. Finally, paragraph 3 recognized the universalization of responsibility relations in the event of the commission of an ‘international crime’.

Without wishing to comment in detail on old Article 40, it is sufficient to note that it presented certain major conceptual problems.²³ It will be noted, first, that the postulate on which the provision was based — the ‘exact’ correlation between the breach of an international obligation of a state and the injury to the subjective right of another state — is not as absolute as one would like to believe. There are in fact several cases where the beneficiaries of an international obligation are not states, but individuals, peoples or other entities. The norms relating to human rights or the right of peoples to self-determination are striking examples. The result is that, if no distinction is drawn between the rights of the victims and the response of states, then ‘human rights’ — to take only one example — have *ipso facto* been transformed into ‘states’ rights’,²⁴ something that does not seem justifiable from a normative or conceptual viewpoint.

In addition to this problematic postulate, the list in Article 40(2) was ‘long and awkward’,²⁵ descriptive in nature and did not cover all possible cases. Moreover, Article 40 did not, as will be recalled, distinguish between states directly injured by the wrongful act and states with only a legal interest in seeing international law respected. We shall return *in extenso* to this distinction and the resulting legal consequences (section 3 below). For the moment, it is important to stress that the shortcomings in the definition of ‘injured State’ were essentially due to the fact that

²² R. Ago, Second Report on State Responsibility, *ILC Yearbook* (1970), vol. II, Part One, 192.

²³ Among the numerous writings on the matter, cf. Sachariew, ‘State Responsibility for Multilateral Treaty Violations: Identifying the “Injured State” and its Legal Status’, 35 *NILR* (1988) 273; Simma, ‘Bilateralism and Community Interest in the Law of State Responsibility’, in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 821; Sicilianos, *supra* note 8, at 103 *et seq.*, 116 *et seq.* and 136 *et seq.*; Frowein, ‘Reactions by Not Directly Affected States to Breaches of Public International Law’, 248 *RdC* (1994-IV) 349 *et seq.*; Dominicé, ‘The International Responsibility of States for Breach of Multilateral Obligations’, 10 *EJIL* (1999) 353; Crawford, Third Report, *supra* note 8, at paras 66 *et seq.*

²⁴ Crawford, Third Report, *supra* note 8, para. 87.

²⁵ *Ibid.*, at para. 76.

the formulation of Article 40 almost disregarded the intrinsic nature and beneficiaries of the obligations breached. But these are valuable criteria, the only criteria enabling the notion of 'injured State' to be circumscribed in its totality, thus progressively enlarging this concept and differentiating the status of the various categories of states affected by the breach.

It is certainly clear that the classification of international obligations according to their nature is not aimed at establishing a typology of wrongful acts. This is not the object of the Articles on State Responsibility. The objective of this classification is instead to arrive at a functional scheme able to delimit the range of states empowered to invoke the responsibility of the defaulting state and to act in consequence, irrespective of the origin — whether conventional or otherwise — of the obligation breached. The approach is not new. It will be recalled that, in the commentary on the provision that became Article 60(2)(c) of the Vienna Convention on the Law of Treaties, the ILC justified the solution adopted by referring to 'integral obligations', such as those resulting, for instance, from agreements relating to disarmament.²⁶ Since then, and most especially in the context of international responsibility, legal scholars have produced several works seeking to circumscribe the range of injured states on the basis of the intrinsic nature and the beneficiaries of the obligation breached.²⁷ It was, then, time for the ILC to incorporate these parameters into its draft.

A Obligations Creating Bilateral or 'Bilateralizable' Relations

In this order of ideas, it is first and foremost important to stress that a large number of international obligations create strictly bilateral relations. This is the case for obligations resulting from a bilateral custom or a bilateral treaty, from a unilateral promise addressed to a single state, from a judgment in a case concerning two parties, etc. In all these cases the injured state is identifiable almost automatically. It was in consequence unnecessary for the ILC to enumerate all these cases in the text of the old Article 40.

