I. Introduction

The concept of third-party countermeasures—that is to say, peaceful unilateral coercive measures adopted by a non-directly injured State in defense of the public interest and not otherwise justified under international law¹—was among the most controversial topics addressed by the

ILC in its work on State responsibility. In a decentralized international legal system which lacks an institutionalized regime of general law-enforcement, there is a straightforward question: should States be permitted to act unilaterally as 'international policemen'\(^2\) and enforce the most serious breaches of international law; or should this right rest with treaty-specific enforcement mechanisms, in particular the UN Security Council in the discharge of its primary responsibility for the maintenance of international peace and security under the UN Charter.

Under the traditional regime of State responsibility, the law seemingly exhausted itself in ‘bundles of bilateral relations’.\(^3\) The answer to the question put above was that only the directly injured State had a right to invoke the wrongful conduct (no matter how serious) of another State.\(^4\) Hence, the right to resort to countermeasures was restricted to the directly injured State.\(^5\) Third States could only protect the public interest by invoking the international responsibility of another State in


circumstances where such a right was granted by a treaty in terms which entitled them to invoke its breach.⁶

An important example of the application of this doctrine can be found in human rights treaties. Over the last 60 years, there has been a significant increase in the treaty-based protection of basic human rights. Under many of these treaties, various enforcement mechanisms have been agreed which grant States (or even individuals) the right to protect the public interest by invoking the international responsibility of another State. However, many commentators have questioned the effectiveness of many of these conventional enforcement mechanisms; at least in securing compliance with the most serious human rights violations.⁷

It is true that the most important means of dealing with major international crises does not lie within the scope of secondary rules of State responsibility. They are the main responsibility of relevant international organizations.⁸ However, as the practice of the UN Security Council has confirmed, the interpretation of its limited competence ratione materiae does not necessarily coincide with all of the serious breaches of international law. On those numerous occasions where the Security Council has not taken enforcement action in response to serious human rights violations, as in the cases of Cambodia, Uganda, Rwanda, Burma or Zimbabwe, States have only had the bilateral regime of State responsibility to fall back on in order to protect the public interest in the absence of recourse to an effective treaty-mechanism. While the Security Council has been more active since the end of the Cold War, many commentators have insisted that the pressure to recognize a regime of third-party countermeasures is in large part linked to the perceived ineffectiveness of the UN system in enforcing serious illegalities.⁹

The need for increasing the effectiveness of international law has been captured in straightforward terms by Gaja:

[w]ere States not even allowed to adopt countermeasures [in response to serious breaches]...one would probably have to conclude that law rather protects the infringement of those [community] interests.¹⁰

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Pellet has even suggested that if individual States were unable to enforce fundamental norms, international law would risk the ‘institutionalisation of Münich’. 11

Two issues in particular have been widely recognized as seriously hampering the effectiveness of any formal law enforcement under this bilateral approach. First, under this approach the rule of standing is based exclusively on the concept of direct injury. The limited effectiveness of the bilateral enforcement paradigm is particularly apparent in the case of human rights violations against a State’s own nationals (eg genocide or torture) where there simply is no directly injured State to invoke the international responsibility of a wrongdoing State. 12 In its 1951 advisory opinion in the Reservations to the Genocide Convention case the ICJ had already alluded to the problem with the limits of bilateralism on the enforcement of the basic human rights of non-nationals:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type, one cannot speak of individual advantages and disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. 13

The European Commission of Human Rights and Inter-American Court of Human Rights have made similar observations. 14 As Byers has explained, erga omnes obligations must therefore:

operate to expand the scope of possible claimants in those situations where traditional rules of standing do not suffice to ensure that all rules of international law are capable of supporting effective inter-State claims. 15

Second, even where there is a directly injured State, governments 16 and


12 See, eg Meron (n 1 above) 250–51; M Byers, ‘Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules’ (1997) 66 NJIL 238; Charney (n 1 above) 95; Simma (n 1 above) 296; D Shelton, ‘International Law and “Relative Normativity”’ in M Evans (ed), International Law (2003) 145 at 149; Seideman (n 7 above) 140.

13 [1951] ICJ Rep 23. The previous year Judge Álvarez had suggested that such obligations were owed to the international community. In his dissenting opinion in the International Status of South West Africa opinion [1950] ICJ Rep 128 at 177, he noted that there are cases in which a State may be under an obligation ‘...without the beneficiary of the rights relating to these obligations being known. The beneficiary is the international community’.

Austria v Italy, 4 YBECHR (1961), 118; Effect of Reservations, para 27, 67 ILR 568.

15 Byers (n 12 above) 212–13.

16 See, eg Algeria (UN Doc A/C.6/47/SR.29, para 70); Bahrain (UN Doc A/C.6/47/SR.26, para 18); Brazil (UN Doc A/C.6/47/SR.25, para 39); Cameroon (UN Doc A/C.6/55/SR.24, para 60); China (UN Doc A/C.6/47/SR.29, para 58); Cuba (UN Doc A/C.6/47/SR.29, paras 58–59); Costa Rica (UN Doc A/C.6/55/SR.17, para 64); Cyprus (UN Doc A/C.6/55/SR.18, para 32); Ecuador (UN Doc A/C.6/47/SR.39, para 49); Egypt (UN Doc A/C.6/47/SR.30, para 30); Greece (UN Doc
commentators have stressed that bilateral countermeasures strongly favour States that are more powerful. In other words, unless third States are allowed to act in solidarity with the aggrieved State, the conditions of *de facto* inequality prevailing in the international community will effectively leave many of the most serious breaches without redress.

