

Oxford Public International Law

Part VII General Problems, Ch.57 Consequences for Third States as a Result of an Unlawful Use of Force

Paolo Palchetti

From: The Oxford Handbook of the Use of Force in International Law

Edited By: Marc Weller

Content type: Book content

Product: Oxford Scholarly Authorities on International Law [OSAIL]

Series: Oxford Handbooks in Law

Published in print: 01 January 2015

ISBN: 9780199673049

Subject(s):

Erga omnes obligations — Neutrality and non-alignment — Belligerents — Armed conflict, international — Armed conflict, non-international — Self-defence — Weapons, nuclear — Armed attack — Aggression — Countermeasures — UN Charter

(p. 1224) Chapter 57 Consequences for Third States as a Result of an Unlawful Use of Force

I. Introduction

IN case of an unlawful use of force by a state against another state, the use of the term 'third states' may be regarded as questionable, if not incorrect. It might convey the idea that a breach of the obligation not to use force gives rise exclusively to a bilateral relation between the two states involved in armed conflict. As is all too well known, this is not the case. The obligation not to use force in international relations being an obligation *erga omnes*, 'all States can be held to have an interest in [its] protection'¹ and are entitled to take certain steps to react against its breach. While, (p. 1225) admittedly, the *erga omnes* character of this obligation may render inappropriate the terminology of 'third states', it is essential for this chapter to draw a distinction between those states which are directly involved in conflict either as the author or as the victim of the unlawful armed intervention, on the one hand, and all other states, on the other hand. The term 'third states' will be used loosely to refer to this latter category of states.

Different sets of legal rules concur to define the legal position of third states in situations arising out of an unlawful use of force. Traditionally, the law of neutrality provided the main legal framework governing the question of the rights and duties of third states vis-à-vis the belligerent states. Under the law of neutrality, a state has the right not to be adversely affected by the conflict if it complies with the duty of non-participation and impartiality. Thus, the neutral state must refrain from assisting one party to the conflict and must ensure equal treatment of the belligerents.² While the law of neutrality aims at the containment of the conflict and appears to be incompatible with the possibility of third party responses against an aggressor, with the crystallization of the rule prohibiting the use of force and the establishment by the UN Charter of a system of collective security, third states have been given the power, and under certain circumstances the duty, to react against an unlawful use of force. Thus, under Article 51 of the UN Charter, which reflects customary international law, third states are entitled to assist the victim of an armed attack by using force in collective self-defence against the attacking state. Under Chapter VII of the UN Charter, the Security Council has the power to oblige member states to take enforcement measures in order to put to an end a situation of threat to peace, breach of the peace, or aggression. Moreover, under Article 2(5) of the Charter, member states have a general duty to 'give the United Nations every assistance in any action it takes in accordance with the present Charter' and to 'refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action'. Lastly, a further development is the emergence of the category of obligations *erga omnes* and of a comprehensive set of rules establishing the consequences arising out of a breach of this category of obligations. As the Articles on State Responsibility adopted in 2001 by the International Law Commission (ILC) make clear, these legal consequences concern to a great extent the position of third states. They have the right to invoke the responsibility of the wrongdoing state, and in particular the right to ask for the cessation of the wrongful conduct and the performance of the obligation of reparation in the interest of the injured state.³ At the same time, when peremptory rules—such as the one which prohibits (p. 1226) aggression⁴—are breached, states are required to abide by a number of duties. These include the duty to cooperate to bring to an end the breach, the duty not to recognize as lawful a situation created by such a breach, and the duty not to render aid and assistance in maintaining that situation.⁵

This brief survey testifies to the variety of possible responses that third states are entitled, and under certain circumstances obliged, to take when confronted with situations of unlawful use of force. The picture which emerges is by no means a tidy one and reveals a certain tension between different approaches to the position of third states. Responses by third states may have the form of a centralized reaction against the wrongdoing state under the aegis of the UN Security Council, or may consist of unilateral actions aimed at enforcing community interests in accordance with the rules on state responsibility. Third states, at least in principle, appear to be entitled to invoke the legal protection ensured by the general rules of neutrality or, on the contrary, may decide to use force against the aggressor by acting in collective self-defence. All this raises evidently a problem of coexistence, if not of consistency, between the various rules dealing with the position of third states in situations of an unlawful use of force.