Similar observations apply *mutatis mutandis* to obligations which, even if taken on in a multilateral framework, can be considered as a bundle of interwoven bilateral relationships dominated by the principle of reciprocity. Indeed, the fact that a collective treaty or rule of general international law binds several states at once — or that a unilateral promise binds its author in relation to a set of states — in no way means that these have an equal interest in compliance. The contrary would lead to a generalized 'review of legality', something unknown to international law.²⁸ The result is that the great majority of relations of responsibility are 'bilateralizable', in the sense that they take shape between the state which committed the wrongful act and the state(s) directly injured. One could not, for instance, maintain that the fact of a state's preventing innocent passage through its territorial waters by the merchant ships of

²⁶ *ILC Yearbook* (1966), vol. II, 255, para. 8.

²⁷ Cf. the authors cited *supra* note 23.

²⁸ Cf. Dupuy, 'Le fait générateur de la responsabilité internationale des Etats', 188 *RdC* (1984-V) 9, at 91 *et seq.*

another state would empower a third state to invoke the responsibility of the defaulting state. The classical conception expressed by Anzilotti²⁹ remains valid in principle, at least as regards the ‘anonymous’ mass of international obligations breach of which creates bilateral or bilateralizable relations. The version of the Articles finally adopted by the ILC in 2001 covers all these cases with an exemplary litotes by stating that ‘[a] State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) [t]hat State individually ...’ (Article 42(1)).

B Obligations Creating Multilateral Relations

In addition to this anonymous mass of obligations, on the model of the Vienna Convention on the Law of Treaties, the ILC separately considered the category of so-called ‘integral’ obligations or (better) ‘interdependent’ obligations. These are obligations, scrupulous performance of which by all states bound by them constitutes a condition *sine qua non* for the functioning of the system they set up. It is clear, for instance in the context of a disarmament treaty, that each state reduces its military power because and to the extent that the other parties do likewise. Non-performance, or material breach, of the treaty by one of its parties would threaten the often fragile military balance brought by the agreement, by radically changing ‘the position of every party with respect to further performance of its obligations’ (Article 60(2)(c) of the Vienna Convention). Consequently, every party to such a treaty other than the defaulting state could be regarded as an injured state, irrespective of whether it has been ‘specially affected’ by the breach or not. The same would be true for a denuclearization treaty or ‘any other treaty where each party’s performance is effectively conditioned upon and requires the performance of each of the others.’³⁰

While it is true that in practice interdependent obligations most frequently arise from systems set up by treaty, Article 42(b)(ii) is worded in general terms in order to cover all obligations of this type, whatever the source. The fact will also be welcomed that in the version adopted on second reading in 2001 the ILC aligned itself to the above-cited terms of the Vienna Convention on the Law of Treaties, altering the previous formula that considerably broadened the notion of ‘integral’ obligations. In fact, in accordance with the version appearing in the ILC report for 2000, an obligation would belong to this category if the breach was ‘of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned’.³¹ But, at least in relation to integral obligations of treaty origin, there was something of a mismatch between this latter wording and the terms of Article 60(2)(c) of the Vienna Convention. It is in fact clear that the ‘radical change’ in treaty relations is a stricter condition than ‘affecting the enjoyment of rights or performance of obligations’ of the states concerned. Without harmonization of the two provisions,

²⁹ Cf. D. Anzilotti, *Cours de droit international*, vol. I (trans. G. Gidel, 1929) 467.

³⁰ Commentary to Article 42 adopted in 2001, UN Doc. A/56/10, 300, para. 13.

³¹ Article 43(b)(ii), Doc. A/55/10, 135.

there would have been a risk of favouring the invocation of the (more flexible) law of state responsibility in order to justify responses (e.g. countermeasures) which were of more doubtful compatibility with (more exacting) treaty law.

Having said that, in addition to obligations of an 'integral' or interdependent nature, the ILC equally mentions obligations *erga omnes partes*. Thus Article 48, entitled 'Invocation of Responsibility by a State Other Than an Injured State', stipulates in paragraph 1 that:

Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) [t]he obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group . . .

