
Countermeasures of General Interest

Denis Alland*

Abstract

The use of countermeasures by indirectly injured states, subjectively analyzed as a means of the defence of general interests — referred to as ‘countermeasures of general interest’ — is not specifically embodied in the ILC’s Draft Articles on the International Responsibility of States. This omission raises questions about the substantial international practice of states on this point, which the article considers. The Draft Articles refer to jus cogens in preference to the previously utilized notion of the ‘international crime’. The article considers how this fits in with the notion of countermeasures of general interest, and also considers the link between international responsibility and the guarantee of international legality.

The text on the international responsibility of states for wrongful acts recently adopted by the UN General Assembly¹ contains neither the words ‘countermeasures of general interest’ nor any synonymous expression, nor even an explicit allusion to any concept corresponding to it. The title of this paper may accordingly seem somewhat odd.

Countermeasures are responses to an internationally wrongful act. They are intrinsically unlawful, but are justified by the alleged initial failing to which they were a response.² Countermeasures have been discussed in many works³ which have added

* Professor of the University of Paris II (Panthéon-Assas). Translated by Iain L. Fraser.

¹ ILC Report on its 53rd Session to the UN General Assembly, *General Assembly Documents*, 56th Session, Supplement No. 10, UN Doc. A/56/10.

² There is a debate about whether countermeasures do or do not include measures of retaliation (which are intrinsically lawful responses to unlawfulness) and sanctions by international organizations. Without going into this debate, and remaining within the conceptual framework of the codification undertaken by the ILC, it may be pointed out that measures by international organizations are explicitly excluded, as are measures of retaliation, which raise no problems in terms of responsibility for a wrongful act, since they presuppose that the state taking them is in compliance with its international commitments.

³ See, e.g., L. Forlati Picchio, *La sanzione nel diritto internazionale* (1974); A.E. David, *The Strategy of Treaty Termination: Lawful Breaches and Retaliations* (1975); M. Doxey, *Economic Sanctions and International Enforcement* (2nd ed., 1980); Leben, ‘Les contre-mesures interétatiques et les réactions à l’illicite dans la société internationale’, 28 *AFDI* (1982) 9; Dominicé, ‘Représailles et droit diplomatique’, in *Mélanges Hans Huber* (1981) 541; Dominicé, ‘Observations sur les droits de l’Etat victime d’un fait internationalement illicite’, in *Droit international* 2 (1982) 1; Dupuy, ‘Observations sur la pratique récente des “sanctions” de l’illicite’, 87 *RGDIP* (1983) 505; E. Zoller, *Peacetime Unilateral Remedies: An Analysis of*

to previous studies on reprisals.⁴ ‘Countermeasures’ — without further specification — as such have a prominent place in the Draft Articles: over one-tenth of the provisions in the Draft Articles are devoted to them!⁵ This is a noteworthy, indeed surprising, fact, if one recalls that the very term ‘countermeasures’ met with hesitation when it first appeared in the Draft Articles,⁶ and even more so when one notes the objections that the integration of countermeasures into the mechanisms of international responsibility has met with generally, and continues to meet with.⁷ As for ‘countermeasures of general interest’, this term is offered in preference to ‘collective countermeasures’ — often employed and gives the illusion of concerted action when in reality such collective countermeasures are really individual initiatives — even if there is more than one such initiative at the same time. But, whatever name may be given them, the point is that countermeasures of general interest cover cases where states that have not suffered damage in the classical sense seek to respond to breaches of certain obligations successively referred to as *erga omnes*, ‘essential to the security of the international community as a whole’, *jus cogens*, etc. This feature distinguishes countermeasures from measures taken by states solely to defend their legally protected interests, in two ways. First, some countermeasures can be analyzed as a defence of general interest because of the mere fact that a state chooses to respond to a wrongful act, even though that state is not itself directly

Countermeasures (1984); Zoller, ‘Quelques réflexions sur les contre-mesures en droit international public’, in *Mélanges Colliard* (1984) 361–381; A. de Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (1985); M. Doxey, *International Sanctions in Contemporary Perspective* (1987); Alland, ‘International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility’, in M. Spinedi and B. Simma (eds), *United Nations Codification of State Responsibility* (1987) 143; L.-A. Sicilianos, *Les réactions décentralisées à l’illicite: Des contre-mesures à la légitime défense* (1990); L. Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (1992); D. Alland, *Justice privée et ordre juridique international. Etude théorique des contre-mesures en droit international public* (1994); Arangio-Ruiz et al., ‘Counter-Measures and Dispute Settlement: The Current Debate Within the ILC’, 5 *EJIL* (1994); Carlo Focarelli, *Le contromisure nel diritto internazionale* (1994); and Leben, ‘Contre-mesures’, in *Répertoire de droit international: Encyclopédie Dalloz* (1998).

⁴ See *inter alia* R. de Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age, suivi de pièces justificatives* (1875); P. Lafargue, *Les représailles en temps de paix (Etude juridique, historique et politique)* (1898); L. Ducrocq, *Représailles en temps de paix: Blocus pacifique (suivi d’une étude sur les affaires de Chine 1900–1901)* (1901); D. Mitrany, *The Problem of International Sanctions* (1925); De la Brière, ‘Evolution de la doctrine et de la pratique en matière de représailles’, 22 *RCADI* (1928-II) 241; O. Brück, *Les sanctions en droit international public* (1933); Cavaré, ‘L’idée de sanction et sa mise en œuvre en droit international public’, 41 *RGDIP* (1937) 385–445; and E.S. Colbert, *Retaliation in International Law* (1948).

⁵ No less than six Articles out of 59 (Articles 22, 49, 50, 51, 52 and 53) are explicitly devoted to countermeasures.

⁶ Paul Reuter called it a word ‘which meant nothing’: *ILC Yearbook* (1983), vol. I, at 102, para. 23; and the Special Rapporteur, Arangio-Ruiz, subsequently endeavoured to avoid using it: Preliminary Report, UN Doc. A/CN.4/416, para. 14, n. 8.

⁷ I shall return to this point below, but it should be recalled here that some states like France and the United Kingdom maintain a minimalist position, regarding it as sufficient that countermeasures are a circumstance precluding wrongfulness, or Mexico, which opposes any provision on countermeasures. This aspect of the matter has, moreover, recently been referred to again by Rapporteur Crawford, UN Doc. A/CN.4/490, paras 30–31.

injured. Secondly, in justifying any countermeasures, a state will often emphasize that it is defending the general interest (though this claim may of course be open to challenge). This accordingly does not mean that states have no interests (in the broad sense) in the politics they pursue in this connection, nor that the presentation they make of the general interests of which they are defenders is indisputable.