This chapter does not aim to examine in any detail the rights and duties of third states under each of the previously mentioned sets of rules but, rather, to provide an analysis of the possible interplay between these different rules, as well as to identify potential areas of friction. In particular, the main focus will be on the rules on state responsibility and on the impact of these rules on, and their mutual interaction with, other rules dealing with the position of third states. The focus on the law on state responsibility appears to be justified by the increasing importance of this body of rules in the determination of the legal consequences stemming from the notion of *erga omnes* obligations.

While this chapter will only deal with the rights and duties of third states, it seems appropriate to make a cursory reference to the position of entities other than states. In particular, it may be observed that, like states, international organizations are also to be regarded as affected by a breach of the obligation not to use force. The ILC Articles on the Responsibility of International Organizations recognize that, in cases of breaches of obligations owed to the international community as a whole, international organizations are entitled to invoke the responsibility of the wrongdoing states. However, this entitlement is subject to the requirement that 'safeguarding the interest of the international community as a whole underlying the obligation (p. 1227) breached is within the functions of the international organization invoking responsibility'.⁶ According to these Articles, when a serious breach of peremptory rules has taken place international organizations have the same duties as states.⁷ Moreover, in the case of an armed attack, international organizations appear to be entitled to act in collective self-defence to support the victims of such an attack.⁸ Since in this regard the position of 'third international organizations' does not substantially differ from that of third states, it will be assumed that the situation stated in regard to the latter category of subjects equally applies, *mutatis mutandis*, to international organizations.

II. The Narrowing of the Scope of Applicability of the Law of Neutrality

In its 1997 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice (ICJ), while recognizing that the principle of neutrality is 'of fundamental character', was careful to stress that its applicability to situations of international armed conflict was 'subject to the relevant provisions of the United Nations Charter'.⁹ The question of the compatibility of the law of neutrality with the system of collective security established under the UN Charter has long been discussed in legal literature.¹⁰ The prevailing view, which finds confirmation in state practice as well as in the position of the ICJ, is that the UN Charter does not prevent a state from invoking the principle of neutrality other than in specific circumstances in which the respect of the duty of impartiality or of non-participation (p. 1228) appears to be incompatible with the duty to comply with enforcement measures adopted by the Security Council.¹¹ This is the case, for instance, when member states are bound to comply with a Security Council decision

imposing economic or other kinds of measures against the aggressor state. Equally, when the Security Council authorizes the use of force against an aggressor, while member states are not bound to take part in the military action against that state, they have at least an obligation, under Article 2(5) of the Charter, to assist those states which act in pursuance of the objectives indicated by the Council.

It is more uncertain to what extent the law of neutrality is applicable in situations in which the Security Council remains inactive. Without entering into the much debated question whether third states are entitled in this type of situation to adopt a position of 'non-belligerency',¹² it may be observed that those who admit the possibility of third states being able to invoke the status of neutrality even in cases of a flagrant breach of the prohibition to use force, mainly rely on the rather formalistic argument that neutrality is not per se incompatible with the current rules of international law outlawing the use of force. In particular, reference is made to the fact that while third states, by acting in collective self-defence, have the right to assist the victim of the armed attack, under general international law they do not have a duty to do so. Thus, in the absence of a legal duty to discriminate between the belligerents, a state would be free to choose non-involvement and to seek the legal protection assured by the law of neutrality.¹³

