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Third State Responsibility for Human Rights Violations

Annie Bird*

Abstract

The International Law Commission's Draft Articles on State Responsibility attempt to transcend the bilateralist paradigm of international law by distinguishing between injured states and 'third' states. Although not directly injured, the Draft Articles recognize that third states have a legal interest in compliance with 'peremptory norms' and 'obligations to the international community as a whole' by reason of the importance of the rights involved. Although breaches of these obligations often involve serious human rights violations, it is not clear to what extent the Draft Articles accurately reflect human rights law. The progressive development of the Draft Articles in outlining rights and obligations for third states remains controversial, and thus provides a compelling opportunity to discuss the relationship between these two bodies of law. This article helps illustrate the extent to which international law is moving away from a purely bilateral conception of responsibility to accommodate human rights.

1 Introduction

> *The majority of observers, following the bilateralist way of thinking, would probably agree that the very idea of obligations on the part of 'third' states in case of a violation of international law constitutes a remarkable innovation, not to speak of the substance of such solidarity.*[1]

The International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) attempt to transcend the 'bilateral straitjacket' of international law by distinguishing between injured states and states other than injured states.[2] An 'interested' or 'third' state can be defined as one which

* PhD researcher, London School of Economics. This article is drawn from my LLM dissertation at the University of Essex. Email:a.bird@lse.ac.uk.

1 Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989), at 836.

2 The Draft Articles are reproduced in UN Doc. A/56/10 (hereinafter 'ILC Report 2001').

is not directly affected or injured by an internationally wrongful act, yet has a legal interest in compliance by reason 'of the importance of the rights involved'.[3] Only specific breaches in the Draft Articles entail legal consequences for third states: namely, when a serious breach of a peremptory norm of general international law or a breach of an obligation owed to the international community as a whole is committed.

These breaches often involve serious human rights violations.[4] However, traditional inter-state responsibility for breaches of international law, designed for reciprocal obligations, does not correspond exactly to the needs of the human rights regime.[5] The ILC dealt with this issue by expanding the concept of 'injured state' when a breach concerns a multilateral treaty or rule of customary international law created or established for the protection of human rights and fundamental freedoms.[6] Although controversial, the ILC found it necessary for the Draft Articles to reflect that certain consequences flowed from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of state responsibility.[7]

Since these norms are also protected by human rights treaties,[8] it becomes necessary to examine differences between the enforcement regimes and to assess whether states, when agreeing on treaty enforcement mechanisms, sought to exclude the rights and obligations outlined in three provisions of the Draft Articles. This question touches on the debate about whether international law is fragmented or unified. Scholars who view human rights as a 'self-contained regime' view international law as fragmented and support treaty exclusivity. The 'exclusivity' argument asks: why should states agree on complex treaty procedures if these can always be circumvented by recourse to extra-conventional means of enforcement?[9] Supporters of this view advocate the total exclusion of the application of general international law on state responsibility.[10] In contrast, others deny the existence of self-contained regimes and support a unified

[3] *Barcelona Traction, Light and Power Case* [1970] ICJ Rep 32, at paras 33–34.

[4] Examples of peremptory norms of international law and obligations *erga omnes* which are also serious human rights violations include genocide, slavery, and racial discrimination. Since there is significant evidence which suggests that obligations *erga omnes* are peremptory in nature, obligations arising under substantive peremptory norms are valid *erga omnes*.

[5] D. Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005), at 98.

[6] *Ibid.*

[7] ILC Report (2001), *supra* note 2, at 111.

[8] Acts of genocide affect Art. 1 of the Genocide Convention; disregard for self-determination runs counter to common Art. 1 ICCPR and ICESCR; practices of slavery violate Arts II and III of the 1926 Slavery Convention and Art. 8 ICCPR; by practising racial discrimination, a state violates its obligations under Arts 2 and 3 CERD. In addition, the latter four examples are covered by the general obligation, derived from Arts 1(3), 55(c), and 56 of the UN Charter to respect human rights. The regional human rights conventions are also affected by breaches in the field of human rights. This review shows that peremptory norms and obligations *erga omnes* almost inevitably have a conventional counterpart.

[9] C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 253.

[10] Simma, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *EJIL* (2006) 483, at 495.

legal order where human rights law is complementary to general international law. The 'complementarity' argument asks: if one accepts that treaties aim at strengthening the law, why should they take away existing means of enforcement and replace them with treaty-based enforcement regimes, which are often poorly developed?[11]

This article showcases this debate by examining the tension between the Draft Articles and human rights law on the issue of third state rights and obligations when peremptory norms and obligations to the international community as a whole are breached. The progressive development of the Draft Articles in outlining how third states can enforce these norms provides a compelling opportunity to discuss the relationship between these two bodies of law. This study focuses on enforcement by states since it is assumed that state enforcement remains an essential aspect of protecting general interests under international law. An examination of the relevant provisions of the Draft Articles – in light of their relationship with human rights law – can help illustrate the extent to which international law is moving away from a purely bilateral conception of responsibility to accommodate categories of general public interest, particularly human rights.[12] Although the Draft Articles have not definitively settled matters since the text is not yet an independent source of law, they are influential to the extent that they reflect human rights law and state practice.