From the 17th century onwards, the problem of the lack of effectiveness posed by the traditional bilateralist regime of State responsibility has been debated by the most prominent international lawyers of their time. The first and perhaps best known example is Grotius’ claim that:

kings have the right to demand punishment not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.

During the 18th century, Vattel and Bynkershoek debated whether England, in 1662, had been entitled to take third-party countermeasures against the Netherlands to secure rights of the Sovereign Order of Malta. Unsurprisingly, Vattel argued that:

L’Angleterre ayant accordé des représailles, en 1662 contre les Provinces-unies, en faveur des Chevaliers de Malte, les États de Hollande disaient avec raison,

A/C.6/55/SR.17, para 85; Indonesia (UN Doc A/C.6/47/SR.28, para 65); Jordan (UN Doc A/C.6/47/SR.28, para 42); Morocco (UN Doc A/C.6/47/SR.25, para 85); Nigeria (UN Doc A/C.6/47/SR.28, para 56); Pakistan (UN Doc A/C.6/47/SR.29, para 62); Portugal (UN Doc A/C.6/56/SR.14, para 67); Tunisia (UN Doc A/C.6/47/SR.30, para 45); Sri Lanka (UN Doc A/C.6/47/SR.27, para 6); Venezuela (UN Doc A/C.6/47/SR.27, para 86) and Denmark (on behalf of the Nordic countries) (UN Doc A/CN.4/488, 114-115 and UN Doc A/CN.4/515, 77).


On the dispute see further R Phillimore, *Commentaries upon International Law* (3rd edn, 1879), vol III, 30-31; C van Bynkershoek, *De foro legatorum liber singularis: A Monograph on the Jurisdiction over Ambassadors in both Civil and Criminal Cases* (1744/1946), ch 22, 120 [554]; for its relevance to the law of countermeasures see also OY Elagab, *The Legality of Non-Forcible Countermeasures in International Law* (1988) 10; Tams (n 1 above) 49.
que selon le Droit des Gens, les représailles ne peuvent être accordées que pour maintenir les Droits des sujets de l’État, & non pour une affaire à laquelle la Nation n’a aucun intérêt.  

In contrast, having duly recognized that the rationale for reprisals was based on the effectiveness of international law, Bynkershoek had earlier doubted whether this position was ‘sound’:

For if you permit reprisals on behalf of subjects, there seems no reason why you should deny them on behalf of foreigners. They are either just or unjust; if unjust, to grant them to subjects involves an injury; if just, to deny them to foreigners inevitably results in injury; for in legal theory it makes no difference whether one is a Trojan or a Tyrian.

In the 19th century, Heffter and Bluntschli argued that in response to a ‘public danger’ third States could act ‘as representatives of mankind’ and formally enforce violations of obligations protecting the community interest as a way of promoting Weltjustiz. Prominent scholars who disagreed with their particular view of world justice included Phillimore, von Martens and von Bulmerincq who all stressed the risks of abuse from such unilateral measures of enforcement. August von Bulmerincq neatly summed up their opposition to third-party countermeasures on grounds of public policy:

Should the States wish to extend the right to exercise reprisals to such an extent, a bellum omnium contra omnes would arise through reprisals and their frequent application would lead to the application of a world justice. This would produce more mischief than it would prevent, while it has always been viewed as a main function of reprisals to prevent a greater evil, war.

In the early 20th century, a body of opinion emerged which stressed the need for international law to distinguish between two different types of breaches: those which only affected the injured State, and those, more serious, which affected the legal interests of the international community as a whole. Many commentators considered that this normative distinction should have consequences for the remedies available to States under the law of State responsibility.
As an example, in 1916, Elihu Root (Nobel Peace Prize laureate and former US Secretary of State) considered that international law should develop to admit a right for any State to resort to unilateral means of enforcement in response to the most serious breaches of international law. In his view, the classical bilateral regime of State responsibility was no longer sufficient to effectively enforce the most basic public interests of the international community. Rather, if the most basic international norms are to be respected:

[t]here must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation…[therefore]…[e]very state has a direct interest in preventing those violations which, if permitted to continue, would destroy the law.26

In contrast, while sharing Root’s view that a distinction between different types of breaches was necessary, Amos Peaslee considered that institutional means of enforcement should be developed to enforce the most serious breaches of international law.27 Other commentators, such as Anzilotti, categorically rejected the idea of third-party countermeasures.28 A significant number of other commentators including Westlake, Hall, Fauchille, Stowell, Ross and Jessup supported de lege ferenda the introduction of a decentralized regime of enforcement which would allow any State to enforce fundamental community norms.29

Others, notably Eagleton, suggested that the law of State responsibility already recognized a role for third States in the enforcement of serious breaches. His position on third-party countermeasures seemed particularly clear:

There can be no doubt that joint action for the support of international rights and for the enforcement of international duties is quite legal, even on the part of States not directly injured.