Even if this view is well founded in regard to compatibility between the principle of neutrality and the rule on collective self-defence, it is doubtful whether the same argument is equally applicable when it comes to assessing the compatibility of this principle with the rules on state responsibility dealing with the consequences arising out of a grave breach of peremptory rules. As already mentioned, these rules do not simply confer rights on third states towards the wrongdoing state; they also impose on them a number of duties. Under certain circumstances, compliance with these duties might require states to adopt conduct which is incompatible with the duties arising from the law of neutrality. Thus, Article 41(1) of the ILC Articles on State Responsibility provides that 'States shall cooperate to bring an end through (p. 1229) lawful means any serious breach' of obligations arising under a peremptory norm of general international law. While, admittedly, this obligation to cooperate is rather vague, and while, as the ILC itself recognized, it might not reflect an already established rule of general international law,¹⁴ it is difficult not to see the tension existing between a duty to cooperate to bring an aggression to an end and the duty of impartiality required under the law of neutrality. It could be held that strict compliance with the duty of impartiality may lead to a breach of the obligation of cooperation, particularly when this may have the effect of undermining the attempt by the state which was the object of the armed attack, or of the states acting in collective self-defence, to put to an end to the unlawful use of force by the wrongdoing state.¹⁵ Reference may also be made to the obligation not to recognize as lawful a situation created by a serious breach of peremptory rules and to the obligation not to render aid or assistance in maintaining that situation, both set forth in Article 41(2) of the ILC Articles. Unlike the obligation provided under paragraph 1 of Article 42, the obligations of non-recognition and of non-assistance are certainly prescribed by rules having a customary nature.¹⁶ Again, compliance with these obligations may conflict with the duties incumbent on a neutral state. Thus, for instance, the duty of impartiality implies that the neutral state cannot change its commercial relations with the belligerent parties so as to favour one party over the other;¹⁷ however, continuing existing commercial relations with the aggressor state might entail a breach of the obligation not to aid or assist a state in maintaining a situation of occupation of a territory brought about by an unlawful use of force.

In all likelihood, it cannot yet be said that the development of rules establishing the legal consequences arising for third states in a case where grave breaches of peremptory rules have been committed has led to a complete obsolescence of the law of neutrality. However, this development marks a significant move away from the importance traditionally accorded to the non-involvement of third states as a means of restraining conflicts. The main

emphasis appears nowadays to be on the effective enforcement of rules aiming to protect the common interests of the international community and on the role which third states may play in that regard. To the extent that this trend will find further confirmation in state practice and will lead to the development of stricter rules imposing duties on third states, the law of neutrality—the scope of applicability of which has already been reduced by the (p. 1230) system of collective security established by the UN Charter—appears destined to find still less room for application, if not to vanish entirely through obsolescence.

III. Collective Self-Defence and Enforcement of *Erga Omnes* Obligations: Common Purpose but Different Conditions?

When the unlawful use of force reaches the level of an act of aggression, third states may rely on two sets of rules to justify their unilateral reaction against the aggressor state. As we have seen, they may base their response on the primary rules on the use of force, which confer on them the right to act in collective self-defence.¹⁸ Alternatively, third states may rely on the secondary rules dealing with the legal consequences arising from a serious breach of a peremptory rule. Among these consequences, reference must be made, in particular, to the possibility of third states taking countermeasures against the wrongdoing state. As is well known, the existence of a right of third states to adopt countermeasures in response to a breach of an *erga omnes* obligation has proved to be a controversial issue; and one on which the ILC has refrained from taking a stand.¹⁹ However, state practice appears to support this possibility, at least in those cases—such as in case of aggression—where the wrongful conduct amounts to a serious breach of peremptory rules.²⁰

(p. 1231) An enforcement action in response to a serious breach of peremptory rules differs in some respects from an action in collective self-defence. A first difference concerns the means available to third states: while in a self-defence scenario the response includes the possibility of military actions against the aggressor, under the law of state responsibility there is a prohibition on resort to forcible countermeasures. Another difference relates to their respective purposes. Collective self-defence is primarily aimed at assisting the victim state in order to put to an end to the aggression; whereas an enforcement action has a broader purpose in that it aims at procuring not only cessation but also reparation for the internationally wrongful act. Notwithstanding these distinctive features, it is clear that these two forms of reaction are strictly related as they both aim at countering acts of aggression by the unilateral actions of third states. Taking into account their strict relation, it may be asked whether, for the sake of consistency, these two sets of reactions should not be subjected to the same or similar conditions or, to put it differently, whether certain requirements which limit the possibility of acting in collective self-defence should also apply to countermeasures taken by third states on the basis of the *erga omnes* character of the obligation breached.