2 Examining Third State Rights and Obligations in the Draft Articles

Three provisions of the Draft Articles are particularly relevant to a discussion of the rights and obligations of third states when a breach of a peremptory norm or 'obligation to the international community as a whole' is committed. Whether or not peremptory norms and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them.[13] The examples which the ICJ 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.[14] Likewise the examples of peremptory norms given by the ILC in its commentary to what became Article 53 of the 1969 Vienna Convention on the Law of Treaties involve obligations to the international community as a whole.[15]

But there is a difference in emphasis. While peremptory norms 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

[11] Tams, *supra* note 9, at 253.

[12] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (2002), at 1.

[13] ILC Report 2001, *supra* note 2, at 111.

[14] *Barcelona Traction, supra* note 3; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 264; *Case Concerning East Timor (Portugal v. Australia)*, Judgment [1995] ICJ Rep 78.

[15] ILC Report 2001, *supra* note 2, at 112.

interest of all states in compliance – i.e., in terms of the Draft Articles, in being entitled to invoke the responsibility of any state in breach.[16] Consistently with the difference in their focus, the ILC found that it was appropriate to reflect the consequences of the two concepts in two distinct ways in the Draft Articles.

First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible state, but for all other states. Secondly, all states are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is dealt with in Article 41; the second is dealt with in Article 48 of the Draft Articles. In addition, it is necessary to examine Article 54, which deals with the issue of measures which can be taken by third states in order to stop a breach of an obligation to the international community as a whole. This section reviews each provision and the corresponding ILC commentary. It then examines the extent to which the provision reflects human rights law and state practice.

A *Article 41 – Consequences of a Serious Breach of a Peremptory Norm*

Due to the gravity of a serious breach of an obligation arising under a peremptory norm of general international law, the ILC wanted to distinguish this violation from other types of violations. In order to do so, Article 41 provides consequences for breaches of this nature:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. 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.

Obligations identified in Article 41 include a duty to cooperate and a duty of abstention. Whether these two obligations accurately reflect human rights law and existing state practice is explored in the following sub-sections.

1 Duty to Cooperate

The first obligation identified in Article 41 is that of a positive duty to cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.[17] The provision does not prescribe what form this cooperation should take, but

[16] *Ibid.*

[17] Art. 40 states: '1) This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2) A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation'.

envisages institutional and non-institutionalized cooperation.[18] The ILC made clear that the obligation to cooperate applies to states whether or not they are individually affected by the serious breach.[19]

Although the ILC admits that the duty to cooperate cannot clearly be found in present international law, it is explicitly recognized in the preamble to the Genocide Convention, which states that 'international cooperation is required' to 'liberate mankind from such an odious scourge'. Several other preambles to human rights treaties mention international cooperation but do not require it. The Universal Declaration of Human Rights pledges cooperation with the UN to promote universal respect for and observance of human rights and fundamental freedoms. The International Covenant on Civil and Political Rights (ICCPR) highlights the 'obligation of States under the UN Charter to promote universal respect for, and observance of, human rights and freedoms'. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) refers to the 'collective enforcement of certain of the rights stated in the Universal Declaration'. The African Charter on Human and Peoples' Rights (Banjul Charter) reaffirms the pledge 'to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation'. However, since these references are located in treaty preambles – which state the aspirations of a particular treaty – it is more appropriate to understand these references to cooperation as a goal of states, but not a duty.

Despite the goal of cooperation provided for in human rights treaties, third states have typically been reluctant to cooperate to stop serious breaches in a state where they have no injured nationals unless there is support for such intervention by a Security Council resolution under Chapter VII of the UN Charter. Even when resolutions are passed, there is no evidence that states believe they are under an obligation to cooperate. In the case of the former Yugoslavia and Rwanda, third states failed to cooperate to stop genocide. A similar situation can be seen in Sudan and the Congo.

That said, the conditions under which sovereignty is exercised – and intervention is practised – have changed dramatically since 1945. The defence of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people. The human rights movement at the international level is a product of increasing multilateral cooperation among states, rather than self-interest based on reciprocity.[20] An example of this cooperation is the 'responsibility to protect' concept, or R2P, which has emerged in recent years.[21] States have discussed cooperation under this framework in order to stop serious breaches of peremptory norms. By far the most controversial form of such intervention is military. But alternatives to military action have also been considered including preventive

[18] ILC Report 2001, *supra* note 2, at 114.

[19] *Ibid.*

[20] L.S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (1992), at 71.

[21] Report of the International Commission on Intervention and State Sovereignty, 'Responsibility to Protect', Ottawa: International Development Research Centre, Dec. 2001 at para. 1.38.

measures and coercive intervention measures, such as sanctions and criminal prosecutions.[22] If extradition requests could be seen as a way in which to implement the duty to cooperate, the extradition of President Fujimori from Chile back to Peru may provide one example. In addition, in *La Cantuta v. Peru*, the Inter-American Court of Human Rights found that a breach of *jus cogens* norms results in certain consequences, including the investigation, indictment, and sanction of those in charge of breaches.[23]

The duty of cooperation outlined in Article 41 clearly represents the progressive development of international law, since it would be premature to conclude that third states believe they are under an obligation to cooperate to stop serious breaches. However, human rights treaties' preambles, state practice, and case law, as well as the R2P concept, contribute to the idea set out in Article 41 and may justify third state cooperation when serious breaches of peremptory norms take place in the future.