Those who have followed the ILC's work on the international responsibility of states over the years will either approve or disapprove (according to their particular point of view) of the ILC's stance on the narrow but important question we are here concerned with. The question of countermeasures of general interest is narrow, since it clearly constitutes only one very particular aspect of the broad topic of the international responsibility of states. Although narrow, the question has considerable consequences in terms of the legitimation of the contemporary international practice of 'sanctions' for the most serious breaches of international law. It is not too much to say that the problem — the contradictions inherent in a self-assessed (i.e. autointerpreted or auto-appreciated) decentralized policing of an international *ordre public* — is one of the more crucial questions in the development of public international law.

The ILC's past work leads one to suspect (or to hope, again according to one's viewpoint) that countermeasures would have an important part to play in terms of the consequences of wrongfulness, especially where this results from a breach of obligations of particular importance for the international community. One might also have thought that countermeasures would appear as a central feature — even if an ambiguous one — of the 'defence of general interests'. Yet countermeasures of general interest are quite simply absent from the final text (see section 1 below). Given that, in parallel (though for unconnected reasons) *jus cogens* was brought into the final text at the last moment, we have to ask what relationship exists between countermeasures of general interest and breaches of obligations resulting from peremptory norms of general international law (see section 2 below).

1 The Absence of Countermeasures of General Interest from the Final Text of the Draft Articles

The reason which led one to expect that countermeasures of general interest would — following the impetus given thereto by Roberto Ago — be enshrined in the final text can be stated very briefly: it was a combination of a broad conception of the definition and functions of international responsibility and of countermeasures. It is hard to interpret the final text from this viewpoint: no provision contains countermeasures of general interest, but to what extent does this call these concepts into question?

In 1962, when the Subcommittee on International Responsibility was set up, these measures (then called 'sanctions') covered a very broad range of actions. In fact, the second point in the recommendations of the Subcommittee made to the ILC referred to '[r]eprisals and their possible role as a sanction for an international wrongful act'.⁸ The general issue of 'sanctions' for international obligations had been set out by

⁸ *ILC Yearbook* (1963), vol. II, at 228, para. 6.

Roberto Ago in his 1939 course at The Hague Academy of International Law,⁹ the main themes of which were taken up again in his reports to the ILC.¹⁰ Concomitantly, the international responsibility of a state for a wrongful act was very broadly defined, and included all sorts of ‘new relations’ set up by the commission of an internationally wrongful act,¹¹ but did not include damages.¹² Countermeasures were initially introduced circumspectly, as ‘circumstances precluding wrongfulness’.¹³ The provision initially proposed by Roberto Ago in his Eighth Report was as follows:

Article 30: Legitimate application of a sanction. The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act is committed as the legitimate application of a sanction against that other State, in consequence of an internationally wrongful act committed by that other State.¹⁴

The Article adopted in 1979 provided as follows:

⁹ ‘Le délit international’, 68 *RCADI* (1939-II) 414–554, especially at 524–531 and 536–545.

¹⁰ See especially Third Report (UN Doc. A/CN.4/246 and Add.1–3, *ILC Yearbook* (1971), vol. II, Part One, chapter 1, ‘General Principles’, paras 34 *et seq.*); and Eighth Report (UN Doc. A/CN.4/318 and Add.1–4, *ILC Yearbook* (1979), vol. II, Part One, at 38–47, paras 78–99).

¹¹ *ILC Yearbook* (1973), vol. II, at 174, paras (4) and (5).

¹² It is not necessary to consider here all the debates this question raised; see Reuter, ‘Le dommage comme condition de la responsabilité internationale’, in *Mélanges Miaja de la Muela*, vol. II (1979) 837.

¹³ The point was debated at the 31st session (1979), at the 1544th and 1545th meetings (UN Doc. A/CN.4/318 and Add.1–3, UN Doc. A/CN.4/L.292, UN Doc. A/CN.4/L.293, *ILC Yearbook* (1979), vol. I, at 54–63), and Draft Article 30 was presented by the Drafting Committee at the 1567th meeting on 10 July 1979 (*ibid.*; and UN Doc. A/CN.4/L.297, *ILC Yearbook* (1979), vol. I, at 170–175) and adopted by the ILC at its 1582th meeting on 2 August 1979 (*ibid.*, at 245). The text and commentary on Article 30 appeared in the ILC Report on the proceedings of its 31st session (UN Doc. A/34/10, *ILC Yearbook* (1979), vol. II, Part Two, at 115–122). On mechanisms precluding wrongfulness, there are several questions that cannot be discussed within the limited framework of this article. The first concerns the alternatives of precluding either responsibility or wrongfulness. The second concerns identification of the circumstance with the mechanism: as A. Pellet has pointed out, it is not the response measure that is a circumstance precluding wrongfulness — which would be a linguistic approximation — but the alleged wrongful act that is the ground for the response, which may under certain conditions justify the response (countermeasure). The same observation may be made regarding self-defence. In both cases, it is the wrongfulness (any wrongful act/aggression) that is the circumstance that precludes wrongfulness of the reaction, while distress, consent, *force majeure* or state of necessity are, from this viewpoint, circumstances precluding the wrongfulness of any subsequent act or conduct. These clarifications have hardly any practical effect, but may be of interest — as we shall see below — in order to grasp clearly certain mechanisms, most notably the (debatable) equation of countermeasures with ‘wrongful’ measures: unless they are reduced to the category of retortion, which would make no sense since by definition they presuppose acts or conduct that are per se contrary to international obligations; this equation is possible only on the condition of including in the notion of ‘countermeasure’ that which is able to justify it, namely, the initial wrongfulness (just as aggression is present in the concept of self-defence); otherwise, how could one explain the lawful nature of a measure that is inherently contrary to an obligation? One can therefore see that the circumstance that precludes wrongfulness is also present in the concept of the countermeasure. In fact, the problem arises because the term ‘countermeasure’ is used sometimes to denote only the measure of response to wrongfulness, and sometimes the whole mechanism (the initial wrongfulness, the intrinsically wrongful response measure, and the judgment that the one is justified by the other, with the effect of making the response measure lawful).

¹⁴ *ILC Yearbook* (1979), vol. II, Part One, at 47, para. 99.