This provision, inspired by the old Article 40(2)(e) and (f), has no counterpart in the Vienna Convention on the Law of Treaties. According to the analysis by Special Rapporteur James Crawford, integral obligations form part of the apparently broader concept of obligations *erga omnes partes*.³² These are said to be 'collective obligations', i.e. obligations binding on a group of states and established in a common interest, transcending the 'sphere of the bilateral relations of the States parties'. Such obligations might concern, for example, the environment, the security of a region (including disarmament), human rights or more generally the protection of a group or a people.³³

These rather heterogeneous examples call for some comment. It would seem that there is a conceptual difference between 'interdependent' obligations — such as those contained in disarmament agreements — and obligations concerning the environment or human rights. The former can certainly not be brought under a bundle of bilateral relations; they are nonetheless dominated by a sort of global reciprocity in the sense that each state disarms because the others do likewise. One can, therefore, easily understand that breach of this sort of obligation might 'radically change' the situation of all the other states as to the further performance of, for example, their own disarmament obligation. The case is different for obligations relating to environmental protection or human rights. These tend to promote extra-state interests, are not of a synallagmatic nature and fall outside the interplay of reciprocity. A breach of human rights by state A, however serious it may be, in no way changes the position of other states regarding compliance with their own obligations in the same area.

It follows that the 'interdependent' obligations and those laid down for the purposes of protecting a collective interest, or (better) an extra-state interest, cannot be identified with each other. To a certain extent, the text adopted by the ILC takes account of this difference in nature, since the interdependent obligations are mentioned in Article 42 relating to invocation of responsibility by the injured state, whereas the obligations protecting 'collective interests' are mentioned in Article 48 concerning invocation of responsibility by a state other than an injured state. However, the legal position of the injured state and of the 'other' states are not identical. This does not prevent the commentary to Article 48 from creating some

³² Third Report, *supra* note 8, at paras 106 and 107, Table 1.

³³ Commentary on Article 48 adopted in 2001, UN Doc. A/56/10, 320, para. 7.

confusion between the interdependent obligations and obligations laid down in order to protect extra-state interests, by bringing them under the same category of obligations *erga omnes partes*, without throwing light on their differences or on the resulting legal consequences.

C *Obligations Creating Relations of a Universal Nature*

The various sorts of obligations *erga omnes partes* must also be distinguished from obligations *erga omnes*. At first sight this distinction seems clear: the former are owed to a group of states parties to a specific legal regime such as a regional convention for the protection of human rights. The latter are by contrast owed to the international community as a whole. It may, however, be that there is an overlap between these two categories of obligations to the extent that the regional instrument takes up an obligation under general international law owed to the international community as a whole. In such an eventuality — frequent particularly in the area of human rights — the states parties to the regional instrument can assert the legal consequences that result from it,³⁴ as well as (where appropriate) the consequences in general international law. The other states in the international community for their part will invoke the responsibility of the defaulting state and the consequences provided by general international law.³⁵ It is thus important to stress that the distinction between obligations *erga omnes partes* and obligations *erga omnes*, while clear *in abstracto*, may become blurred *in concreto*, in the sense that obligations with the same content may simultaneously come within both categories.

We must now consider the ILC's approach, which consists of identifying with each other, or nearly so, obligations *erga omnes* and obligations arising from peremptory norms. According to the commentary:

The examples which the International Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention involve obligations to the international community as a whole.³⁶

In other words, obligations *erga omnes* and obligations resulting from peremptory norms would be two faces of the same coin. The only distinction between these two categories of obligations would be a 'difference in emphasis':

While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance — i.e. . . . in being entitled to invoke the responsibility of any State in breach.³⁷

Hence the reference to 'serious breaches of obligations under peremptory norms of

³⁴ Cf. Article 55, adopted by the ILC in 2001, entitled '*Lex Specialis*'.

³⁵ Cf. Articles 48(1)(b) and (2) and 54.

³⁶ UN Doc. A/56/10, Introduction to the Commentary on Articles 40 and 41, 281, para. 7.

³⁷ *Ibid.*

general international law' in the chapter concerning the specific consequences of these breaches, and the use of the notion of 'obligations owed to the international community as a whole' in Article 48, devoted to the 'invocation of responsibility by a State other than an injured State'.

The approach is certainly subtle. Nonetheless, one wonders whether, apart from this undeniable difference in viewpoint, one can assert that in substance the two notions coincide. Legal scholars are far from unanimous on this point, as the ILC seems to affirm.³⁸ If one is prepared to subscribe to the assertion that peremptory norms of general international law give rise to obligations *erga omnes*, it may be hard to admit the converse proposition that all obligations *erga omnes* result from *jus cogens* norms.