One of the main issues in this regard concerns the importance given to the consent of the state which is the victim of aggression.²¹ In its judgment in the *Nicaragua* case, the ICJ stated that ‘there is no rule permitting the exercise of collective self-defence in the absence of a request by the state which regards itself as the victim of an armed attack’.²² While this requirement is not set forth under Article 51 of the Charter, it appears to find its basis in customary rules on the use of force.²³ Accordingly, under these rules the attitude of the victim state is decisive for all other states: without its request, third states are not entitled to act in collective self-defence. To what extent, in the case of aggression, can the attitude of the victim state affect the rights and (p. 1232) duties arising for third states under the law of state responsibility? State practice does not provide a clear answer to this question; which is not surprising since in most cases victim states are willing to accept the response of third states against the aggressor. While this issue will only rarely arise in practice, the problem remains whether the absence of an express request by the victim state, or a passive attitude of such state towards the unlawful conduct of the aggressor state, may

preclude third states from taking countermeasures or even from invoking the responsibility of the aggressor state.

A first problem concerns the possibility that the victim state waives its claims towards the aggressor. It may be asked whether this waiver, which obviously must be validly given and cannot be imposed by coercion, has the effect of extinguishing any claim by third states relating to the cessation of the act of aggression or the reparation due to the victim state. Article 45 of the ILC Articles on State Responsibility does not take a clear stand on this issue. Addressing this point, the ILC commentary simply observes, in rather obscure terms, that since a serious breach of obligations arising from peremptory norms of general international law 'engages the interest of the international community as a whole, even the consent or the acquiescence of the injured state does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law'.²⁴ According to one view, where a serious breach of a peremptory rule specially affects one state—as occurs in the case of aggression—priority must be given to the position held by that state for the purposes of determining the legal consequences arising from such a breach. This would imply that a waiver by the victim state would have the effect of precluding third states from invoking the responsibility of the aggressor state.²⁵ However, this view appears to narrow down excessively the legal entitlements of third states. Since the obligation not to use force is held by all states, it seems that all states are at least entitled to determine whether that obligation has been breached and to request cessation if the breach continues. In other words, the very notion of obligations *erga omnes* appears to entail that every state is entitled to claim compliance with this type of obligation, independent of the attitude taken by the state which has been specially affected by the breach of that obligation.²⁶ Significantly, Article (p. 1233) 48 of the ILC Articles does not subject the right of third states to claim the cessation of the wrongful conduct to the position eventually adopted by the victim state. The attitude of the victim state appears instead to be relevant only as far as claims for reparation are concerned. Since, as provided for under Article 48, reparation may be claimed only 'in the interest of the injured State', a waiver by that state of its right to invoke responsibility appears to entail a correspondent loss by third states of their right to claim reparation.²⁷

It remains to be seen whether third states are entitled to take countermeasures against the aggressor state only following a prior request by the victim state or whether instead countermeasures may be taken even in the absence of a prior request. While the ILC Articles on State Responsibility do not address this issue, a brief remark in the commentary to Article 54 appears to suggest that the ILC was rather inclined to support the former solution. Referring to the practice concerning countermeasures taken by third states in response to breaches of *erga omnes* obligations, it observed that 'in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State'.²⁸ Interestingly, to support this statement the ILC made reference to the fact that, in its *Nicaragua* judgment, the ICJ indicated in the prior request of the victim state an indispensable requirement for action in collective self-defence, thereby suggesting that this condition also applies by analogy to countermeasures based on the *erga omnes* character of the obligation breached.²⁹ The possibility of applying by analogy the condition indicated in *Nicaragua* with regard to the exercise of the right of collective self-defence was also advocated in more precise terms by the Commission's Special Rapporteur, James Crawford, according to whom 'If State A cannot act in collective self-defence of State B without State B's consent, it does not seem appropriate to hold that it could take (collective) countermeasures in cases where State B is the victim, irrespective of State B's wishes'.³⁰ Leaving aside the question whether this view finds confirmation in state practice, it can be observed, however, that this extension by analogy of the requirement of the prior request of the victim state does not seem to rely on solid arguments. The fact that an action in collective self-defence is subject to such a

requirement may be explained by the need to limit the recourse to force by third states, which could abuse this right for (p. 1234) purposes other than the protection of the victim state. While resort to countermeasures by third states may also be a source of abuse, it seems apparent that the possibility of a military response poses greater risks than countermeasures. This may justify a difference in the conditions required for these two sets of reactions by third states. Moreover, if it is admitted that third states have an autonomous right to claim the cessation of the wrongful conduct by the aggressor state, it seems reasonable to say that, in principle, they should also be entitled to take countermeasures in order to enforce the obligation breached, irrespective of the attitude of the victim state.³¹ The recognition of this entitlement would ensure that, even in cases where the victim state remains passive, breaches of *erga omnes* obligations are effectively countered.