Article 30: Countermeasures in respect of an internationally wrongful act. The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.¹⁵

The Article finally adopted reads:

Article 22: Countermeasure in respect of an internationally wrongful act. The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

All these definitions were understood, by the ILC and by certain governments in their observations, as in need of clarification: under what conditions may one regard a countermeasure as 'legitimate', enabling the state taking it to justify non-compliance with an international obligation? Under Article 22 the justification for countermeasures can be found in Chapter II of Part Three of the Draft. The second and third parts of the Draft (which did not always have the same object at the various stages of codification), relating to the content and implementation of international responsibility, defined the provisions governing countermeasures from various angles over the last 20 years of the ILC's work. There is no point, in an article focusing on the role of countermeasures in the defence of general interests, in tracing the detailed history of the provisions governing countermeasures in general. In fact, a number of points have always received fairly broad agreement. This is particularly true of proportionality (Article 51), prior notification (Article 52(1)) or prohibited countermeasures (Article 50). In particular, these features of the provisions on countermeasures remain applicable whatever countermeasure may be employed: it is irrelevant from this viewpoint whether countermeasures are or are not responses in defence of the general interest. What is certain is that the desire to incorporate provisions on the regime of the countermeasures into the Draft explains their quantitative success: we find a series of provisions aimed at clarifying the conditions under which countermeasures may be taken. It was therefore through mistrust that provisions regarding countermeasures were added as the ILC's work progressed. The ILC itself states in its latest commentary that Chapter II of Part Three 'has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds', and it insists on 'the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse'.¹⁶

The prominent position given to countermeasures is noteworthy and may even seem surprising: have countermeasures regained the role of 'sanctions' in international law as initially contemplated? This point may be clarified by asking what functions do states assign to countermeasures in international practice, and do these

¹⁵ *ILC Yearbook* (1979), vol. II, Part Two, at 115, para. 25.

¹⁶ ILC Report on its 53rd session, A/56/10, *supra* note 1, at 324 and 325, para. (2) and at 327, para. (6).

functions correspond to the mechanisms of international responsibility?¹⁷ Were practice regarding the objectives pursued by states in adopting countermeasures to be surveyed, one would see that statistically the cessation of wrongfulness is the primary aim of countermeasures, with reparation of only secondary (and often symbolic) importance. One would also see that all these objectives (and hence functions) that can be distinguished academically are inextricably intertwined in practice, with one and the same measure able to serve various functions. It is therefore clear that countermeasures, a more heterogeneous institution than the whole set of rules defining international responsibility, cannot faithfully reflect the functions of responsibility. It is easy to understand why. One need only consider, if the metaphor is permissible, that countermeasures grow in a mulch of failure, blockages and disputes. They come at the end of a chain of actions that have failed to secure compliance with a primary obligation, with reparation for damages or with the setting up of a dispute settlement procedure.

In the work of codification, countermeasures were brought into the Draft Articles as a means of precluding wrongfulness, and were then fitted without difficulty into the broader definition given by the ILC to the international responsibility of states. This should not blind one to the irreducible externality of countermeasures in relation to the responsibility mechanism. It is clear that countermeasures may make a contribution to implementing a state's responsibility, but this is an insufficient reason to make them a specific institution of responsibility. Countermeasures are mechanisms of private justice that find their *raison d'être* in the failure of the institutions; they intersect with and affect the responsibility that they may serve, but are not an emanation of it. The partial identity of their objectives with the functions of responsibility is not enough for them to be equated with it. Kelsen maintained that sanctions in general international law are analogous to enforcement in civil law, and it will be recalled that Paul Reuter had warned the ILC, saying in particular that seeking *restitutio in integrum* using countermeasures has to do with constraint.¹⁸ This means that countermeasures cannot be specially linked with responsibility, but are an empirical response to functions that vary according to the nature of the initial wrong and the circumstances in which it was committed. As a means serving various ends, countermeasures cannot without artificiality be enclosed within the specific mechanism of responsibility. It is true that countermeasures are, like responsibility, possible consequences of an internationally wrongful act, but this means that they meet, not that they are related. The views set out in the ILC's work on this point seem in part to depart from the practice of states. The latest rapporteurs have repeatedly insisted that countermeasures do not have the effect of punishing, and that, apart from seeking

¹⁷ See the treatment of this issue in chapter 4 on 'Functions of countermeasures', in Alland, *Justice privée*, *supra* note 3, at paras 135 *et seq.*

¹⁸ *ILC Yearbook* (1983), vol. I, para. 15; see also *ILC Yearbook* (1985), vol. I, at 92, para. 2, where Reuter says that the second part of the Draft calls into question the 'executive function in international law'. This view of the matter was, moreover, supported by France's representative on the Sixth Committee: the French delegate asserted that the question of reprisals ought not to be dealt with in the framework of the study on responsibility (UN Doc. A/C.6/39/SR. 38, para. 40).

cessation of the wrong, the intent behind countermeasures is essentially reparatory. Nonetheless, for the ILC they remain an institution of responsibility in the broad sense.

It is accordingly from the ILC's own viewpoint that the absence of any provision relating to countermeasures of general interest is most surprising. Since the 1970s and especially at the start of the debates on international crimes of states, it was evident in the work on codifying international responsibility that countermeasures were bound to play an important part as the consequences of certain wrongful acts of particular severity for the international community. Along the lines of the provisions of the 1969 Vienna Convention on the Law of Treaties relating to peremptory norms of general international law, and following the ICJ's celebrated *dictum* in the *Barcelona Traction* case, the idea took shape that certain international obligations cannot be analyzed within the classical bilateral contractual framework,¹⁹ and that certain principles are of fundamental importance. Roberto Ago managed to persuade us that it was appropriate to extend the consequences of this development in international law in the area of the law of treaties into the field of responsibility. The first part of his Draft consequently distinguished between international crimes and delicts (former Article 19). From that moment on, the ILC, which had to draw the consequences of this affirmation in terms of the consequences of wrongfulness (content of international responsibility), seems to have been in difficulties that ended only with the dropping of the notion of international crime. A reading of the whole of the ILC's work shows that the interactions and points of contact between the notions of obligation *erga omnes*, *jus cogens* and international crime (through the 'essential' obligations) of states are very numerous, to the point that one ends by being convinced that more or less the same idea is involved, though seen from different aspects.²⁰ One of the aspects of the problem was as follows: ought one, in consequence of the importance of the principles breached by an international crime, allow every state an entitlement to react against the perpetrator by taking countermeasures?²¹ The question was not the result of 'doctrinal slippage' within the ILC; it could not be regarded as abstract given that a very contemporary practice was developing on the international stage, where states in no way 'injured' in the most classical sense were taking countermeasures

¹⁹ Although, for an argument against this, see Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, Carnegie Institution of Washington, 'Classics of International Law', 1916), who concludes — significantly — with an account of reprisals (LII, chapter XVIII, paras 341–352): 'Reprisals are resorted to between Nation and Nation in order to obtain justice when it cannot otherwise be had. If a Nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to make due satisfaction, the latter may seize something belonging to that Nation and may turn the object to its own advantage to the extent of what is due to it' (para. 342); 'according to the Law of Nations, reprisals could only be granted in order to uphold the rights of the subjects of the State *and not in cases where the State had no concern in the matter*' (para. 348, emphasis added).