2 *Duty of Abstention*

The second obligation identified in Article 41 is a duty of abstention on states, which is comprised of two obligations. The first is an obligation of collective non-recognition by the international community as a whole of the legality in situations resulting directly from serious breaches.[24] This requirement prohibits both formal recognition and acts which imply recognition.

The basis for the obligation of non-recognition cannot be found in human rights treaty law, but can be seen in UN Security Council resolutions (UNSCR), General Assembly resolutions, and case law. UNSCRs 216, 217, 277, 288, 328, 423, 445, 448, and 662 all contained the duty of collective non-recognition. For example, the rule of non-recognition was respected by nearly all states after several UNSC resolutions called on states not to recognize the racist regime in Southern Rhodesia.[25] This rule was made robust by a system of sanctions in which the majority of states participated. It is unclear whether and how the rule would have been enforced if a third state had endeavoured unambiguously to breach it.[26]

In addition, GA resolution 31/6 A of 26 October 1976, endorsed by UNSCR 402, called upon all Governments 'to deny any form of recognition to the so-called independent Transkei'.[27] The ICJ urged states not to recognize the construction of the wall by Israel as legal in *Legal Consequences of the Construction of a Wall on the Occu-*

[22] *Ibid.*

[23] *La Cantuta v. Peru*, Merits, Reparations and Costs, Series C No. 162, Inter-American Court of Human Rights, 29 Nov. 2006, at para. 59.

[24] This has been described as 'an essential legal weapon in the fight against grave breaches of the basic rules of international law': Tomuschat, 'International Crimes by States: an Endangered Species?', in K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (1998), at 253.

[25] SC Res. 216, UN SCOR, 20th Sess., 1258th mtg., at para. 2 (1967); SC Res. 217, UN SCOR, 20th Sess., 1265th mtg., at para. 6 (1967); and SC Res. 277, UN SCOR, 25th Sess., 1535th mtg., at 5–6 (1971).

[26] Grant, 'East Timor, the UN System and Enforcing Non-Recognition in International Law', 33 *Vanderbilt J Transnat'l L* (2000) 6.

[27] At para. 3.

pied Palestinian Territories.[28] The European Court of Human Rights applied the principle of non-recognition in the *Loizidou* and *Cyprus v. Turkey* cases.[29] Thus, in certain instances, third states have abstained from recognizing as lawful a situation created by a serious breach. However, once again, an *obligation* of non-recognition cannot be found in human rights treaty law, case law or state practice.

The second obligation in Article 41(2) prohibits states from rendering aid or assistance in maintaining the situation created by a serious breach. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by Article 16. It deals with conduct 'after the fact' which assists the responsible state in maintaining a situation 'opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law'.[30] It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one.[31]

This obligation does not reflect human rights law, and state practice can be found which does not comply with this obligation. For example, third states have engaged in trade relationships which have helped keep perpetrators in power by assisting them financially. China has been accused of giving aid to the Sudanese Government and trading with other African countries responsible for serious breaches. The US gave aid and assistance to several Latin American countries which were committing serious breaches, including Peru, Chile, Argentina, Guatemala, Honduras, Nicaragua, and El Salvador.[32]

However, there is evidence in support of this duty as well. For example, the EU placed a ban on buying fruit from illegal Israeli settlements. In addition, UNSC and GA resolutions made several calls not to render assistance in these situations. GA resolution 47/70 called on all states

> not to recognize any changes carried out by Israel, the occupying Power, in the occupied territories and to avoid actions, including those in the field of aid, that might be used by Israel in its pursuit of the policies of annexation and colonization or any of the other policies and practices referred to in the present resolution.[33]

GA resolution 47/20 also called upon the international community to refrain from supplying materials for the use of military forces or police in Haiti, including arms, ammunition, and petroleum.[34] But, as with the obligation of non-recognition, evidence of a *duty* to abstain from rendering aid or assistance is limited.

[28] [2004] ICJ Rep 70, at para. 163.

[29] *Loizidou v. Turkey*, Merits, 1996–VI ECtHR, (Series A) 2216, at 2234–2235; App. No. 25781/94, *Cyprus v. Turkey*, 2001–IV ECtHR, 1, at paras 89–98.

[30] ILC Report 2001, *supra* note 2, at 115; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1971] ICJ Rep 56, at 126.

[31] ILC Report 2001, *supra* note 2, at 115.

[32] See *Military and Paramilitary Activities Case (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 65.

[33] A/RES/47/70, at para. 15.

[34] *Ibid.*, at para. 8.

3 Conclusions

For those who believe human rights law is a self-contained regime, Article 41 is problematic. It goes too far in establishing third state obligations for serious breaches of peremptory norms, where treaty law and state practice are limited, if not silent on these supposed duties. For those who believe in a unified legal order, Article 41 is a mix of new ideas and already established general international law. It will remain to be seen whether or not third states rely on Article 41 in the future as support for their compliance with these obligations. The discussion will now turn to Article 48, a provision which covers a broader number of human rights violations than the limited scope of serious breaches to peremptory norms.