IV. Centralized vs Decentralized Response by Third States: To What Extent May Security Council's Measures Limit Unilateral Responses by Third States?

Under Article 51 of the Charter, third states are entitled to act in collective self-defence 'until the Security Council has taken measures necessary to maintain international peace and security'. Does the same limit apply when third states, acting under the law of state responsibility, adopt unilateral countermeasures to react against an aggression? Or does this limit only apply to military actions based on the right to collective self-defence, third states' right to take peaceful countermeasures being not affected, at least in principle, by Security Council measures? Here again, the question revolves around the differences and analogies between the conditions required for these two sets of reactions by third states. From a broader perspective, it raises the problem of the relationship between the state responsibility regime and the UN collective security system.

The Articles on State Responsibility do not provide clear indications on this issue;³² the only provision dealing with this problem is Article 59, which simply (p. 1235) states that 'These articles are without prejudice to the Charter of the United Nations'. The main point which can be drawn from this provision is that, in the case of conflict between the obligations flowing from the Charter or from binding acts taken by a UN organ and the rules on state responsibility, the former obligations prevail.

When acting under Chapter VII, the Security Council may certainly exclude the adoption of countermeasures against a state. Such exclusion may be expressly stated or, alternatively, it may be inferred from the text of the resolution that the measures adopted by the Security Council were intended to be exclusive. In such situations, the obligations resulting from the decision of the Security Council prevail and states are under a duty not to take countermeasures or to suspend the countermeasures which they have already taken. This does not mean that whenever the Security Council takes measures which are binding on states, unilateral countermeasures by third states are ruled out irrespective of the content of the measures adopted.³³ The view that third states cannot resort to unilateral countermeasures once the Security Council has made use of its powers under Chapter VII, is premised on the idea that a centralization in the hands of the Security Council of the response against grave breaches of peremptory rules would allow for defusing the risk of abuse inherent in a system which allocates to each and every state the power to react to those breaches. However, this view does not take into due account the fact that the Security Council is a political body whose main task is to maintain peace and not to enforce law, and that effective enforcement of obligations *erga omnes* may necessitate giving third states the possibility of going beyond the measures adopted by the Security Council. Whether third states are entitled to adopt countermeasures after an intervention by the Security Council appears to depend in each case on the specific content of the decisions taken by the Council.³⁴ However, in principle, the fact that the Security Council is actively seized of a certain situation does not prevent third states from resorting to countermeasures. State

practice appears to support this conclusion as in several instances third states have taken countermeasures to react to breaches of *erga omnes* obligations even in cases where the Security Council has already intervened.³⁵

(p. 1236) Apart from the limitation flowing from the Charter, the intervention of the Security Council may have other consequences. In particular, it may have an indirect impact on the power of third states to adopt countermeasures as it may call into question the issue of proportionality.³⁶ When considering whether to take countermeasures in addition to the measures adopted by the Security Council, third states must take into account the need to comply with the requirement of the proportionality of the overall response against the wrongdoing state. In this respect, an intervention by the Security Council will normally have the effect of reducing the room for manoeuvre for third states.

In the case of aggression, third states are entitled to take countermeasures against the aggressor state even if the Security Council remains inactive. As we have seen, if the Security Council intervenes by adopting 'measures necessary to maintain international peace and security', as a matter of principle this intervention does not imply that third states are precluded from acting unilaterally. Also in this respect, therefore, the rules on collective self-defence differ from the rules governing the legal entitlements of third states in the case of grave breaches of peremptory rules. As with the requirement of the prior consent of the victim state, such difference may be explained by the fact that collective self-defence involves the possibility of third states using military force in order to repel aggression. This justifies tighter control by the Security Council over the action of third states.³⁷ When peaceful countermeasures are at stake, considerations based on the need for effective enforcement of community values appear to prevail over the risks inherent in a decentralized response. While the Security Council may limit or rule out third party countermeasures, such limitations may not be presumed and only operate if they are clearly imposed by a binding decision.