²⁰ Hutchinson, 'Solidarity and Breaches of Multilateral Treaties', 59 *BYbIL* (1988) 151; Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 248 *RCADI* (1994-IV) 347–437; Simma, 'From Bilateralism to Community Interest in International Law', 250 *RCADI* (1994-VI) 217–384.

²¹ Charney, 'Third States Remedies in International Law', 10 *Michigan Journal of International Law* (1989) 57; Vadapalas, 'L'intérêt pour agir en responsabilité internationale', 20 *Polish Yearbook of International Law* (1993) 17.

against wrongs judged *by them* (self-assessment) as particularly odious and disturbing for the international community.²²

The question has been tackled by the ILC from various angles: the response of ‘third’ states,²³ the definition of the state ‘injured’ by an internationally wrongful act, the part that should be played by the United Nations, the duplication of functions, a compulsory dispute settlement system, *actio popularis*, etc. To schematize the history of the relationship between breach of obligations *erga omnes* and countermeasures, they were first seen — undoubtedly because of a broader conception of ‘sanctions’ than countermeasures today cover — as a specific consequence of the crime. Then very rapidly came mistrust in Ago’s illuminating phrases, which deserve to be cited at length:

the former monopoly of the State directly injured by the internationally wrongful act of another State, as regards the possibility of resorting against that other State to sanctions which would otherwise be unlawful, is no longer absolute in modern international law. It probably still subsists in general international law, even if, *in abstracto*, some might find it logical to draw certain interferences from the progressive affirmation of the principle that some obligations — defined in this sense as obligations *erga omnes* — are of such broad sweep that the violation of one of them is to be deemed as offence committed against all members of the international community, and not simply against the State or States directly affected by the breach. In reality, one cannot underestimate the risks that would be involved in pressing recognition of this principle — the chief merit of which, in our view, is that it affirms the need for universal solidarity in dealing with the most serious assaults on international order — to the point where any State would be held to be automatically authorized to react against the breach of certain obligations committed against another State and individually to take punitive measures against the State responsible for the breach.²⁴

The tendency to mistrust initially grew stronger both in the ILC discussions²⁵ and with Riphagen’s work,²⁶ until the complete change that came about in 1984. At this

²² Alland, *Justice privée*, *supra* note 3, at 69–70; see also Crawford, Third Report, UN Doc. A/CN.4/507/Add.4, paras 391–392.

²³ In my opinion, the term ‘State indirectly affected’ is always to be preferred to ‘third State’.

²⁴ *ILC Yearbook* (1979), vol. II, Part One, at 43, para. 91. Ago had in mind an institutional solution to the problem. He went on to say: ‘It is understandable, therefore, that a community such as the international community, in seeking a more structured organization, even if only an incipient “institutionalization”, should have turned in another direction, namely towards a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented.’ For an analysis of the ILC’s work at this time, see Alland, ‘La légitime défense et les contre-mesures dans la codification du droit international de la responsabilité’, 110 *Journal du droit international* (1983) 728.

²⁵ See e.g. Ian Sinclair, who is not convinced that ‘the concept of the injured State could be dispensed with in the case of a breach of an obligation *erga omnes* and that every State without exception could be regarded as having an equal legal interest in the matter.’ (*ILC Yearbook* (1983), vol. I, at 130, para. 28). Similarly, Ushakov doubts that ‘an international crime necessarily injured all States within the international community; since some of them would be injured directly, while others would not. Indeed, in some instances, no State was actually injured; it was rather the international community of States as such that was affected.’ (*ILC Yearbook* (1984), vol. I, at 277, para. 4).

²⁶ ‘There is little on counter-measures of injured States and even less on responses of third States’, UN Doc. A/CN.4/330 and Corr.1, *ILC Yearbook* (1980), vol. II, Part One, at 128 para. 97. ‘Actually the introduction of extra-State interests as the object of protection by rules of international law tends towards

point, Article 5 defined the term injured state and provided that 'if the internationally wrongful act constitutes an international crime' all states are regarded as injured states;²⁷ combined with the other Articles then under consideration, the institution of an *actio popularis* was arrived at mechanically.²⁸ The next rapporteur came back to the question:

Nowadays, the debate no longer so much concerns the existence of *erga omnes* obligations. Apart from the problem of identifying *in concreto* the ... rules ... the main issue in the area of State responsibility is to determine the consequences of the fact that *erga omnes* obligations carry corresponding *omnium* rights.²⁹

But even though mentioning the right of any state "individually" to resort to unilateral measures in order to protect its (individual) right to obtain respect for the common, legally protected interest' in the event of breach of a general rule creating 'integral' legal relationships,³⁰ the rapporteur was not able to reach a satisfactory solution to the question. Finally, in the 1996 version of the Draft, one could more or less derive the following argument: countermeasures are a possible consequence of

the recognition of an actio popularis of every State having participated in the creation of such extra-State interest, the other possibilities of enforcement being either only self-enforcement ...' (UN Doc. A/CN.4/354/Add.1, para. 84). The notion of crime is a distortion of bilateralism (*ibid.* at para. 121): the possibility of unilateral countermeasures following a crime must be considered (*ibid.* at para. 125), but finally the rapporteur says that, in principle, a state 'cannot arrogate to itself the role of "policeman" of the international community' (*ibid.* at para. 131). In his Fourth Report, the rapporteur is concerned about subjectivism (UN Doc. A/CN.4/366/Add.1, *ILC Yearbook* (1983), vol. II, Part One, paras 5, 8 and 28) and says that the common interest calls for some sort of collective treatment of this interest (*ibid.*

²⁷ UN Doc. A/CN.4/380, *ILC Yearbook* (1984), vol. II, Part One, at 3 *et seq.*

²⁸ Article 9 provided: '1. Subject to Articles 10 to 13, the injured State is entitled, by way of reprisal, to suspend the performance of its obligations towards the State that has committed the internationally wrongful act. 2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed.' Exercise of the right was then made subject by Article 10 to exhaustion of procedures for peaceful settlement of disputes, except for conservatory countermeasures. Article 12 listed forbidden measures (diplomatic immunities, binding rules) and Article 14 essentially took over the 1982 Article 6 ('1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State: (a) not to recognize as legal the situation created by such act; (b) not to render aid or assistance to the author State in maintaining the situation created by such act; and (c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b). 2. Unless otherwise provided for by applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security. 3. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1 and 2 above and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.' (*ILC Yearbook* (1982), vol. I, at 199 and 200, para 2)), while adding the clarification that 'an international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole'.