26 Root (n 18 above) 7–9.
28 Anzilotti (n 4 above), 88–89. It should be noted that, in his classical conception of State responsibility, a breach of international law only gave rise to a right of reparation and thus excluded the notion of countermeasures; ibid, 96; D Anzilotti, ‘La responsabilité internationale des États à raison des dommages soufferts par des étrangers’ (1906) 13 RGDIP 5 at 13. It would be incorrect, however, to conclude that he did not recognize the growing need for the international community to more effectively enforce serious breaches: he simply stressed that the answer to that question lay outside of the law of State responsibility. Hence, outside of the realm of international responsibility, States could enforce serious breaches by relying on the notion of intervention as justification; ibid, 68–77; D Anzilotti, Cours de droit international (1929) 517–18.
29 J Westlake, International Law (1924), vol I, 304, 317, 320 (recognizing a general right of any State to intervene where the previous wrongful act might lead to war between the States concerned); Hall (n 2 above) 65–66; P Fauchille, Traité de droit international public, tome I, Première partie: Paix (1922) 570; Stowell (n 2 above) 46–47; A Ross, A Textbook of International Law: General Part (1947) 255; P Jessup, A Modern Law of Nations (1948) 10–12; see also K Strupp, Das Völkerrechtliche Delikt (1920) 14. Admittedly, while most of these statements were made in the specific context of a possible right of intervention, they are, nevertheless, relevant for third-party countermeasures: intervention was normally regarded as an illegal act and thus required a legal justification. For a similar approach see, M Akehurst, ‘Reprisals by Third States’ (1970) 44 BYIL 1–2.
He immediately added, however, that this ‘mode of collective interference’ should be channelled ‘through an established agency…if proper impartiality is to be secured.’

In the inter-war period, the Council of the League of Nations provided such an agency, endowed with powers under Article 16 of the Covenant to suspend extant treaties in response to acts of aggression committed by member States. However, its abject failure to enforce the most basic community norms in this field only served to intensify the doctrinal debate about the need for a *su generis* public law dimension of State responsibility. This brief historical *tour d’horizon* thus demonstrates that, at the dawn of the modern era, the effectiveness of the bilateral paradigm of enforcement was being widely questioned.

In the modern period, much of the impetus for the debate on the limits of the bilateral enforcement paradigm in the law of State responsibility for the protection of basic community interests stems from the widely discussed 1966 judgment of the ICJ in the *South West Africa cases (second phase).* By a narrow majority in 1962, the Court upheld its jurisdiction over the proceedings brought by Liberia and Ethiopia against South Africa for the latter’s serious violations of the 1920 Mandate Agreement for the former German colony of South West Africa. During the second phase of the case, the Court (by the casting vote of President Spender) controversially reversed its decision: in the absence of any individual injury to their respective legal rights, Liberia and Ethiopia were not deemed to have standing under the compromissory clause in Article 7(2) of the Mandate Agreement. As a result, they could not bring a public interest claim against South Africa for the latter’s serious violations of the said Agreement arising from its administration of South West Africa (later Namibia).

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33 [1966] ICJ Rep 47, para 88. The UN General Assembly renamed the country as Namibia in 1968, see UNGA Res 2372 (XXII).
At the height of the decolonization process, the judgment raised a ‘storm of indignation’ in the UN General Assembly. In legal terms, the judgment suggested that individual States could not act in the public interest by enforcing breaches of community interest obligations. In other words, in the absence of a directly injured State, the Court emphasized that these public interests could be ‘exercise[d] only through the appropriate League organs [which, however, no longer existed] and not individually’. In response to the outcry caused by the judgment, institutional action was taken by the United Nations: the General Assembly resolved to terminate the Mandate Agreement. As for the Court, acutely aware of the sensibilities of developing countries in an era of decolonization, it attempted to reverse the effect of South West Africa four years later in another landmark case.

The received history of modern international law traces the first significant steps of a move away from traditional bilateralism towards a public law dimension of State responsibility to 5 February 1970 and the reading out of the famous dictum in the Barcelona Traction case by the then ICJ President, Judge Bustamante y Rivero. It was in this dictum that the concept of *erga omnes* obligations was first mentioned as a means of law enforcement for the most serious breaches.