V. Concluding Remarks

As has emerged from this brief analysis of some of the problems which concern the role of third states in situations of unlawful use of force, this is an area of law where a number of important issues still remain controversial and where the diversity of approaches underlying the various rules applicable in this type of situation add to the complexity of the legal regime governing the conduct of third states. Nowadays, through the development of rules which specify the legal consequences (p. 1237) flowing from the concept of *erga omnes* obligations, the primary emphasis is generally placed on the role of third states as guardians of community interests, including the fundamental interest of preserving peace and security. However, while international law has gone a long way towards accommodating the protection of community interests, the development of these rules has not yet led to the displacement of the older rules on neutrality, which give priority to the containment of conflict and the protection of bilateral interests. Nor is it clear to what extent, if any, in the case of aggression, the law on the use of force governing collective self-defence has an impact on the rules governing third parties' responses based on the *erga omnes* concept. From a different perspective, it can be said that the uncertainties surrounding the question of the role of third states in situations of unlawful use of force simply reflect the still uncertain status of the law governing many aspects of third states' enforcement of community interests.

Among the problems which still remain to be fully resolved, three can be singled out as most relevant for the definition of the role of third states in situations of unlawful use of

force. They relate to the relationship of third states, respectively, with the wrongdoing state, with the direct victim of the unlawful use of force, and with the Security Council.

The first issue concerns the existence of third states' duties aimed at ensuring compliance with *erga omnes* obligations. As we have seen, while the ILC has recognized the existence of duties to this effect, their precise content is rather vague and states are left with a significant measure of discretion in relation to the type of conduct they must take in order to comply with these duties. Whether international law will develop stricter legal standards is uncertain; but at present this appears unlikely. Practice supporting the existence of these duties is rather limited and states do not show any signs pointing towards their readiness to accept stricter standards.³⁸ However, if a development in this direction does take place, the emergence of stricter duties will have a significant impact on third states, as they, in most cases, would be prevented from taking a position of neutrality in their relationship with the aggressor state.

The second point concerns the possibility for third states to invoke the responsibility of the aggressor state, and to take countermeasures against it, irrespective of the attitude of the state which is the direct victim of the aggression. As we have seen, there is in this respect an opposition between a more traditional view which, by upholding a bilateralist paradigm, identifies the consent of the injured state as a necessary requirement for a response by third parties, and a view which, by relying on the communitarian character of the interests involved, denies the existence of (p. 1238) such a requirement. If the development of international law goes in the direction of placing greater importance on the enforcement of community interests, and therefore accepting a third party response in the absence of a request by the victim state, the role of third states would be further enhanced.

This leads to a last point, which concerns the relationship between the unilateral responses of third states against serious breaches of peremptory rules and the centralized mechanism of reaction established by the UN Charter. As has already been stated, in principle the fact that the Security Council has adopted measures to address a certain matter does not preclude the possibility of third states taking countermeasures. So far, the coexistence between the collective security system and the possibility of a decentralized reaction by third states has not given rise to major problems. However, this state of affairs may change if resort to collective countermeasures becomes more widespread in the future. While the Security Council certainly has the power to decide on the suspension of unilateral countermeasures, it remains to be seen whether it will make use of this power, thereby accepting that it plays an effective role as an institutional safeguard against the risk of improper resort to countermeasures. The solution to this dilemma, however, lies in the realm of politics, not in that of law.

Footnotes:

1 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Rep 1970, 32, para 33. In this judgment the Court expressly recognized that obligations *erga omnes* 'derive, for example, in contemporary international law, from the outlawing of acts of aggression' (para 34). On the *erga omnes* character of the obligation not to use force, see also the International Law Commission's Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol II (2), 127.