²⁹ Arangio-Ruiz, Fourth Report, UN Doc. A/CN.4/444, *ILC Yearbook* (1992), vol. II, Part One, at 44, para. 132.

³⁰ *Ibid.* at para. 147.

any wrongful act; a crime is a wrongful act that injures all states; but Article 51 states that all the consequences attaching to a delict follow from a crime; accordingly, all states may take countermeasures following a crime. But this last conclusion is not explicitly stated. We are left with some ambiguity.

The difficulty obviously had to be taken up again by James Crawford. He began by noting that, according to the second part of the ILC Draft in a previous version, Article 40(3) (formerly Article 5) says that any state other than the one committing the international crime is an injured state, thus opening up the possibility for all states to invoke Articles 42–46 (to seek reparation) and Articles 47 and 48 (to take countermeasures).³¹ The Special Rapporteur goes on to stress that ‘there is some hierarchy of norms, and . . . the importance of at least a few basic substantive norms is recognized as involving a difference not merely of degree but of kind. Such a difference would be expected to have its consequences in the field of State responsibility.’³² He goes on to propose substituting the term ‘exceptionally serious wrongful act’ for ‘international crime’.³³ In 1998, the ILC decided to set aside the notion of state crime for the time being, and to explore ‘whether the systematic development in the Draft Articles of key notions such as obligations *erga omnes*, peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by Article 19’.³⁴ It was when it came to the Third Report that the question was openly tackled, though for the reason just indicated the term ‘international crime’ is no longer used, but instead that of obligations to the international community as a whole (leaving aside ‘conventional’ countermeasures involving multilateral treaties³⁵). In fact,

on the one hand, it seems useful to distinguish the case of obligations owed collectively to a group of States or to the international community as a whole [and] the more general interest of States in compliance with international law should be recognized in some way. However, outside the field of ‘integral’ obligations, or obligations *erga omnes partes*, as explained above, it

³¹ Crawford, First Report, UN Doc. A/CN.4/490, para. 51 and UN Doc. A/CN.4/490/Add.3, para. 84; the same reference can be found in the Second Report, UN Doc. A/CN.4/498 Add.4, para. 371.

³² Crawford, First Report, UN Doc. A/CN.4/490/Add.2, para. 71.

³³ UN Doc. A/CN.4/490/Add.3, at para. 87.

³⁴ UN Doc. A/CN.4/498/Add.4, para. 372.

³⁵ This point calls for wide discussion: the distinction between Article 60 in the 1969 Vienna Convention and countermeasures within the meaning of Article 22 in the ILC Draft is not in my view beyond all criticism. See the Third Report by Crawford, UN Doc. A/CN.4/507/Add.3, paras 324–325. Even in the treaty framework, the rapporteur notes: ‘but just because human rights obligations under multilateral treaties or general international law are not “allocatable” or owed to any particular State does not make it necessary that all States concerned should be considered as obligees.’ Crawford, Third Report, UN Doc. A/CN.4/507, para. 88. See also Reuter, ‘Trois observations sur la codification de la responsabilité internationale des Etats pour fait illicite’, in *Mélanges Virally* (1991) 389; Bowett, ‘Treaties and State Responsibility’, in *Mélanges Virally* (1991) 137; Dupuy, ‘Droit des traités, codification et responsabilité internationale’, 43 *AFDI* (1997) 7.

is doubtful that States have a right or even a legally protected interest, for the purposes of State responsibility, in the legal relations of third States *inter se*.³⁶

But, on the other hand,

it is not clear that those States, merely because they are recognized as having a legal interest in the performance of the obligation, should be able to seek compensation or take countermeasures on their own account . . . [I]t will be a matter for consideration . . . to what extent States may take countermeasures in the collective interest . . . Exactly where the threshold should be set for countermeasures to be taken by individual States, acting not on their own but in the collective interest, is a difficult question.³⁷

Finally, the rapporteur proposes recognizing countermeasures of general interest in two cases: where a state directly injured so requests, and where there is no injured state. He says that 'it does not seem inconsistent with principle that they be recognized as entitled to take countermeasures with the consent of that [the victim] State', and proposes that states bound by the obligation should be entitled to take countermeasures on behalf of the injured state with that state's consent and within the scope of the consent given.³⁸ Where there is no injured state within the meaning of Article 1 or 40A, the rapporteur proposes that the Draft Articles authorize states parties to an obligation due to the international community (in essence every state) to take collective countermeasures in response to a gross and well-attested breach of that obligation, in particular in order to secure cessation and to obtain assurances and guarantees of non-repetition on behalf of the non-state victims.³⁹ This was embodied in Draft Articles 50A and 50B. Draft Article 50A, 'Countermeasures on behalf of an injured State' provides:

Any other State entitled to invoke the responsibility of a State under [article 40A(2)] may take countermeasures at the request and on behalf of an injured State, subject to any conditions laid down by that State and to the extent that that State is itself entitled to take these countermeasures.⁴⁰

Article 50B, 'Countermeasures in cases of serious breaches of obligations towards the international community as a whole', provides:

(1) In cases referred to in article 51 where no individual State is injured by the breach, any State may take countermeasures, subject to and in accordance with this Chapter in order to ensure the cessation of the breach and reparation in the interest of the victims. (2) Where more than one State takes countermeasures under paragraph 1, those States shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled.⁴¹

As we know, these provisions disappeared from the final text. Thus the combination of Article 22 in Chapter II of Part One (definition of countermeasures), Chapter III of Part Two (severe breaches of peremptory norms of general international law) and

³⁶ Crawford, Third Report, UN Doc. A/CN.4/507, paras 103–104.

³⁷ *Ibid.*, at paras 113–115.

³⁸ UN Doc. A/CN.4/507/Add.4, paras 401 and 402.

³⁹ *Ibid.*, at para. 406.

⁴⁰ UN Doc. A/CN.4/507/Add.4, para. 413.

⁴¹ *Ibid.*

Chapter II of Part Three (provisions on countermeasures) leave the text silent on countermeasures in defence of general interests, and institutes a specialized procedure for relations of the bilateral type. Nothing is provided regarding countermeasures that a state may take following an internationally wrongful act involving breach of an obligation arising from a peremptory norm of general international law. Given the ambiguity of the text and of the interpretations offered by various combinations of these provisions, one might ask whether countermeasures of general interest are indeed excluded, or whether it was merely decided not to deal with them, thus leaving open the question whether they are recognized in international practice.