B *Article 48 – Invocation of Responsibility for a Breach of an Obligation to the International Community as a Whole*

Although state responsibility arises under international law independently of its invocation by another state, Article 48 permits third states to invoke the responsibility of a state which has breached an obligation owed to the international community as a whole. Under this provision, a third state acts, not in its individual capacity by reason of having suffered injury, but in its capacity as a member of the international community as a whole. Article 48 provides:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
   (a) the 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; or
   (b) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
   (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
   (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

The intention of Article 48 was to give effect to the statement by the ICJ in the *Barcelona Traction* case, which found that '*all* States can be held to have a legal interest' in the protection of obligations to the international community as a whole in view of the 'importance of the rights involved'.[35] The Court specifically mentioned genocide and 'principles and rules concerning the basic rights of the human person, including

[35] *Barcelona Traction, supra* note 3, at paras 33–34 (emphasis added).

protection from slavery and racial discrimination'.[36] It also observed that some of the rights had 'entered into the body of general international law', whereas others were 'conferred by international instruments of a universal or quasi-universal character'. Specifying the relationship between enforcement rights offered by Article 48 and human rights treaty-based rules of law enforcement thus becomes an important task. The following sub-sections focus primarily on the rights outlined in paragraph 1(b) of Article 48 – entitling third states to invoke the responsibility of another state which breached an obligation owed to the international community as a whole; and, to a lesser extent, paragraphs 2(a) and 2(b) – entitling third states to claim cessation, non-repetition, and reparation for the beneficiaries of the obligation breached.[37]

1 Right to Invoke Responsibility

Paragraph 1(b) of Article 48 entitles states other than the injured state to invoke responsibility if the obligation in question was owed 'to the international community as a whole'. The ILC clarified that all states are by definition members of the international community as a whole, and are therefore entitled to invoke the responsibility of another state for breaches of collective obligations protecting interests of the international community as such.[38] The ILC avoided use of the term 'obligations *erga omnes*' as it was seen to convey less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all parties to a treaty.[39]

Although the Draft Articles do not define invocation, the ILC commentary states that 'invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal'.[40] The distinction between legal interests to invoke responsibility and standing to institute ICJ proceedings has not usually been drawn in practice: the latter was considered to be a consequence of the former.[41]

[36] *Ibid.* While commentators have criticized the underlying distinction between basic and other human rights (see B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2nd edn, 2002) at Art. 55(c), MN 12; I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (2001), at 131–133; and Meron, 'On a Hierarchy of International Human Rights', 80 *AJIL* (1986) 1 at 10), it is difficult to ignore the fact that, at least in 1970, the Court was not prepared to admit the *erga omnes* character of all human rights (see Oellers-Frahm, 'Comment: The *erga omnes* Applicability of Human Rights', 30 *Archiv des Völkerrechts* (1992) 28, at 31; M. Ragazzi, *The Concept of International Obligations* Erga Omnes (1997), at 140–141).

[37] Although para. 3 applies to third states, Professor Andrea Gattini has noted that the requirements set out in Arts 43–45 – especially the nationality of claims requirement and entitlement to waive a claim – cannot always easily be applied to the case of third states. For this reason, Gattini suggests that the *mutatis mutandis* clause articulated in para. 14 of the ILC Commentary to Art. 48 be regarded as an integral part of the Arts: see Gattini, 'A Return Ticket to "Communitarisme", Please', 13 *EJIL* (2002) 1181, at 1196–1198.

[38] ILC Report 2001, *supra* note 2, at 127.

[39] *Ibid.*

[40] *Ibid.*, at 294–295.

[41] Tams, *supra* note 9, at 163.

In order for a third state to assert the right to make a claim, it must first establish that it has standing to do so. However, establishing this entitlement is complicated by the uncertainty about which obligations are owed to the international community as a whole, as well as the relationship between enforcement rights provided for by general international law and treaty-based rules. According to Article 55 of the Draft Articles, special rules of international law, including human rights law, may determine whether third states are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This provision thus requires an assessment of the relevant human rights conventions in order to determine whether or not a third state has standing to institute ICJ proceedings.

Most human rights treaties include provisions on third state rights in the form of inter-state procedures. These are the only provisions which can be regarded as constituting treaty-based *leges speciales* to the general rules on state responsibility since they deal with the scenario of states claiming the responsibility of other states.[42] Provisions for inter-state claims can be found in several regional and international human rights treaties: the ECHR (Article 33); the ACHR (Article 45); the Banjul Charter (Article 49); the Genocide Convention (Article 9); the Slavery Conventions (Article 8); the ICCPR (Articles 41–43); CERD (Articles 11–13); CAT (Article 21); CEDAW (Article 29); the CMW (Article 74); and CED (Article 32). The following only looks at those treaties most likely to involve obligations to the international community as a whole.

The Slavery Conventions and the Genocide Convention provide for the general right of all states parties to institute ICJ proceedings in response to treaty breaches, which can be exercised irrespective of any individual injury. These treaties therefore clearly provide for the right of third states to invoke the responsibility of other states which have breached an obligation to the international community as a whole, as outlined in Article 48(1)(b) of the Draft Articles.