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35 It should be noted that the Court did not close the door completely on public interest claims. For such rights to be admissible, however, they needed to be ‘clearly vested’ in third States. See [1966] ICJ Rep 32 and 49 (para 67).  
37 Since the League of Nations had been dissolved in 1946, the ICJ recommended the devolution of the supervisory functions previously exercised by the League Council to the appropriate organs of the UN. The reason for this devolution was that the ‘effective performance’ of the Mandate required international supervision; a ‘necessity for supervision’ thus continued to exist despite the disappearance of the League Council as the supervisory organ under the Mandate Agreement. See the ICJ’s advisory opinion in *International Status of South West Africa* [1950] ICJ Rep 128 at 136–38; and further I Brownlie, *Principles of Public International Law* (6th edn, 2003) 642; R Jennings and A Watts, *Oppenheim’s International Law* (9th edn, 1992) 301–02; G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: International Organizations and Tribunals’ (1952) 29 *BYIL* 1 at 8.  
39 [1970] ICJ Rep 3 at 32, para 33. It may be noted that the notion of *erga omnes* obligations had already been referred to in the same sense by the eminent Belgian jurist Henri Rolin in an article published in 1956 on the nature of the obligations under the ECHR and the possibility for third States to bring judicial claims in the public interest under the said convention; see further H Rolin, ‘Le rôle du requérant dans la procédure prévue par la Convention européenne des droits de l’homme’, 9 *Revue hellénique de droit international* (1956) 8.
Soon after the judgment, and in recognition of the above identified deficiencies in the bilateral enforcement structure of international law, the ILC proposed a broadening of the rules on standing and introduced an aggravated regime of State responsibility based on the cognate concepts of \textit{erga omnes} obligations, peremptory norms (\textit{jus cogens}) and so-called ‘international crimes of State’. From early on in its work, it was clear that the ILC was moving towards ‘constructing a system of multilateral public order’ rather than simply codifying the classical rules of State responsibility.\textsuperscript{40} In the opinion of many commentators, these normative developments represent part of an emerging ‘constitutional’ dimension of international law.\textsuperscript{41}

As then Special Rapporteur Riphagen stated, breaches of the fundamental obligations underpinning this constitutional regime could be formally protected in two ways: by the international community (in the form of the UN) or individual States.\textsuperscript{42} The view has often been expressed that the former solution would be more desirable: that is, for the international community as a whole to authorize the use of coercive measures of enforcement.\textsuperscript{43} Of course, there is no legal entity by that name and no institutional mechanism of general law enforcement exists.\textsuperscript{44} Indeed, as Reuter has noted, the UN and the international community as a whole are ‘legally...still two different concepts’.\textsuperscript{45}

According to many commentators, in order to uphold the fundamental rules of this constitutional regime, the concept of \textit{erga omnes} obligations—that is to say, obligations owed to the international community as a whole—must imply that individual States can take third-party countermeasures to enforce the most serious breaches of international law.\textsuperscript{46}

\textsuperscript{40} ILC Rep (2000), UN Doc A/55/10, 112 (para 365). See further commentary to Art 1 ASR in ILC Rep (2001), UN Doc A/56/10, 66–67 paras 4–5 (on a wider definition of international responsibility).


\textsuperscript{42} W Riphagen, ‘Preliminary Report on State Responsibility’, in YbILC (1980) vol II/1, 107 at 121. For a third possibility, combining institutional and decentralized means of enforcement, see also, eg Simma (n 1 above) 311 para 67.


\textsuperscript{45} YbILC (1985) vol I, 94 (para 15).

\textsuperscript{46} See, eg Gaja (n 10 above) 156; Elagab (n 20 above) 59; Meron (n 1 above) 296; Tomuschat (n 10 above) 360–67; G Arangio-Ruiz, ‘Seventh Report on State Responsibility’, UN Doc A/CN.4/469, 14 (para 35); C Annacker, ‘The Legal Regime of \textit{Erga Omnes} Obligations in International
At the end of the 19th century, Hall had already advocated this position in unequivocal terms:

When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state . . . to hinder the wrong-doing from being accomplished. Whatever may be the action appropriate to the case, it is open to every state to take it. International law being unprovided with the support of an organised authority, the work of police must be done by such members of the community of nations as are able to perform it.\(^47\)

Some commentators have gone even further and expressed the essentially Austinian position that in the absence of an effective general regime of enforcement, such as third-party countermeasures, these normative developments would be meaningless.\(^48\) As an illustration of this body of opinion, Meron has remarked that insisting exclusively on institutional mechanisms of enforcement for the most serious breaches of international law would ‘deprive the erga omnes concept of much of its potential practical utility’.\(^49\) An even more emphatic exponent of this line of argument is Judge Weeramantry. In the *East Timor* case, he insisted in broad enough terms on the importance of the effectiveness of the law-enforcement attributes inherent in the *erga omnes* concept to make it relevant for third-party countermeasures. In a dissenting opinion, he stated in categorical terms that:

a disregard for *erga omnes* obligations makes a serious tear in the web of international obligations, and the current state of international law requires that violations of the concept be followed through to their logical and legal conclusion.\(^50\)

Conceptually, at least, the international legal system may thus have to recognize a peaceful unilateral coercive enforcement regime influenced...
by Scelle’s theory of role-splitting (dédoublement fonctionnel).
In other words, in the absence of an international institution performing the role of a res publica and charged with protecting the community interest, individual States may be allowed to adopt prima facie unlawful peaceful unilateral coercive measures not only to defend their own self-interest but also the public interest.