By way of illustration of the problem, in the celebrated passage in the *Barcelona Traction* judgment, the ICJ noted that obligations *erga omnes* result *inter alia* 'from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.³⁹ The word 'including' clearly suggests there are several other principles and rules relating to human rights that give rise to obligations *erga omnes*. It is, moreover, significant that the Institute of International Law has not hesitated to generalize the ICJ's *dictum* by stating without further ado that the international obligation of states to ensure the observance of human rights, 'as expressed by the International Court of Justice, is *erga omnes*'.⁴⁰ Yet the obligation in question is much broader than the obligations resulting from norms of *jus cogens* in the area of human rights. These chiefly concern the irreducible core of human rights, that is, those rights which are non-derogable even 'in time of war or other public emergency threatening the life of the nation'.⁴¹ Obligations *erga omnes* and those resulting from peremptory norms form two concentric circles, the first of which is larger than the second. Trying to identify them is a problematic approach which blurs the conceptual clarity of the whole system of 'serious' breaches of international law. Thus the preferred text is that presented in the ILC's report for 2000, which refers only to obligations *erga omnes*.

Despite these problems, the classification of international obligations — 'ordinary' obligations, interdependent obligations, obligations protecting extra-state interests (which apply *erga omnes partes*), obligations *erga omnes*, obligations resulting from peremptory norms — renders the progressive broadening of the circle of states affected by their breach more comprehensible. It is still necessary, however, to differentiate the legal position of these states.

³⁸ Cf. Gaja, 'Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts', in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 151; Ragazzi, *supra* note 15, at 189 *et seq.*

³⁹ ICJ Reports (1970) 3, at para. 34.

⁴⁰ Resolution on the protection of human rights and the principle of non-intervention in the internal affairs of states, 13 September 1989, *Yearbook of the Institute of International Law*, vol. 63-II (1990) 341.

⁴¹ In the terms of Article 15 of the European Convention on Human Rights.

3 Differentiation of the Position of States Affected by the Breach

A *States Individually and Non-Individually Injured*

This differentiation constitutes a major change in the Articles finally adopted by the ILC in comparison with the draft adopted on first reading in 1996: instead of treating all injured states in the same way, there is now a distinction between the injured state on the one hand and ‘a State other than an injured State’ on the other.⁴² This distinction tends to reflect the idea that the commission of a wrongful act, while it may affect a number of states, does not necessarily affect them all in the same way. The wrongful act, while violating a genuine subjective right of one or several states, may affect the legal interests of other states. Only the former, however, deserve to be termed ‘injured States’.

In 1985, when the Riphagen proposal on the definition of an injured state was debated at the Sixth Committee of the General Assembly, several delegations made similar comments.⁴³ They distinguished between states ‘directly’ or ‘individually’ injured by the breach and states ‘not directly’ or ‘not individually’ affected, a distinction subsequently taken up by some legal scholars.⁴⁴ This terminology, it is submitted, is preferable to the one finally adopted by the ILC, because referring to an ‘injured State’ and ‘States other than an injured State’ might lead one to think that these ‘other’ states are third parties in relation to the unlawful act. It is, moreover, significant that in his third report Professor Crawford actually used the term ‘third states’ for those states legally affected by the commission of a wrongful act.⁴⁵ However, either a state is in no way affected by a wrongful act, in which case it must be called a ‘third’ state and will not be able to invoke the responsibility of the defaulting state; or else a state is affected — if only indirectly — by the wrongful act, in which case it cannot be treated as a third state. It is though hard to see how a state other than the ‘injured State’ could be entitled to invoke the responsibility of the defaulting state. This responsibility can be invoked either by a state individually injured or else by a state not directly injured but nonetheless affected by the breach, but not by a third state in the strict sense of the term. While fully subscribing to the *ratio* of this distinction proposed by the ILC, it is submitted that the terminology used is problematic. Instead of talking of ‘injured States’ and ‘States other than an injured State’ the distinction should be drawn between states ‘directly’ or ‘individually’ injured by the breach and states ‘not directly’ or ‘not individually’ affected, the latter not being true third parties in relation to the wrongful act.

Apart from the terminological problems — which sometimes risk blurring the

⁴² See Article 48 and the relevant commentary, UN Doc. A/56/10, 318 *et seq.*; and J. Crawford, Fourth Report on State Responsibility, Doc. A/CN.4/517, 2 April 2001, paras 35 *et seq.*

⁴³ Cf. the debate on the ILC Report for 1985 (A/C.6/40/SR.23–SR.26), and the thematic summary drawn up by the Secretariat (UN Doc. A/CN.4/L.398, paras 163, 165 and 174).