2 See Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge: Cambridge University Press, 2011), 25 ff; Michael Bothe, 'The Law of Neutrality' in Dieter Fleck (ed),

Handbook of International Humanitarian Law (2nd edn, Oxford: Oxford University Press, 2008), 571 ff.

3 Articles on the Responsibility of States for Internationally Wrongful Acts, Art 48. See also the ILC's Commentary, 126 ff.

4 As the ILC observed, 'it is generally agreed that the prohibition of aggression is to be regarded as peremptory': *Yearbook of the International Law Commission*, 2001, vol II (2), 112. See also the ICJ's position in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep 1986, 100–1, para 190.

5 Articles on State Responsibility, Art 41. See also the ILC's Commentary, *Yearbook of the International Law Commission*, 2001, vol II (2), 114 ff.

6 See Articles on the Responsibility of International Organizations, Art 49, para 3, A/66/10, paras 88 ff.

7 Articles on State Responsibility, Art 42.

8 Art 21 provides that 'The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law'. On the possibility of international organizations using force in self-defence, see Pierre Klein, *La responsabilité des organisations internationales* (Brussels: Bruylant, 1998), 419 ff; Christian Dominicé, 'La responsabilité internationale des Nations Unies' in Jean-Pierre Cot et al (eds), *La Charte des Nations Unies, Commentaire article par article* (3rd edn, Paris: Economica, 2005), 158; Emmanuel Roucouas, 'Present Problems of the Use of Force in International Law: Sub-Group on Self-Defence: Provisional Draft' (2006) 72-I *Annuaire de l'Institut de droit international* 127.

9 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1997, 261, para 89.

10 See Dietrich Schindler, 'Aspects contemporains de la neutralité' (1961) 121 *Recueil des cours de l'Académie de droit international* 221; Charles G. Fenwick, 'Is Neutrality still a Term of Present Law?' (1969) 63 *American Journal of International Law* 100; Christine Chinkin, *Third Parties in International Law* (Oxford: Oxford University Press, 1993), 313; Maria Gavouneli, 'Neutrality—A Survivor?' (2012) 23 *European Journal of International Law* 267.

11 For this view, see Bothe, 'The Law of Neutrality', 575; Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality' in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007), 543.

12 Non-belligerency would imply the possibility of third states supporting one of the belligerent states without becoming a party to the conflict. See Schindler, 'Aspects contemporains de la neutralité', 266 ff; Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts', 548 ff.

13 Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), 403; Gavouneli, 'Neutrality—A Survivor?', 272.

14 *Yearbook of the International Law Commission*, 2001, vol II (2), 114, para 3.

15 See Nina Jorgensen, 'The Obligation of Cooperation' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of State Responsibility* (Oxford: Oxford University Press, 2010), 700; Karl Doehring, 'Neutralität und Gewaltverbot' (1993) 31 *Archiv des Völkerrechts* 199.

16 See, in this respect, the position held by the ICJ in its advisory opinions on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep 1970, 54, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep 2004, 200, para 159.

17 Bothe, 'The Law of Neutrality', 572.

18 A response in collective self-defence certainly comprises a use of force against the aggressor. However, as observed in the Commentary on Art 21 of the Articles on State Responsibility, 'Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision'. *Yearbook of the International Law Commission*, 2001, vol II (2), 74, para 2. Admittedly, when third party responses take the form of non-military reactions, the distinction between action in self-defence and countermeasures becomes blurred. On this point, see also Brownlie, *International Law and the Use of Force*, 404, and Christian Hillgruber, 'The Right of Third States to Take Countermeasures' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Leiden: Brill, 2006), 281.

19 Art 54 simply provides that 'This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached'. It is not clear whether, by using the expression 'lawful measures', Art 54 refers to countermeasures or to measures of retortion which are per se lawful. On this issue, see Denis Alland, 'Countermeasures of General Interest' (2002) 13 *European Journal of International Law* 1121.

20 See Art 5 of the resolution on 'Obligations *erga omnes* in international law', adopted in 2005 by the Institute of International Law (2005) 71-I *Annuaire de l'Institut de droit international* 135. For an extensive survey of state practice, see Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2010), 207 ff.