Article 44 ICCPR and Article 16 CERD both contain explicit non-exclusivity clauses, providing that the respective enforcement systems 'shall not prevent the states parties . . . from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them'. As is clear from the drafting history, the reference to 'general or special international agreements' was inserted to preserve the possibility of inter-state judicial proceedings before other fora.[43] The different non-judicial procedures were therefore intended to complement, rather than exclude, other means of enforcement. Drafters were mainly concerned to preserve the availability of regional human rights mechanisms, but there is little doubt that 'other procedures' also covers ICJ proceedings.[44] In addition to this non-exclusivity clause, Article 22 CERD also specifically states that states parties can institute ICJ proceedings where the treaty-specific means of dispute settlement have failed.

[42] Simma, 'Human Rights and State Responsibility', in A. Reinisch and U. Kriebaum (eds), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (2007), at 363.

[43] Tams, *supra* note 9, at 280.

[44] *Ibid.*

Similarly, although neither the ACHR nor the Banjul Charter contains an express clause along the lines of Article 44 ICCPR or Article 16/22 CERD, both implicitly recognize the non-exclusivity of the respective enforcement mechanisms.[45] In the case of the ACHR, this follows from Article 46(1)(c), under which proceedings are admissible only if 'the subject of the petition or communication is not pending in another international proceeding for settlement'. Similarly, Article 48 of the Banjul Charter provides that an inter-state communication can be forwarded to the Commission only if 'within three months . . . the issue is not settled to the satisfaction of the two States involved through bilateral negotiation *or by any other peaceful procedure*'.[46] In line with this interpretation, African states parties to the Banjul Charter have not challenged the admissibility of human rights claims before the ICJ. On the contrary, the only inter-state complaint admitted under the Banjul Charter was accompanied by parallel ICJ proceedings, brought under the optional clause. Neither the ACHR nor the Banjul Charter thus affects the right of states to institute ICJ proceedings in response to *erga omnes* breaches.

In contrast, the much more ambiguous Article 55 of the ECHR on balance points towards exclusivity, since the provision gives priority to the ECHR, but allows states parties to enter into special agreements with a view to conferring jurisdiction on another judicial body.[47] States parties to the ECHR therefore have contracted out of the right to bring contentious ICJ proceedings about matters falling within the jurisdiction of the Strasbourg Court.[48]

Therefore, as long as both states have consented to the jurisdiction of the ICJ,[49] third states are entitled to invoke the responsibility of another for breaches of obligations to the international community as a whole. Apart from the ECHR, several human rights treaties (i.e., the ICCPR, CERD, the ACHR, and the Banjul Charter) either expressly or by implication recognize the right of states to use other, extra-conventional means of dispute settlement, including ICJ proceedings.[50] This entitlement is critical to the ability to enforce these obligations, since it can be argued that the enforcement system in many human rights treaties is ineffective. The ECHR, CERD, and the Banjul Charter allow for any state party to invoke the responsibility of another state, but several conventions require that each state make a declaration recognizing the competence of the treaty body to receive and examine such a claim (i.e., ACHR, ICCPR). Where a declaration is required, relatively few states have subjected themselves to this form of scrutiny by other states and no state has yet made a complaint to the international treaty bodies.[51]

[45] See this discussion in *ibid.*, at 282.

[46] Emphasis added.

[47] Tams, *supra* note 9, at 283.

[48] *Ibid.*, at 286.

[49] In the *East Timor case* [1995] ICJ Rep. 78, the ICJ confirmed that even where breaches of obligations *erga omnes* are at stake, the Court can exercise jurisdiction only where both parties to the proceedings have consented to it.

[50] Tams, *supra* note 9, at 286.

[51] See Human Rights Bodies – Complaints Procedures, Office of the High Commissioner for Human Rights, available at: www2.ohchr.org/english/bodies/petitions/index.htm#interstate (last accessed 9 May 2010).

Even if inter-state procedures were used more frequently by third states, the result of these claims essentially culminates with the publication of a report detailing treaty breaches. Claims do not result in a legally binding decision by courts as is the case with regional human rights instruments. Since no sanction or penalty results in the case of a violation, Simma suggests that they should not be regarded as exhausting the application of the remedies available at the level of general international law on state responsibility.[52] This argument is supported by the ICJ decision in the *Nicaragua case*, which stated that the mechanisms provided for by human rights conventions must have 'functioned'.[53] Even though third states remain most reluctant to institute claims when their own nationals or interests have not been affected, this review has shown that human rights law does not seem to rule out this possibility when breaches to the international community as a whole have been committed.