⁴⁴ Cf. e.g. Frowein, *supra* note 23, *passim*.

⁴⁵ UN Doc. A/CN.4/507/Add.4, para. 400.

conceptual clarity of the distinction — the distinction between states directly injured and other states affected by the breach is important since it entails legal consequences. In fact, only the state individually injured has the entire range of rights and powers consequent on the wrongful act. States not directly injured for their part enjoy limited rights.

B Full Rights and Limited Rights

The notion of a state (directly) injured is clearly defined in Article 42. In the event of a breach of an obligation that creates relations of a bilateral nature, the injured state is the one to which the obligation is individually owed. If there is a breach of an obligation that gives rise to multilateral relations, the state directly injured is the one specially affected by the breach, or else any state to which an obligation of an 'integral' nature is owed. Finally, in the event of a breach of an obligation *erga omnes*, the state directly injured is the one specifically affected by the breach. For it is clear that a breach of an obligation that creates multilateral or universal relations can have specific effects on one or several particular states. In the case of aggression, for instance, the state individually injured will of course be the state attacked. The question of what state has been specifically affected is a question of fact that can be answered only on a case-by-case basis. It is also possible, however, that there is no state individually injured, as in the case of a violation by a state of the rights of its own nationals.

It is, however, certain that the state individually injured, if one exists, has the full range of rights and powers consequent on the wrongful act: such a state may call for cessation if the act continues; it is entitled (where appropriate) to demand assurances and guarantees of non-repetition; it can in principle choose the appropriate form of reparation (restitution, compensation or satisfaction); it is entitled to take countermeasures, the main aim of which is to induce the responsible state to perform its 'secondary' obligations; and, finally, it can assert any other consequence provided for by a special rule of international law (cf. Article 55, entitled '*Lex Specialis*').

The position of the 'other' states, namely, the states not individually injured, to which Article 48 refers, is quite different. Subject to the foregoing remarks, the states not directly injured are first and foremost those which, without being specially affected by the breach, participate in a specific legal regime from which obligations *erga omnes partes* derive. Furthermore, even if they are not specifically injured, all states are affected by the breach of obligations *erga omnes*, and *a fortiori* by a breach of obligations resulting from peremptory norms of general international law.

It would, however, be excessive or indeed illogical to grant all states the whole set of rights that the state individually injured enjoys. This kind of 'levelling upwards' would risk leading to absurd results, especially in the area of reparations. It was in consequence necessary to circumscribe clearly the rights of states not individually injured, but also to tie, to some extent, the exercise of these rights to the attitude of the state directly injured. Failing that, states not directly injured could be 'more royalist than the king'.

Article 48(2), as finally adopted by the ILC, tends to respond specifically to these objectives. According to its provisions, states not directly affected by the breach may, first, call for cessation of the internationally wrongful act and (where appropriate) for assurances and guarantees of non-repetition. They may also call for performance of the obligation of reparation, but only in the interest of the state directly injured if one exists, or that of the beneficiaries of the obligation breached (private persons or non-state entities). In other words, states not individually affected do not essentially act on their own account but rather act much more on behalf of and in the interests of the subjects that have been directly injured.

According to the text of the Draft appearing in the ILC's report for 2000, the same principle explicitly applied to the entitlement of states not directly injured to take countermeasures.⁴⁶ In the final version, by contrast, this power becomes particularly ambiguous. This finding leads us to look more closely at the consequences of 'serious' breaches of international law.

4 The Ambiguous Codification of the Consequences of 'Serious' Breaches

A Ambiguities Relating to the Nature and Seriousness of the Breach

The first ambiguity concerns the scope of application of the provisions relating to 'serious' breaches. Without going back over previous developments, it is sufficient to recall that the relevant chapter and the Articles it contains (Articles 40 and 41) refer to 'serious breaches of obligations under peremptory norms of general international law', whereas other provisions regarding the invoking of the responsibility of the state (Articles 42 and 48) or countermeasures (Article 54) refer instead to the breach of obligations *erga omnes*.