21 As regards the question of whether third states are entitled to take countermeasures once the Security Council has taken 'measures necessary to maintain international peace and security', see Section IV. Another interesting issue is whether the distinction between an armed attack and minor breaches of the prohibition not to use force, which is relevant for the purpose of determining whether a state is entitled to use force in self-defence, is also relevant for the purpose of determining whether third states are entitled to take countermeasures. On this issue, see Jochen A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law' (1994) 248 *Recueil des cours de l'Académie de droit international* 373; Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (Paris: PUF, 2005), 254 ff.

22 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep (1986, 105, para 199. According to the Court, 'the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such State should have declared itself to have been attacked'.

23 For a different view, however, see Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford: Oxford University Press, 2008), 185 ff; Dinstein, *War, Aggression and Self-Defence*, 294 ff.

24 *Yearbook of the International Law Commission*, 2001, vol II (2), 122, para 4.

25 Christian Tams, 'Waiver, Acquiescence, and Extinctive Prescription' in Crawford, Pellet, and Olleson, *The Law of State Responsibility*, 1041. See also the more nuanced view of Iain Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 *European Journal of International Law* 214.

26 For this view, see Giorgio Gaja, 'Obligations and Rights *Erga Omnes* in International Law: First Report' (2005) 71-I *Annuaire de l'Institut de Droit International* 119; Enzo Cannizzaro, *Corso di diritto internazionale* (Turin: Giappichelli, 2012), 437; Villalpando, *L'émergence de la communauté internationale*, 327 ff. According to Paolo Picone, 'Il ruolo dello Stato leso nelle reazioni collettive alle violazioni di obblighi *erga omnes*' (2012) 96 *Rivista di diritto internazionale* 957, states, including the injured state, are not entitled to waive their recognized powers to protect the interests of the international community.

27 For the view that 'if the injured State, however, decides not to claim reparation, other States cannot do more than claim cessation of the internationally wrongful act and, if circumstances so require, appropriate assurances and guarantees of non-repetition', see Stefan Talmon, 'Jus Cogens after *Germany v. Italy*: Substantive and Procedural Rules Distinguished', Bonn Research Papers on International Law, Paper 2/4, 2012, 24.

28 *Yearbook of the International Law Commission*, 2001, vol II (2), 139, para 5.

29 *Yearbook of the International Law Commission*, 2001, vol II (2), 139, para 5 fn 861.

30 James Crawford, Third Report on State Responsibility, A/CN.4/507/Add.4, 19, para 400. For the view that countermeasures are only permitted if the injured state has called upon third states to adopt them, see also Hillgruber, 'The Right of Third States to Take Countermeasures', 291.

31 Villalpando, *L'émergence de la communauté internationale*, 338 ff.

32 For an overview of the different positions which emerged during the debate in the ILC, see Maurizio Arcari, 'Responsabilità dello Stato per violazioni gravi di norme fondamentali e sistema di sicurezza collettiva delle Nazioni Unite' in Marina Spinedi, Alessandra Gianelli, and Maria Luisa Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (Milan: Giuffrè, 2006), 291 ff; Vera Gowlland-Debbas, 'Responsibility and the United Nations Charter' in Crawford, Pellet, and Olleson, *The Law of State Responsibility*, 115.

33 For a different view, see Frowein, 'Reactions by Not Directly Affected States', 371. According to Linos-Alexandre Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in Crawford, Pellet, and Olleson, *The Law of State Responsibility*, 142, 'the triggering of Chapter VII ends the power of States not individually injured to react as they please at the individual level'.

34 See Villalpando, *L'émergence de la communauté internationale*, 448 ff; Pierre Klein, 'Responsibility for Serious Breaches Deriving from Peremptory Norms of International Law and United Nations Law' (2002) 13 *European Journal of International Law* 1254; Hillgruber, 'The Right of Third States to Take Countermeasures', 288.

35 Martin Davidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council' (2006) 77 *British Yearbook of International Law* 417; Tams, *Enforcing Obligations Erga Omnes*, 267 ff.

36 On the requirement of proportionality of countermeasures, see the Articles on State Responsibility, Art 51.

37 Cannizzaro, *Corso di diritto internazionale*, 441.

38 See Christian Tams, 'Individual States as Guardians of Community Interests' in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press, 2011), 400.