These policy considerations have not made the concept of third-party countermeasures any less controversial. The most controversial issue identified by those commentators opposing the concept is that, operating as a self-help remedy, countermeasures are associated with an inherent risk of abuse. Critics have warned that ‘the stability of the international legal order would be threatened’ by a regime of third-party countermeasures. Such a regime would constitute a ‘lex horrenda’ and be an invitation to chaos which would legitimize ‘mob-justice’, ‘vigilantism’ and ‘power politics’. Put simply:

under the banner of law, chaos and violence would come to reign among states.

Special Rapporteur Riphagen essentially shared these concerns and expressed the view that ‘a single State cannot take upon itself the role of “policeman” of the international community’. He therefore proposed an alternative regime to third-party countermeasures, linking the enforcement of the system of aggravated responsibility to the existing procedures

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53 Hutchinson (n 9 above) 202.
of the Security Council under Chapter VII of the UN Charter. This proposal has proved less radical in so far as it reflects the broadening practice of the Security Council under Chapter VII in relation to the invocation of international responsibility for the most serious breaches of international law.

Nevertheless, Riphagen’s proposal also generated significant criticisms. For example, it has been argued that this regime would only be of marginal use since the competence of the Security Council on issues of international peace and security already follows from the UN Charter. It has also been pointed out that the regime of international responsibility is distinct from the powers of the Security Council under Chapter VII of the UN Charter to maintain international peace and security: the Council is a political rather than a judicial body. Its wide enforcement powers, which do not presuppose a breach of international law, underline this basic distinction and would thus make the Security Council ill-suited to enforce an aggravated regime of responsibility.

In light of the problems associated with simply referring back to existing Charter mechanisms, Special Rapporteur Arangio-Ruiz proposed a far more elaborate and ambitious institutional safeguards regime. His scheme was based on a two-phase procedure in which the General Assembly or the Security Council would make a political assessment and the ICJ a decisive legal determination. Any State party to the UN Charter and to a future convention on State responsibility could bring an allegation of a serious breach of a peremptory norm to the attention of the General Assembly or the Security Council. If either of these organs decided (by qualified majority) that a State was guilty of a serious breach, any State could then bring this claim before the ICJ for judicial determination. In the event that the Court found that a serious breach had been or was being committed, States would be authorized to resort to

58 See further MJ Aznar Gómez, Responsabilidad Internacional del Estado y Acción del Consejo de Seguridad de las Naciones Unidas (2000); Gowlland-Debbas (n 55 above) 55; Villalpando (n 1 above) 438–43.
third-party countermeasures. But while this regime may have provided a strong institutional safeguard against abusive uses of third-party countermeasures, the ILC rejected it as unrealistic—far removed from States’ conception of international law as a decentralized system of law.\(^{53}\)

In any case, Riphagen’s and Arangio-Ruiz’s proposals were based on the assumption that the law of State responsibility would be formally recognized in conventional form. On second reading, it became clear that this was unlikely to happen.\(^{64}\) The debate on institutional safeguards therefore lost most of its earlier significance. Hence, no institutional safeguards regime for the most serious breaches was formally adopted by the ILC. Instead, the commentary to Article 40 of the Articles on State Responsibility (ASR) refers back to the mechanisms provided by the UN Charter:

Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases… Moreover… serious breaches… are likely to be addressed by the competent international organizations including the Security Council and the General Assembly.\(^{65}\)

It is notable that the ILC refers back to the traditional role of the Security Council in the maintenance of international peace and security for the enforcement of serious breaches despite the problems associated with this regime as identified above. Apart from the question of the eventual form of the Articles on State Responsibility, the reference back to the Security Council is also to a considerable extent linked to the ILC’s eventual position on third-party countermeasures. After having rejected Special Rapporteur Crawford’s proposal of 2000 to recognize third-party countermeasures, the debate on an institutional safeguards regime naturally lost most of its earlier relevance.\(^{66}\)

As Special Rapporteur Crawford cautioned, however, the deletion of an article legitimizing third-party countermeasures would suggest that only directly injured States could take countermeasures.\(^{67}\) Upon the suggestion of the United Kingdom, a savings clause was therefore agreed as Article 54 ASR which left the question of third-party countermeasures to be determined by the progressive development of international law.\(^{68}\)

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\(^{53}\) For a summary of the debate, see YbILC (1995), vol II/2, 55, para 395.


\(^{65}\) See ILC commentary to Art 40 ASR in its 2001 Report, UN Doc A/56/10, 286, para 9.

\(^{66}\) For the proposed Arts 50A and 50B, adopted by the Drafting Committee as Art 54 in 2000, see UN Doc A/CN.4/L.600, 49–52 and ILC Report (2000), UN Doc A/55/10, 107–08, 139.


\(^{68}\) For the UK’s proposal see UN Doc A/C.6/55/SR.14, para 32. For a different interpretation by France of Art 54 (arguing that its wording allows for third-party countermeasures) see UN Doc A/C.6/56/SR.11, para 72.
The 'agnostic' provision ultimately adopted by the ILC, entitled 'Measures taken by States other than an injured State', explains that:

This Chapter [on countermeasures] 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 obligations breached.\(^\text{69}\)

The 'agnostic' position adopted by the ILC on third-party countermeasures thus brings us back to the main question of our inquiry—that is to say to assess, whether in the words of the Nordic representative on the UN General Assembly’s Sixth Committee, third-party countermeasures represent a form of 'public law enforcement'\(^\text{70}\) which entitle individual States to protect the basic values supporting the constitutional structure of international law. On the assumption that the answer may be in the affirmative, it will be evaluated to what extent, if any, the Security Council acts as a type of public law safeguard within this putative system of public law enforcement for international law.