If the two categories of obligations coincide, as the ILC seems to suggest, the only important problem would concern the threshold of seriousness required in order for states not directly injured to be able to assert the consequences provided for in Articles 48 and 54. However, we can note the fact that the criterion of seriousness of breach appears only in Articles 40 and 41, and does not appear in the text of Articles 48 and 54. A textual interpretation of these latter provisions would therefore lead one to think that any state could invoke any breach whatsoever of an obligation *erga omnes* and implement all the consequences relating thereto, including the adoption of 'lawful measures' against the responsible state. But this would be a striking novelty, in no way corresponding to the practice of states, nor, it is submitted, to the intentions of the ILC itself or its Special Rapporteur. For we know that the whole debate on the universalization of relations of responsibility, and relevant state practice, relate to 'gross' or 'systematic' breaches⁴⁷ of peremptory or *erga omnes* obligations, not to minor

⁴⁶ Cf. Article 54 of the text, UN Doc. A/55/10, 139.

⁴⁷ See the tenor of Article 40(2) as finally adopted by the ILC, and the relevant commentary, UN Doc. A/56/10, 285.

breaches of these obligations.⁴⁸ As far as we know, for instance, no one has ever maintained that a minor breach of an obligation *erga omnes* would justify the taking of countermeasures by every state of the international community. It will be recalled in this connection that, according to the 1996 Draft, only ‘international crimes’ entailed the universalization of the relations of responsibility (Article 40(3)). And, obviously, the element of seriousness of the breach was inherent in the notion of ‘crime’.

The codification of ‘secondary’ norms relating to the universalization of the relations of responsibility becomes still more problematic if we add the ambiguity (mentioned earlier) of the nature of the obligation breached (obligations arising from peremptory norms — obligations *erga omnes*). This duality of language, combined with the related problem of the threshold of seriousness of breaches, leads to the following result: the serious breach of a small number of peremptory obligations entails ‘particular consequences’ that are fairly mild, namely, the duty upon states to cooperate to bring to an end through lawful means any serious breach, the obligation not to recognize as lawful the resulting situation, and the duty not to render aid or assistance to the maintenance of that situation (Article 41 of the text adopted in 2001).⁴⁹ At the same time, a minor breach of a broader range of obligations — obligations *erga omnes* — creates the notably more serious consequences appearing in Articles 48 and 54.

All of these incongruities could have been remedied by two changes to the version of the Articles finally adopted in 2001. The first would consist in reverting essentially to the text contained in the ILC’s report for 2000, eliminating the twofold reference to obligations of a peremptory nature *and* obligations *erga omnes*, and referring everywhere in Articles 40, 41, 42 and 48 to ‘obligations owed to the international community as a whole’. The second amendment would consist in adding the element of seriousness of breach to paragraph 1(b) of Article 48 regarding the invocation of responsibility in case of breach of an obligation *erga omnes*.

B Ambiguities Relating to the Adoption of Collective Countermeasures

More specifically as regards the question of so-called ‘collective’ countermeasures, i.e. countermeasures adopted by states not individually injured by a serious breach of international law, the text adopted on second reading in 2001 is every bit as ambiguous as the first version of 1996.

The latter was far from being clear on this point. Certainly, Article 40(3) stipulated that, if the internationally wrongful act constituted an international crime, the expression ‘injured State’ would designate ‘all other States’. However, between acceptance of the idea that every state was injured by an international crime and recognition of the entitlement of any state to respond with countermeasures, there

⁴⁸ Cf. Sicilianos, *supra* note 8, at 135–177. In the same sense, cf. the observations of several governments to the Sixth Committee of the General Assembly, UN Doc. A/CN.4/513, paras 180–181.

⁴⁹ Cf. also, however, the saving clause of Article 40(3), UN Doc. A/56/10, 286.