Various clarifications have the objective of leading us to think that the absence of provisions on countermeasures of general interest in the text does not have the effect of precluding them. In other words, the text would be 'neutral' from this viewpoint. In the ILC's report on its 53rd session we read that Article 54, dealing with countermeasures by states other than the injured state, would be deleted and replaced by 'a saving clause leaving all positions on this issue unaffected'.⁴² The commentary to Article 54 says that:

[The] chapter on countermeasures does not prejudice the right of any State, entitled under article 48(1) to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The Article speaks of "lawful measures" rather than 'countermeasures' so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.⁴³

Moreover, the commentary to Article 22 says:

Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While Article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.⁴⁴

Finally, Article 41(3) on the 'Particular consequences of a serious breach of an obligation under this chapter' provides that:

This Article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.⁴⁵

This provision allows us to conceive that international law allows the possibility for ('non-injured') states to take countermeasures of general interest following breach by any state whatever of an obligation arising under a norm of *jus cogens*.

Despite these formulations by the ILC, I do not believe the text is 'neutral' on the

⁴² ILC Report on its 53rd session, *supra* note 1, at para. 55.

⁴³ *Ibid.*, at 355, para. (7).

⁴⁴ *Ibid.*, at 183, para. (b).

⁴⁵ *Ibid.*, at 286.

point that interests us here, since the foregoing arguments are not entirely convincing. First, as regards Article 54, I cannot see how, being confined to *lawful* measures, this text could not ‘prejudice’ the question of recourse to countermeasures which are by definition intrinsically wrongful.⁴⁶ This is the entire difference between measures of retaliation which are lawful per se, and countermeasures which, though intrinsically wrongful, become lawful only because they are justified and meet certain conditions. This is, moreover, the reason why Article 22 says that ‘the *wrongfulness* of an act of a State not in conformity with an international obligation . . . is *precluded* if . . .’. This argument could not be applied to measures of retaliation, since they are in harmony with the international obligations of the state taking them. This is why the text does not apply to retaliation, which does not need to be justified and raises no problems in terms of international responsibility. Again, as regards the commentary to Article 22, it is hard to imagine in what twilight zone of logic a text not applying to acts not meeting the qualifications it lays down can nonetheless manage not to preclude its applicability to them. Let us leave these formulations to Busiris, and note instead that Article 54 leaves no room for the theory of countermeasures by states not directly injured in response to a breach of obligations *erga omnes*. There remains Article 41(3). If ‘international law’ recognizes that states are entitled to take countermeasures of general interest, one may ask why it has not been codified on this point, and one is left with the feeling that the ‘reference’ made in Article 56 could have sufficed: ‘the applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.’ If this entitlement is not — or not yet — recognized, to what does the expression ‘further consequences’ used in Article 41(3) refer? The ILC’s commentary indicates that it may cover two things: ‘the individual primary rule, as in the case of the prohibition of aggression’ or ‘the conviction that the legal regime of serious breaches is itself in a state of development’. In this case, the expression ‘further consequences in international law’ can clearly not be aimed at countermeasures of general interest.

In any case, it is unlikely that international actors will ever cite the ILC’s text to justify their response to wrongful acts for the protection of the effective interest; on the contrary, a state at which countermeasures of this type are aimed could find material there for argument against their well-foundedness.

2 The Relationship Between Countermeasures of General Interest and Breaches of Obligations Resulting from Peremptory Norms of General International Law

One important — and in my view regrettable — last-minute change made to the text compels us to extend our thoughts on countermeasures of general interest in an

⁴⁶ See *supra* note 13.

unexpected direction. We are told that it was on the recommendation of the ‘Open-ended Working Group’ that an understanding was reached that ‘the previous references to serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, which mostly dealt with the question of invocation as expressed by the International Court of Justice in the *Barcelona Traction* case, would be replaced with the category of peremptory norms’.⁴⁷ Two justifications are offered for this change: ‘Use of that category was to be preferred since it concerned the scope of secondary obligations and not their invocation. A further advantage of this approach was that the notion of peremptory norms was well-established by now in the Vienna Convention on the Law of Treaties.’⁴⁸ The first formula is very obscure: how does the reference to peremptory norms concern the scope of secondary obligations rather than their invocation? If we follow the categories used for some 30 years by the ILC, peremptory norms are clearly ‘primary’ rules, as are obligations *erga omnes*. Nor can one see why the peremptory norms should not raise the question of ‘invocation’ (presumably meaning the identification of the subjects entitled to assert the breach); the 1969 Vienna Convention instead shows that the question arises for breach of *jus cogens*. The second part of the justification is easier to understand: the peremptory norms are ‘better established’. Yet the justification is not beyond all criticism. Not so much because it intends to eliminate a mechanism of private justice as a means of sanction (in the broad sense) for breach of peremptory norms — which is consistent from a theoretical viewpoint — but because the very concept of a peremptory norm is ill-suited: there is no null wrongful act.

Countermeasures are a mechanism of private justice. There is no need to dwell on what this expression may mean. Suffice it to indicate that it summarily denotes one of the worrying, though also banal, features of countermeasures on the international scene: self-assessment. Many consequences derive from this feature. As was noted earlier, if the mechanisms of responsibility and peaceful settlement of disputes worked satisfactorily there would never be any need for countermeasures. Thus, integrated systems like the European Union explicitly exclude them. The circumstances in which states have recourse to a policy of countermeasures mean that countermeasures take shape exclusively in a mode of subjective allegations: a state claims that it has been injured, that an international obligation has been breached, and this claim alone is the basis for the measures it takes. It is possible that a state may abusively exaggerate the rights it asserts. It would only be, if at all, at a second stage that it would pay the consequences, if the state concerned in turn asserted its responsibility. Here we see the notion of the ‘wager’ mentioned in the 1978 judgment on the interpretation of the 1946 Franco–American air agreement. The private-justice procedure allows a state to cease to respect obligations incumbent on it, to the extent that it chooses and at a time it chooses, as long as it considers that an internationally wrongful act has been committed to its detriment by another state. It is important to stress that the principles

⁴⁷ ILC Report on its 53rd session, *supra* note 1, at para. 49.

⁴⁸ *Ibid.*

governing countermeasures can operate only *a posteriori*, when the well-foundedness of the countermeasures are evaluated to see if they are justified. Just as with self-defence, the reaction comes first and its legal assessment only later, if ever. The result is that countermeasures are unsuited to any *a priori* legal conditioning: subjecting their exercise to pre-conditions is a contradictory undertaking that amounts quite simply to precluding countermeasures. In fact, in order to be operative (which here means beyond a state's self-assessment), any condition has to be verified by a third party, which means an end to private justice.