In attempting to answer this question in this study, the normative considerations described above are helpful in illustrating the inherent tension between the need for a more effective legal order in spite of decentralization, and the risks of abuse relating to the allocation of enforcement authority to individual States, even if limited to the most serious illegalities. While these normative considerations no doubt play an important role in shaping the law, few studies to date have considered the impact of the very substantial amount of international practice on \textit{prima facie} unlawful unilateral coercive measures adopted in defense of a public interest on the development of the law of third-party countermeasures.\(^\text{71}\) It must be stressed, however, that not all instances of \textit{prima facie} unlawful unilateral coercive measures adopted by States in the public interest are relevant to the concept of third-party countermeasures. In fact, there is overwhelming support among commentators and governments for the view that only a serious breach of an \textit{erga omnes} obligation might potentially justify resort to third-party countermeasures.\(^\text{72}\) Consequently,

\(^{69}\) See ILC commentary to Art 54 ASR reproduced in Crawford (n 3 above) 302.

\(^{70}\) Finland (on behalf of the Nordic countries) in UN Doc A/C.6/56/SR.11, para 36; Koskenniemi (n 1 above) 340.

\(^{71}\) For an exception see Tams (n 1 above) 198–251.

international practice on prima facie unlawful unilateral coercive measures taken in the public interest and falling below this threshold is not included in the present study.

Good examples of such practice can be found at both national and international levels where States have contemplated the use of trade sanctions to enforce violations of international environmental law. Examples include section 8(a) of the 1967 Fisherman’s Protective Act passed by the US Congress (the so-called ‘Pelly Amendment’) and multilateral treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or the Montreal Protocol on Substances that Deplete the Ozone Layer, which all authorize the use of prima facie unlawful unilateral trade sanctions to protect the environment. There remains a rich practice of prima facie unlawful unilateral coercive measures adopted by non-directly injured States to enforce serious breaches of erga omnes obligations. This study will therefore limit itself to an assessment of this large volume of international practice in an effort to establish whether present-day international law can be said to recognize a system of public law enforcement for the most serious breaches of international law.

The analysis of State practice in this study is divided into five parts. The following section will make some preliminary observations on some of the complex issues involved in assessing practice relevant to third-party countermeasures; Section III evaluates in chronological order (i) instances where States have adopted prima facie unlawful unilateral coercive measures in defence of a public interest; (ii) instances where States, while not having actually adopted such measures, have made statements expressing such an intention; and (iii) instances where States
have not used third-party countermeasures as a justification for *prima facie* wrongful conduct against another State but instead relied on other concepts. Finally, Sections IV and V assess the State practice examined in this study and offer some concluding observations.

## II. The Distinction between Countermeasures and Other Unilateral Coercive Measures

At the outset, it should be stressed that the evaluation of State practice on third-party countermeasures raises a series of problems. In order to properly evaluate State practice on third-party countermeasures and the relevant *opinio juris* it is necessary to distinguish them from other unilateral coercive measures taken in defence of community interests. In particular, third-party countermeasures need to be distinguished from economic and political sanctions authorized by international organizations (for example under Chapter VII of the UN Charter), bilateral countermeasures, retorsion, economic coercion, treaty denunciation, suspension and termination under Articles 56, 60 and 62 Vienna Convention on the Law of Treaties, collective self-defence and the right to adopt unilateral coercive measures in derogation of certain treaty commitments such as the national security exception in Article XXI GATT. Distinguishing between the various possibilities is not always a straightforward exercise.

A first problem is the distinction between countermeasures and retorsion. While countermeasures violate conventional and/or customary international law rights of the target State, retorsive measures are generally considered not to have this effect. Instead, retorsion is considered to be an unfriendly but nonetheless lawful act.76 This distinction poses two problems relevant to our inquiry. First, in the absence of adequate documentation, it may prove difficult to assess whether the unilateral coercive measure taken by the sanctioning State actually affects rights of the target State and hence constitutes a countermeasure (as opposed to an act of retorsion). Where already problematic issues are compounded by an absence of documentation, any aim of exhaustively identifying all examples of third-party countermeasures becomes virtually impossible.77