was a step that certain ILC members were not ready to take.⁵⁰ Articles 51–53, concerning the specific consequences of ‘international crimes’, were no more explicit. To be sure, Article 51 stated that ‘[a]n international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in Articles 52 and 53’. One might accordingly deduce that, since the countermeasures constituted a legal consequence of the ‘delicts’, Article 51 *a fortiori* recognized the power of any state ‘injured’ by a crime to have recourse to countermeasures. The commentary to Article 51, however, carefully avoided referring to countermeasures.⁵¹ Similar observations apply *mutatis mutandis* to Article 53, which stated that ‘[a]n international crime committed by a State entails an obligation for every other State: ... (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime’. The very brief commentary to this provision referred in particular to the cooperation of states in implementing sanctions adopted by the Security Council. It added, however, that, ‘apart from any collective response of States through the organized international community, the Commission believes that a certain minimum response to a crime is called for on the part of all States’.⁵² To what form of ‘minimum response’ was the ILC alluding? One might think of protests, diplomatic pressure and retorsions, but also of countermeasures. It should also be recalled that countermeasures are analyzed as legal entitlements, not obligations. But Article 53 laid down ‘obligations’ of states, not mere entitlements. In short, the whole set of relevant provisions in the version of the Draft adopted in 1996 contained allusions that might, as the case required, be interpreted as allowing the adoption of countermeasures by states not individually affected by a ‘crime’, while remaining evasive, and in the final analysis inconclusive, on the point.

Similar ambiguities mark the ILC’s work on the second reading of the Draft. Concerning the question of ‘collective’ countermeasures, the Commission again took a hesitant attitude: while in the report submitted to the General Assembly in 2000 it proposed a provision that would explicitly recognize the entitlement of states ‘other than the injured State’ to take countermeasures,⁵³ it took a step back the following year. For Article 54 in the version adopted in 2001, entitled ‘Measures Taken by States Other Than an Injured State’, is of an ambivalence worthy of the Pythian oracle. Located at the end of the chapter on countermeasures, the Article provides that:

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

⁵⁰ Cf. e.g. the position of Reuter, *ILC Yearbook* (1985), vol. I, 1891st meeting, 30 May 1985, at 94, para. 14. For a summary of the views expressed at the ILC, cf. more recently *ILC Yearbook* (1995), vol. II, Part Two, 50–51.

⁵¹ ILC Report, *supra* note 2, at 165 *et seq.*

⁵² *Ibid.*, at 170.

⁵³ Cf. Article 54, UN Doc. A/55/10, 139.

The ambiguity lies both in the heading, which talks of ‘measures’ and not ‘countermeasures’, and in the text, which refers to ‘lawful measures’. This latter expression can in fact be interpreted in two ways, according to the position one takes on the question of ‘collective’ countermeasures. Those unfavourable to those countermeasures⁵⁴ will probably maintain that ‘lawful measures’ must be taken to mean measures lawful *per se*, i.e. acts of retorsion rather than countermeasures. Those who take the opposite viewpoint will recall that acts of retorsion were explicitly excluded from the scope of application of the Articles on State Responsibility,⁵⁵ that permitting retorsions and devoting a specific provision to the purpose is pointless, since they are in any case permitted; that countermeasures too are ‘lawful measures’, given that their wrongfulness is precluded by Article 22 — and by customary law — to the extent that they are taken in accordance with the procedural and material conditions codified essentially in Articles 49–53; and, finally, that Article 54 is an integral part of the chapter on countermeasures.

The second interpretation is the legally correct one, since it conforms with the spirit and other provisions of the Articles on State Responsibility. This is the case even though the ambiguities of Article 54 are undoubtedly deliberate, and seek to respond to certain critical observations by governments.⁵⁶ From a policy viewpoint, one can of course understand the approach of the ILC, which was keen to secure a favourable reception for its Draft by the Sixth Committee of the General Assembly, an objective which was, overall, attained. Like any compromise formula, however, Article 54 will perpetuate the debate around ‘collective’ countermeasures without being able to satisfy everyone.⁵⁷ It should in any case be noted that state practice in the matter is far from being ‘embryonic’ or emanating solely from Western states, as the ILC suggests.⁵⁸ The practice, which consists in states not directly injured by a serious breach of international law responding to it by measures unlawful in themselves, goes back over two decades, and certainly does emanate from Western states, but also from African states and former socialist states, if we take account of the responses of the latter group of states to the apartheid regime.⁵⁹ The ILC could therefore have kept to the option proposed in its report for 2000, by explaining it better in the commentary. This would also have contributed to regulating and channelling a practice that sometimes sins through excessive zeal.

⁵⁴ Cf. e.g. D. Alland, *Justice privée et ordre juridique international. Étude théorique des contre-mesures en droit international public* (1994) 370–371. See also O.Y. Elagab, *The Legality of Non-Forcible Countermeasures in International Law* (1988), who very briefly raises the question, but concludes in ambiguous fashion (*ibid.*, at 59).