What is true of countermeasures generally is also true of countermeasures claiming to be responses to a wrongful act of particular severity or to a breach of an obligation *erga omnes*. This is evident in the case of East Timor: 'Portugal's assertion that the right of peoples to self-determination . . . has an *erga omnes* character, is irreproachable.' All too often this is quoted out of context. The Court continued:

However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgement would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.⁴⁹

This means that the allegation of breach of an obligation *erga omnes* remains an allegation, and is no 'open sesame' to universal judicial action (as the Court recalled in 1966 in connection with *actio popularis*). The claim that an obligation *erga omnes* has been breached by a state has no more *value* than if the claim concerned a bilateral treaty. Everything still has to be established: the existence of the breach and its *erga omnes* nature. The ground for the countermeasures, be it serious, very serious, a crime or a serious breach of an obligation *erga omnes* or a norm of *jus cogens*, does not change in nature: being self-assessed, it is always a subjective claim with the chances of success dependent on the responses of other subjects of law. This irritating aspect is undoubtedly the origin of certain efforts to domesticate countermeasures, but at the same time it explains why it amounts to squaring the circle. The last Special Rapporteur has not escaped this trap:

Countermeasures can only be justified in response to conduct which is internationally wrongful in law and in fact. The belief of the 'injured' State in the wrongfulness is not a sufficient basis. Thus 'an injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for an unlawful act in the event of an incorrect assessment'.⁵⁰

Later, he returns to this idea: 'countermeasures can only be taken in response to conduct actually unlawful; a good-faith belief in its unlawfulness is not enough.'⁵¹ The Special Rapporteur then hopes that the initial wrongful act justifying the

⁴⁹ ICJ Reports (1995) 90, at 102.

⁵⁰ Crawford, Second Report, UN Doc. A/CN.4/498, para. 383 (quoting the commentary to Article 47, para. (1)).

⁵¹ Crawford, Third Report, UN Doc. A/CN.4/507/Add.3, para. 294.

countermeasures could thereafter be ‘established’.⁵² Numerous examples could be given of these vain efforts, in the context of the ILC or in legal scholarship. All these proposals certainly remove the major drawback of self-assessment, but, since the latter is coextensive with private justice, by converting the response to wrongfulness into a measure authorized by a third party or accepted by agreement, it eliminates the problem without solving it.

Thus, entrusting the defence of peremptory norms of general international law to unilateral responses by states fails to take account of the nature of the latter:⁵³ it means bringing the bindingness under the will of states, since states may agree to allow a situation to be asserted against themselves even though it was created following an internationally wrongful act in breach of an obligation resulting from a peremptory norm. This is to allow derogation from what has been defined as non-derogable. The Special Rapporteur came close to acknowledging this when he proposed that all states ‘be recognized as entitled to take countermeasures *with the consent of that [victim] State*’, and that states bound by a collective obligation ‘should be entitled to take countermeasures on behalf of the injured State, *with that State’s request and consent and within the scope of the consent given*’. But he noted that, if a victim state is left to face the responsible state alone, a legal relationship based on multilateral obligations is effectively converted to a bilateral relationship at the level of its implementation.⁵⁴ Continuing this observation, one cannot deny that, *in the economy of the text*,⁵⁵ it would be consistent to eliminate countermeasures of general interest in defence of international *ordre public*.

But it will probably not be in these terms that the question is raised and solved. It is most likely — because the starting point was fear of abuse by military and economic great powers that might make use of the weapon of countermeasures — that countermeasures were discarded when no longer coming within the injured state/guilty state framework. What is feared is that countermeasures may be merely a way of imposing a partial, biased and subjective view of international *ordre public*, in short, that they may allow the domination of a few states over others to be legitimized, since countermeasures retain their self-assessed nature. This is why it was felt preferable not to enshrine countermeasures in the final text, but to leave it understood that practice has not attained a sufficient level of maturity on this point to be codified. In addition — *without there being a link* — since there was no longer to be the notion of crime, it was felt useful or appropriate to make reference to a notion that has acquired some *droit de salon*, in relation to which objectives and criticisms are more delicate, namely, the notion of *jus cogens*. This entails a laborious reframing of the question of *jus cogens* and its relation with countermeasures of general interest.

There is an old and persistent misunderstanding in relation to peremptory norms of

⁵² Crawford, First Report, UN Doc. A/CN.4/490, paras 36–37.

⁵³ K. Sachariew, ‘State Responsibility for Multilateral Treaty Violations: Identifying the “Injured State” and its Legal Status’, 35 *NILR* (1988) 273, at 282.

⁵⁴ Crawford, Third Report, UN Doc. A/CN.4/507/Add.4, paras 400–402 (emphasis added).

⁵⁵ I.e. irrespective of whether an international custom has been formed or is coming into being in relation to countermeasures of general interest.

general international law. The promotion of *jus cogens* in the area of responsibility raises inextricable difficulties if there is not some effort made to dissipate it. This task is both useful and not impossible, since despite appearances the point is less to reconcile opposing ideologies than to agree on a few mutual points. For the difficulties do not arise solely from the political antagonism between supporters and opponents of the theory, but are also caused by an incomprehensible reluctance to employ the most widely accepted legal categories. What does bindingness have to do with responsibility? If we bring together legal usage on the point, 'peremptory' denotes the idea of limiting normative power, and always means 'that from which one may not derogate'.⁵⁶ Derogation has to do with legal acts;⁵⁷ saying that a wrongful *action* derogates from *jus cogens* or anything else has no meaning from a technical legal viewpoint. As has been shown, bindingness is a technique determining the effect of certain norms (non-derogability); it is not, strictly speaking, substantive law, nor a category of norms, but an attribute pertaining to certain norms (from which one may not derogate).⁵⁸

Whatever may be the case with this particular point, peremptory norms theory is a limit to voluntarism. It necessarily follows that a sanction of nullity attaches to acts contrary to peremptory law. This consequence was, moreover, drawn by the 1969 Vienna Convention on the Law of Treaties itself. It must further be noted that that was not enough to 'detach' the 'peremptory' norms from their conventional bedrock: it is possible not to ratify the Vienna Convention, to make reservations (most especially to the provisions regarding the mandatory settlement of disputes), or to denounce it, and so forth. But, outside such integrated systems, no mechanism of nullity of international acts can operate: it is replaced by a set of subjective allegations, entirely dependent of the will of the states, each of which may subjectively claim or challenge the nullity of an act.⁵⁹ That is why proclamations of bindingness are unfailingly dropped in the intersubjective relationships of states,⁶⁰ in a way contradictory with what in principle constitutes their main feature. It is, then, better not to suggest that the existence of a power of individual sanction by states, universally distributed as a specific response to breach of an obligation resulting from a peremptory norm of general international law, would be adequate to defend it: it would be its negation. Being dispersed, the power of drawing the consequences of a breach of peremptory law continues to shut legal relations into the intersubjective relationship and stands against the objective grasping of these norms. We said earlier that countermeasures grow in the soil of equivalent and contradictory assertions. Admitting here that *jus cogens* is to be placed in this interplay of subjective claims and interpretations would mean denying what characterizes it. The suspect recourse to Latin formulae that

⁵⁶ Cornu, *Vocabulaire juridique* (6th ed., 1987); Leben, 'Impératif juridique, dérogation et dispense: Quelques observations', *Droits*, No. 25/1997, 'La dispense', at 33.