2 Right to Claim Cessation and/or Non-repetition

Under paragraph 2(a), any state referred to in Article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under Article 30.[54] Third states often call for states to stop serious violations of human rights. The entitlement of third states to seek cessation and/or non-repetition is thus less controversial and is difficult to distinguish from a simple protest. Matthew Craven finds that this right does not necessarily amount to the presentation of a claim as the definition of invocation in Article 42 of the commentary suggests.[55]

3 Right to Claim Reparation

Paragraph 2(b) of Article 48 allows a third state to claim from the responsible state reparation for the beneficiaries of the obligation breached. This aspect of Article 48 involves, as the ILC acknowledges, 'a measure of progressive development'. This provision does not reflect human rights law, and state practice is difficult to come by. In cases where states invoked the responsibility of another state, a clear distinction has been drawn between the capacity of the applicant state to raise the matter and the interests of the beneficiaries of the obligation.[56] Thus, a state invoking responsibility under Article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party.[57] Where the injured party is a state, its government will be able authoritatively to

[52] Simma, *supra* note 42, at 365.

[53] *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14 at 134, para. 267.

[54] Art. 30 states: 'The State responsible for the internationally wrongful act is under an obligation: (*a*) to cease that act, if it is continuing; (*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require'.

[55] Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', 11 *EJIL* (2000) 489, at 490.

[56] See, e.g., the observations of the European Court of Human Rights in *Denmark v. Turkey* (friendly settlement), judgment of 5 Apr. 2000, Reports of Judgments and Decisions 2000-IV, at 7, 10, and 11, paras. 20 and 23.

[57] ILC Report 2001, *supra* note 2, at 127.

represent that interest. However, cases where there is no injured state present greater difficulties, which the Draft Articles do not solve. Despite the lack of state practice, the ILC justified this entitlement since it 'provides a means of protecting the community or collective interest at stake'.[58] Scobbie notes that this represents an 'obvious attempt to take state responsibility beyond the bilateral paradigm'.[59]

4 Conclusions

Article 48 establishes the *right* of third states to invoke responsibility and claim cessation, non-repetition, and reparations for the beneficiaries of the obligation breached. Since several human rights treaties provide for inter-state procedures, it is necessary to examine whether these conventions exclude these entitlements. Upon examination of the relevant treaties, it is apparent that the right of third states to invoke the responsibility of states which have breached obligations to the international community as a whole is provided for. State practice supporting the right of third states to claim cessation and/or non-repetition can also be found. The right of third states to claim reparation for the beneficiaries of obligations breached is more difficult to find in human rights law and state practice.

Regardless of evidence in support of the rights provided for by Article 48, it seems that Simma remains correct when he states, 'Viewed realistically, the world of obligations *erga omnes* is still the world of the "ought" rather than of the "is"'.[60] Many states still view human rights law as a self-contained system where offending states do not expect claims to be brought by third states to an international tribunal.[61] And the idea that a third state is entitled to claim reparation to the benefit of victims is something almost unknown in international practice.[62] Although third states have been willing to request cessation and/or non-repetition, on the whole, the entitlements provided for in Article 48 do not have much weight in practice.

What is important for supporters of a unified legal order, however, is that there is indeed an entitlement to act as a matter of right. This means that *démarches* in the field of human rights may be presented as formal legal claims, as is customary in other areas of international relations.[63] It follows that diplomatic protection may indeed be exercised on behalf of victims of human rights violations, irrespective of their nationality.[64] It also follows that governments can no longer evade domestic pressures to act

[58] *Ibid.*, at 323.

[59] Scobbie, 'The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law', 13 *EJIL* (2002) 1201, at 1213.

[60] Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *Erga Omnes?*', in J. Delbruck (ed.), *The Future of International Law Enforcement. New Scenarios – New Law?* (1993), at 125.

[61] Simma, 'Self-Contained Regimes', 16 *Netherlands Yrbk Int'l L* (1985) 12, discussing the view of W. Riphagen (the former Special Rapporteur of the ILC on State Responsibility).

[62] C. Tomuschat, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (1999).

[63] M. Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992), at 190.

[64] *Ibid.*

on behalf of foreign victims of human rights violations with the argument that they have no legal right to do so.[65] Perhaps the precise contours of such an entitlement will become more clearly visible in the future.

Thus far we have explored the obligations and rights put forward by Draft Articles 41 and 48. Article 41 has outlined obligations for third states when serious breaches of peremptory norms occur, while Article 48 has set out third state rights when obligations to the international community as a whole have been breached. The following discussion of Article 54 helps illustrate the difficulty in ensuring consequences for serious human rights violations.

C *Article 54 – Measures Taken by Third States*

While the right of an injured state to resort to countermeasures is undisputed, the same does not apply to the right of third states to respond with countermeasures whenever obligations owed to the international community as a whole are endangered. This question of enforceability of human rights has remained most controversial – so much so that it almost jeopardized the adoption of the final Draft Articles.[66] Some members of the ILC supported a system of countermeasures, whereas others were adamantly opposed to the idea. It was suggested that Article 54 be deleted and replaced by a savings clause. This is indeed what happened in the final draft due to pressure from governments and in order to secure acceptance of the text as a whole. Article 54 provides:

> 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 beneficiaries of the obligation breached.