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77 Examples include the US grain embargo against the Soviet Union in response to its invasion of Afghanistan in December 1979, below Section III.A.7; the continuing Arab League trade embargo of Israel since 1948 and the multitude of individual sanctions (including a wide range of dubious membership suspensions and other measures imposed by international organizations) imposed on South Africa between 1947–1994. For discussion and further references on Afghanistan see J Crawford, ‘Third Report on State Responsibility’ UN Doc A/CN.4/507/Add.4, para 393; Sicilianos (n 9 above) 158; C Rousseau, ‘Chronique des faits internationaux’ (1980) 84 RGDP 827 at 833–34; on Israel see G Feiler, *From Boycott to Economic Co-operation: The Political Economy of the Arab Boycott of Israel* (1998); GC Hubbauer, JJ Schott and KA Elliott, *Economic sanctions reconsidered: history and current policy* (1985) 180–87; on South Africa see further K Magliveras, *Exclusion from Participation in International Organisations: The Law and Practice behind Member States’
Second, in the absence of a prior judicial determination of the existence of a primary breach, it is often difficult to assess authoritatively whether there has indeed been a violation of international law; let alone a serious violation.\textsuperscript{78} In other words, the problem of auto-interpretation of self-help remedies makes them more difficult to evaluate in legal terms and more prone to abuse. An obvious starting point is to rely on justifying statements of the sanctioning State(s), protests from other States related to the unilateral coercive measure in question and existing institutional action by the United Nations. In this regard, the suggestion made by the ICJ in the \textit{Nicaragua} case not to ‘ascribe to States views which they have not themselves advanced’ provides a useful starting point.\textsuperscript{79}

Unfortunately, the primary evidence in the form of official statements from States is rarely conclusive. While a sanctioning State will often provide a political explanation for taking unilateral coercive measures against another State, it is uncommon for it to conclusively refer to a legal basis for the action. This problem is not unique to analysing State practice in relation to third-party countermeasures. However, official statements referring to unilateral coercive measures taken in the public interest become more difficult to assess on those frequent occasions where the conduct of the target State gives rise either to alternative or converging justifications for unilateral coercive measures under treaty law or general international law. Any study of international practice must therefore assess the possible application of the alternative and converging justifications described above.

\section*{III. A Review of State Practice on Unilateral Coercive Measures in the Public Interest}

\subsection*{A. Adopted unilateral coercive measures in violation of international law}

Since an integral part of the inquiry is related to the Security Council as an institutional or public law safeguard against abuse for third-party countermeasures, it is proposed to start the analysis of State practice in 1945 with the entry into force of the UN Charter. Since then, there have been a large number of instances where States not directly injured by a prior breach of international law have adopted \textit{prima facie} unlawful unilateral coercive measures in defence of a public interest. These measures have


\textsuperscript{78} Compare Crawford (n 77 above) para 116.

\textsuperscript{79} \textit{Nicaragua} case [1986] ICJ Rep 109, para 207.
included trade embargos, breaking off of air links, suspensions of development aid, membership suspensions from international organizations, suspensions of military assistance and suspensions of fishing rights. In most cases, these measures have not complied with States’ treaty obligations. In other cases, States have often frozen foreign States’ assets in violation of general international law. Let us now turn to the following examples of where such conduct has been adopted.

1. United States—North Korea and China (1950)

The first case in point since the establishment of the United Nations is the action of the United States against North Korea and China in response to their invasion of South Korea on 16 December 1950. The illegality of the invasion, including the participation of Chinese armed forces in an ‘act of aggression’, had been confirmed by numerous General Assembly and Security Council resolutions. However, with the Security Council being paralysed by the threat of a Soviet veto, no mandatory resolution authorizing sanctions was adopted. Instead, the General Assembly had recommended the imposition of an arms embargo on North Korea and China. In response to the North Korean and Chinese invasion of South Korea, US President Truman declared all North Korean and Chinese assets within the United States frozen.

These unilateral coercive measures cannot be categorized as retorsion since the freezing of foreign State assets constitutes a prima facie illegal measure requiring justification under general international law. The US freeze order on North Korean assets, which still remains in force, was mainly of symbolic value as its assets in the US were negligible. However, the freeze order directed at China was more significant and was justified by the United States in the following way:

The United States is taking measures today to place under control all Chinese Communist assets within US jurisdiction… This action has been forced upon us by the intervention of Chinese military forces in Korea… If the Chinese Communists choose to withdraw their forces of aggression and act in conformity with United Nations principles, this government will be prepared promptly to consider removing restrictions.

From the above statement it can be inferred that the US action was taken independently of an ineffectively operating Security Council. Moreover, as the statement excludes any explicit reference to a right of collective self-defence, and as South Korea was the directly injured State

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 eighty GA Res 498 (V) (1 February 1951).
 eighty-one See, eg, SC Res 82 (25 June 1950); GA Res 377 (V) (3 November 1950).
 eighty-two GA Res 500 (V) (18 May 1951).
 eighty-four Dept of State Bulletin (25 December 1950), 1004. See also Keesing’s Contemporary Archives [hereinafter Keesing’s] (1951), 11171, 11260.
in this case, the US justification may be interpreted as a third-party countermeasure.\textsuperscript{85}

2. Developing Countries—South Africa (1960–1964)

The next example concerns a variety of unilateral coercive measures taken against South Africa by developing States in the 1960s.\textsuperscript{86} In June 1960, the Second Conference of African Independent States recommended all African States to institute a total trade embargo against South Africa in response to its continuing policy of apartheid.\textsuperscript{87} In 1963, at the first meeting of the newly created OAU,\textsuperscript{88} the proposed African sanctions regime was extended to cover the termination of diplomatic and consular relations, the closure of maritime ports and airports to South African shipping and aircraft and prohibited its aircraft to overfly the territories of African States.\textsuperscript{89} An almost identical call for action was repeated in 1962 by the UN General Assembly in Resolution 1761.\textsuperscript{90} This resolution thus established that South Africa had committed a serious violation of international law and recommended, \textit{inter alia}, UN Member States to impose a total trade embargo.