⁵⁷ See the issue devoted to 'La dispense' by the journal *Droits*, No. 25/1997.

⁵⁸ R. Kolb, *Théorie du jus cogens international: Essai de relecture du concept* (2001) 173.

⁵⁹ Unless one believes, as in the philosophy of the Ancients, in the natural objectivity of the nullity of an act, independently of any proclamation of nullity by a third party authorized to do so.

⁶⁰ D. Alland (ed.), *Droit international* (2000), at paras 215–216.

flourishes here more than anywhere else does not eliminate this contradiction.⁶¹ Hence the criticisms that may be brought against the introduction of these notions into the area of responsibility.⁶² We can understand why essential obligations or obligations *erga omnes* are preferable from the viewpoint of a decentralized response to breaches of them: they refer to a (substantive) content and not to a quality (regime), and they do not imply nullity can be adapted (technically speaking) to the intersubjective mechanisms of opposability. It may therefore be concluded that, when it comes to peremptory norms, countermeasures of general interest could not possibly look like suitable consequences: it is not a problem of the maturity of practice.⁶³

It is, however, desirable to go further. The effort must be made, on a nominalist viewpoint and despite the needless complications that it entails, to accept that international law, in a conventional and highly original fashion, has developed a notion of peremptory norm that neither involves non-derogability nor provisions for nullity, having regard to the provisions for sanction. The convergence of the notion of obligations *erga omnes* with *jus cogens* can be noted at various stages of the work on codifying the law of responsibility of states. It is more than suggested in Crawford's Third Report, which, when it tackles the problem of 'responsibility towards the international community as a whole', notes that 'the content of these obligations is largely coextensive with the content of peremptory norms', adding that the essential core of obligations towards the international community is made up of those accepted by it as non-derogable: prohibitions on the use of force, genocide, slavery, the right to self-determination, human rights and obligations under humanitarian law.⁶⁴ *Jus cogens* has mutated into a principle with priority among various rules, more than a norm on the validity of normative production (nullity).⁶⁵ This convergence has given rise to an equivalence that we cannot dwell on here. One might still accept a text which refers to obligations 'arising' under peremptory norms of general international law, and which refers to the substantive level of the principles that are given enhanced protection by the label of *jus cogens*. Thus, it is not the bindingness of the norms that countermeasures of general interest would defend, but the essential nature of the principles they contain.

If we agree to this notion — regretting that it has not been expressed more explicitly — we still have to ask how far the elimination of countermeasures of general interest is still justified. We have already said how far their self-assessed nature — combined with the political advantages of the argument for powerful states in their defence of principles essential to the international community — may arouse legitimate

⁶¹ There would be much to say about the use of Latin in this area of international law, perhaps aimed at suggesting a link with the rigour and respectable authority of Roman law; in fact none of the expressions used corresponds to an institution of Roman law: *jus cogens* is unknown to Roman law, as is *jus dispositivum* or obligations *erga omnes*, and *actio popularis* existed for penal actions and did not have any of the meaning and scope of application it is sometimes given in international law.

⁶² See, *inter alia*, C. Focarelli, *Le contromisure nel diritto internazionale* (1994).

⁶³ Alland, *Justice privée*, *supra* note 3, at para. 290.

⁶⁴ Crawford, Third Report, UN Doc. A/CN.4/507/Add.4, paras 368–374.

⁶⁵ Kolb, *supra* note 58, at 131.

mistrust. But the fact remains that international practice, analyzed at length in monographs and studies relating to countermeasures, and cited in the latest reports presented to the ILC, has grown up over the last two decades. It is not for me to judge whether it has the consistency and coherence required to be the object of codification at the present state of international relations, but it would seem, comparing it with the practical corpus supplied by the codifiers in support of each of the provisions presented as codifying customary law, that the principle of response by indirectly injured states could be recognized without difficulty. Some objections brought against this practice explain why it has been relegated to the sphere of fact. In particular, it is allegedly 'dominated by a particular group of States' (i.e. Western states), and is also 'selective'.⁶⁶ The point is a little paradoxical when we recall that it was the Western states that displayed the clearest opposition to the idea of international crimes of state; the statement has to be further qualified since, even if the practice is Western-dominated, it is by no means exclusive to Western states. Furthermore, the 'selectivity' of the practice (where states respond to one incident, but not to another) is not an objection in itself; it is merely the cost of the intersubjectivity that dominates in this area. There is no reason for surprise, in these circumstances, that states that have the resources should undertake the defence of the interests of the 'international community' only where that fits — or at any rate does not run too directly counter to — their own interests. All this is inseparable from the self-assessed nature of these response measures.

If we highlight the fundamental importance of certain principles, it is not at the same time very consistent to allow breaches of them to remain 'unpunished' while the whole battery of responses integrated in the responsibility mechanisms could be deployed in cases of wrongful acts of less importance. Here again we see that it is more in terms of the guarantee of international legality and enforcement channels that these questions arise, and that possible countermeasures are located, than in the area of responsibility. The introduction of peremptory norms of general international law in the text adopted in 2001 has to be understood as a way of identifying an (albeit very restricted) number of principles of substantive law which, being *international* acts, enjoy the supposedly enhanced protection of *jus cogens*, in order to transpose them to the area of *wrongful acts*. The study of countermeasures of general interest — called for by the silence or sibylline references in the ILC text — can be embarked on if so reframed. In this connection, at the present state of affairs, we cannot eliminate the problem raised by the case where no state is directly injured in the sense of classical responsibility (genocide perpetrated by a state against part of the population on its own territory); if, for one reason or another, institutional response mechanisms do not work, we have to choose between the subjectivism of a decentralized response in defence of general interests and the absence of any consequences for the most serious wrongful acts.

⁶⁶ Crawford, Third Report, UN Doc. A/CN.4/507, para. 396.