The adoption of the Draft Articles has far from concluded the debate over the entitlement of third states to resort to countermeasures. While Article 54 limits the right of any state entitled to invoke responsibility under Article 48 only to lawful measures rather than countermeasures, the ILC commentary leaves the settlement of the issue to the further development of international law. Alain Pellet has noted that, paradoxically, the saving clause is a *de facto* recognition of countermeasures left widely deregulated in the final Draft Articles.[67] For this reason, Simma finds defining the contours of lawful measures based on actual state practice an important task because failure to understand this limitation could actually leave states more latitude to take this controversial action.[68]

The ILC justified the inclusion of the saving clause on the basis that state practice in this area is 'limited and rather embryonic'. However, the ILC then mentioned four

[65] *Ibid.*

[66] Simma, *supra* note 10, at 526.

[67] Pellet, 'The New Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime?', 32 *Netherlands Yrbk Int'l L* (2001) 75.

[68] Simma, *supra* note 42, at 377.

instances in which third states have responded to alleged human rights violations without claiming to be individually injured. First, in 1978 the US prohibited exports and imports from Uganda in order to 'dissociate itself from any foreign government which engages in the international crime of genocide'.[69] Secondly, in 1981 the US and other Western countries suspended treaties for landing rights when the Polish government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.[70]

Thirdly, when South Africa declared a state of emergency in large parts of the country in 1986, some countries introduced measures which went beyond the recommended sectoral economic boycotts by the Security Council.[71] For example, the US Congress suspended landing rights of South African Airlines on US territory in order to encourage the government of South Africa 'to adopt reforms leading to the establishment of a non-racial democracy'.[72]

Fourthly, in response to the humanitarian crisis in Kosovo, in 1998 the Member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[73] For a number of countries, such as France, Germany, and the United Kingdom, this measure implied the non-performance of bilateral aviation agreements.[74] Because of doubts about the legitimacy of the action, the British government initially was prepared to follow the one-year denunciation procedure provided for in Article 17 of its agreement with Yugoslavia.[75] However, it later changed its position and denounced flights with immediate effect.[76] Justifying the measure, it stated that 'President Milosevic's . . . worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally apply'.[77]

In addition to these examples, Tams examined 'the question left open by Article 54' by identifying 13 cases where third states had taken countermeasures. He found that most of these cases involved states responding against breaches of obligations protecting human rights of individuals or groups which also involved breaches of 'core' obligations *erga omnes*. Responses were directed against policies of apartheid and racial discrimination,[78] acts of genocide,[79] conflicts about self-determination claims,[80] or the

[69] Uganda Embargo Act, Public Law 95-435 of 10 Oct, 1978, *United States Statutes at Large 1978*, xcii, pt 1 (1980) at 1051–1053.

[70] 86 *RGDIP* (1982) 603.

[71] SC Res. 569 (1985) of 26 July 1985. For further references see L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (1990), at 165.

[72] For the text and implementation of this provision see 26 ILM (1987) 79 (sect. 306) and 105 respectively.

[73] Common positions of 7 May and 29 June 1998, OJ (1998) L 143/1 and L 190/3, implemented through Council Regs 1295/98, OJ (1998) L 178/33 and 1901/98, OJ (1998) L 248/1.

[74] See, e.g., 10 UKTS (1960). Cmnd. 972; and *Recueil des Traités et Accords de la France* (1967), No. 69.

[75] ILC Report 2001, *supra* note 2, at 138.

[76] *Ibid.*

[77] 69 BYBIL (1998) 581; see also 70 BYBIL (1999) 555.

[78] E.g., the different instances involving South Africa.

[79] As in the case of Uganda.

[80] E.g., the cases of Yugoslavia 1998 and 1991, or the frequent instances involving support for anti-colonial struggles.

practice of torture (often combined with other human rights violations).[81] In all these instances, the *erga omnes* character of the obligation was beyond doubt. What is more, in cases not involving 'core' obligations to the international community as a whole, states have usually adopted countermeasures in response to wrongful acts affecting obligations which count among the candidates most likely to have acquired *erga omnes* status. For example, third states have taken countermeasures in response to the following human rights violations: the right to life, fair trial guarantees, freedom of expression, and the freedom from arbitrary detention.[82]

In the clear majority of these cases, states targeted by countermeasures (such as Poland in 1981, Surinam in 1982, or Burundi in 1996, to name but a few) were parties to the ICCPR, but had not accepted the HRC's competence to receive inter-state complaints. Had the ICCPR regime been exclusive, none of these countermeasures could have been taken. There is little doubt that, at least where inter-state procedures are not available, the ICCPR or ACHR enforcement mechanisms do not affect the right of third states to take countermeasures in response to, at the very least, serious breaches of obligations to the international community as a whole.[83] For Tams, this practice clearly shows that by entering into the relevant treaties states did not intend to contract out of countermeasures. Furthermore, as discussed in the section on third states' rights to invoke responsibility, he argues that, apart from the inter-state procedures in the ECHR and the Genocide and Slavery Conventions which result in a binding judgment by an international court, much suggests that the inter-state procedures are not sufficiently effective to warrant a restriction of the right to take countermeasures.[84]