⁵⁵ Cf. the ILC commentary introducing the chapter on countermeasures, UN Doc. A/56/10, 325, para. 3.

⁵⁶ Cf. the commentary on the final version of Article 54, *ibid.*, at 355, para. 7; J. Crawford, Fourth Report, *supra* note 42, paras 59–60.

⁵⁷ One may note by way of example the sharp criticism of the final version of Article 54 by the Finnish representative on the Sixth Committee of the General Assembly, M. Koskenniemi, speaking on behalf of the Nordic countries (UN Doc. A/C.6/56/SR.11).

⁵⁸ Cf. commentary on the final version of Article 54, paras 3 and 6.

⁵⁹ On this practice, cf. Sicilianos, *supra* note 8, at 155–175; for more recent examples, cf. the commentary on the final version of Article 54, UN Doc. A/56/10, 353 et seq.

It must be stressed that the entitlement of all states to have recourse to countermeasures against serious breaches of obligations owed to the international community as a whole is ‘without prejudice to the Charter of the United Nations’.⁶⁰ In other words, this is a subsidiary competence, subordinate to the ‘constitutional’ instrument of the international community, and more particularly to the Security Council’s Chapter VII powers. If the Council decides to adopt sanctions against such a glaring breach of international law — as it has repeatedly done in the 1990s⁶¹ — the entitlement of states not directly injured to have recourse to countermeasures at the inter-state level fades away. Implementation of the sanction will be centralized and coordinated by the Security Council, with the states being turned into agents executing the Council’s decisions. We may, however, note that in certain cases the states give themselves a power of self-interpretation of the latter’s resolutions, drawing on the preambles thereto to justify the adoption of ‘collective’ countermeasures with only a remote relation, or none at all, to the UN sanctions, or even measures that might go counter to UN objectives.⁶² This is a tendency that risks calling the already shaky edifice of Chapter VII of the Charter into question. Hence the interest in having the regulation of ‘collective’ countermeasures clarified, stating without further ado — in the text of Article 54 or in the commentary to it — that, if the Security Council adopts sanctions, the entitlement of states not individually injured to take such measures fades away.

5 Conclusion

It would certainly be presumptuous to seek to make a definitive judgment on the whole set of Articles adopted by the ILC in 2001 on the multilateral dimension of relations of responsibility. It is, however, indisputable that the final version of the Articles contains considerable advances over the text adopted in 1996, thanks to the tireless efforts of the Special Rapporteur, James Crawford, and the Commission as a whole.

The ‘decriminalization’ of international responsibility constitutes a step forward that has facilitated the favourable response to the Articles from the General Assembly. Dropping the notion of an ‘international crime’ does not on that account mean that the ILC has at the same time disavowed the idea underlying the old Article 19 of the Draft, namely, the need to distinguish between ‘ordinary’ and ‘serious’ breaches of international law. This idea reappears in the classification of international obligations in terms of their intrinsic nature and of their beneficiaries.

⁶⁰ In the terms of Article 59, *ibid.*, at 365.

⁶¹ Cf. D. Cortright and G.A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (2000); and V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (2001).

⁶² Cf., on this point, the critical observations by Angelet, ‘La mise en œuvre des mesures coercitives économiques des Nations Unies dans la Communauté européenne’, 26 *Revue Belge de Droit International* (1993) 500, especially at 501 *et seq.*; Karayannis, ‘Sanctions internationales et droit communautaire. À propos du règlement 1901/98 sur l’interdiction de vol des transporteurs yougoslaves’, 35 *Revue Trimestrielle de Droit Européen* (1999) 363, especially 376 *et seq.*

The classification in question could have been more refined had the distinction between interdependent obligations and those protecting extra-state interests been more clearly established, on the one hand, and had obligations deriving from peremptory norms and obligations *erga omnes* not been essentially equated. Despite these ambiguities, the classification of international obligations elaborated by the ILC makes much more comprehensible the gradual enlargement of the circle of states affected by a breach, while at the same time enabling the legal position of states individually injured or not to be distinguished. It is nonetheless the case that the provisions governing the regime of 'serious' breaches of international law continue to present certain ambivalences, especially as regards 'collective' countermeasures.