Tams also finds support from government comments on the Draft Articles. Unlike the eventual provision, Article 54 of the provisional set of Draft Articles adopted, after much discussion in 2000, had expressly recognized a right of all states to take countermeasures in response to serious breaches of obligations *erga omnes*.[85] The ILC's definition of 'serious' breaches as a 'systematic or gross failure . . . to fulfil [an] obligation' did not raise major concerns among governments. Based on the actual conduct of states in specific disputes involving these breaches, he found that government comments on balance supported rather than undermined the existence of a right to take countermeasures and concluded that the ILC could have said more than Article 54, i.e., that states are entitled to take countermeasures in response to systematic or large-scale breaches of obligations to the international community as a whole (despite a lack of ICJ jurisprudence on this right).[86]

Despite the existence of state practice, the ILC concluded that there is no clearly recognized entitlement of third states to take countermeasures in the collective interest. States were therefore resorting to such measures, knowingly acting in violation of

[81] E.g., the cases of Burundi, Liberia, Uganda, and Surinam.
[82] E.g., the cases of Poland/Soviet Union (1981), Nigeria, and Zimbabwe.
[83] Tams, *supra* note 9, at 289.
[84] *Ibid.*, at 290–291.
[85] *Ibid.*, at 241.
[86] *Ibid.*, at 249.

international law, or they were relying on something which justified their course of action. State practice may therefore represent a certain *opinio juris* that third states think that countermeasures are permissible, and that they would repeat such non-forcible action should serious human rights violations take place. However, others still argue that human rights treaties are self-contained regimes, meaning that 'normal' sanction against material treaty breaches would not apply if a state party to a human rights treaty had accepted neither the optional inter-state complaint procedure nor the individual complaints mechanism. Since inter-state claims do not result in any penalty, however, human rights treaties would remain virtually 'sanctionless' on the international plane. Simma states, 'Were this view to become generally accepted, then international treaty law for the protection of human rights would assume a quality lower than that of other treaties'.[87]

As long as the issue of third state countermeasures remains unresolved, the dangers arising from the use of such measures, even in violation of international law, are not eliminated. In cases where no state is 'injured' but where breaches of human rights obligations owed to the international community as a whole affect only the nationals of the responsible state, the difficulty is that, almost by definition, the injured parties will lack representative organs which can validly express their wishes on the international plane, and there is a substantial risk of exacerbating such cases if third states are freely allowed to take countermeasures based on their own appreciation of the situation.[88] On the other hand it is difficult to envisage that, faced with serious violations of human rights, third states should have no entitlement to act. It therefore seems that two alternatives exist: either that third state countermeasures are prohibited or that they are legitimated on the basis of stringent conditions and the principle of proportionality.[89]

3 Conclusion

The ILC's Draft Articles on State Responsibility represent a combination of codification and progressive development in the area of third state responsibility for serious breaches of peremptory norms and obligations to the international community as a whole. Article 41 first requires third states to cooperate to bring to an end a serious breach of a peremptory norm of international law. It also imposes a duty of non-recognition and a duty to abstain from rendering aid or assistance to a state which has committed these breaches. The second obligations are weaker than the first, but both reflect the novel idea that third states are under an *obligation* to act when peremptory norms are breached.

[87] Simma, 'Consent: Strains in the Treaty System', in R. St. J. Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (1983), at 485.

[88] Third Report of the Special Rapporteur, Addendum 4, 4 Aug. 2000 (A/CN.4/507/Add.4), at para. 403.

[89] E. Katselli, *Countermeasures by Non-Injured States in the Law on State Responsibility*, Ph.D. Thesis, Department of Law, University of Durham.

Article 48 entitles third states to invoke state responsibility for breaches of obligations to the international community as a whole. It also permits third states to claim cessation, non-repetition, and reparation for the beneficiaries of the obligation breached. Several human rights treaties recognize the right of third states to use other, extra-conventional means of dispute settlement, including ICJ proceedings. Nor does a conflict arise with the right of third states to request cessation and/or non-repetition of breaches. More complicated is the right to request reparation for beneficiaries of the obligation breached which is almost non-existent in international law.

Due to the controversial nature of countermeasures by third states, the ILC opted for a saving clause, under Article 54, which reserves the position and leaves the resolution of the matter to the further development of international law. Although no general rule covering conflicts between countermeasures and conventional dispute settlement mechanisms exists at present, states have frequently taken countermeasures in response to serious breaches of obligations to the international community as a whole in the field of human rights.

These provisions shed light on the relationship between the law of state responsibility and human rights law. Those who view human rights law as a self-contained regime argue that human rights treaties exclude third state rights and obligations to carry out actions suggested in the ILC provisions. However, Tams correctly observes that the importance of the notion of self-contained regimes has been over-stated since, if a regime were truly self-contained, no treaty would qualify: even comprehensive treaty regimes depend on external rules, not contained in the treaty, in order to address problems of interpretation, attribution, or consequences of breach.[90]

In contrast, this study has shown that human rights law is complemented by the enforcement regime outlined in the draft articles. Since inter-state procedures remain weak and, arguably, ineffective, it is important that other forms of enforcement are possible when peremptory norms and obligations to the international community as a whole are breached. However, unless the Draft Articles become law, future state practice will ultimately determine whether third states act upon the rights and obligations outlined by the ILC. Regardless, the Draft Articles represent a clear shift away from a purely bilateralist paradigm to one which sets out a framework for third state responsibility when serious human rights violations are committed.

[90] Tams, *supra* note 9, at 254.