Following these recommendations, several (mainly) African States imposed flight and port entry bans against South Africa.\textsuperscript{91} In the absence of any rights under general international law or specific treaty commitments,

87 C Rousseau, ‘Chronique des faits internationaux’ (1960) 64 \textit{RGDIP} 824; Tomaševski (n 86 above) 49. These annual conferences were a predecessor to the Organization of African Unity (OAU) and its successor the African Union (AU) founded in 1963 and 1999 respectively.
90 GA Res 1761 (XVII) (6 November 1962), op para 4(d). Although the first GA Res on South Africa (GA Res 265 (III)) was passed as early as 1948, the 1962 resolution was the first that effectively recommended conduct that would otherwise be \textit{prima facie} unlawful in light of GATT law. Nine years later, in response to the ICJ’s determination of South Africa’s continued illegal presence in South West Africa in the \textit{Namib} case, the GA adopted Resolution 2871 (XXVI) which in op para 6(d) yet again called for economic sanctions. For individual State and UN action against South Africa during the 1980s see below III.A.11.
91 Keesing’s (1963–64) 19699. For further references see Dugard (n 89 above) 160 (his n 18).
These unilateral coercive measures can be regarded as acts of retorsion. However, as we will see below, many States (including South Africa) were already parties to GATT and hence the call for a trade embargo in the resolutions expressed at least a willingness to contemplate a *prima facie* violation of international law. In the absence of any relevant bilateral treaties, any such violation would have to be justified either under the exceptions in Articles XIX–XXI GATT or on the basis of general international law. Following the recommendation of the second African conference, Ghana and Malaysia imposed a trade embargo on South Africa in 1960. Over the next four years, seven other States followed the African and UN recommendations and imposed trade embargos. Embargoing States included Indonesia, Kuwait, Nigeria, Pakistan, Sierra Leone, Tanganyika (now Tanzania) and Uganda.

As for possible justifications, the *Nicaragua* case makes clear that, in absence of specific treaty commitments, an embargo does not as such violate international law. In this case, at the time of the embargos, South Africa and the nine embargoing States were parties to GATT. The GATT regime, by virtue of Articles XI and XIII in particular, prohibits the use of qualitative and discriminatory trade restrictions such as embargos. Since the exceptions in Articles XIX–XXI GATT were not invoked by any of the nine embargoing States, the embargo could not be categorized as an act of retorsion based on a treaty right. Instead, it would have to be justified as an extra-conventional measure. While both Ghana and Malaysia conceded that the embargo violated international law, they did not attempt to justify their actions on the basis of general right of entry into ports under general international law, see further L de La Fayette, *Access to Ports in International Law* (1966) 11 *IJMCL* 1; V Love, ‘The Right of Entry into Maritime Ports in International Law’, 14 *San Diego Law Review* (1977) 597.

C Rousseau, ‘Chronique des faits internationaux’ (1960) 64 *RGDIP* 804–06.

Tanganyika imposed its trade embargo in 1963 at a time when it had gained independence from the United Kingdom and was no longer a trust territory administered by the United Nations.

*Keessing’s* (1963–64) 19757 (Kuwait); *Keessing’s* (1963–64) 19757 (Indonesia); *Keessing’s* (1961–62) 18027 (Nigeria); *Keessing’s* (1964) 20421 (Pakistan); *Keessing’s* (1961–62) 18186 (Sierra Leone); *Keessing’s* (1963–64) 19699 (Republic of Tanganyika) and *Keessing’s* (1963–64) 19699 (Uganda). These examples are limited to States that *prima facie* violated international law by taking unilateral coercive measures against South Africa. For examples of retorsive acts by a large number of other States see, eg Tomasevski (n 86 above) 51, 53 (tables 2.2–2.3) and Pocarelli (n 85 above) 39–40.


This is in contrast to Ghana’s 1961 boycott of Portuguese goods in response to the situation in Angola where it did invoke the security exception in Article XXI GATT. See GATT Doc SR 19/12, 196.
international law. On the other hand, they did not at any time declare that their actions were illegal outright. This leaves intact the alternative categorization of the embargo as a third-party countermeasure in response to a serious breach of an *erga omnes* obligation.

It should be noted that, apart from recommending an arms embargo in 1963, the Security Council did not discuss adopting sanctions against South Africa during the period in question. But if the Council did not impose mandatory sanctions at this time there was, as we have seen, plenty of other institutional activity (regional as well as universal) recommending the adoption of unilateral coercive measures against South Africa. Of particular interest to the debate on institutional safeguards against abuse for third-party countermeasures is the activity of the General Assembly during this period.

It is worth pointing out that, although most of the nine States only imposed the trade embargo after the adoption of General Assembly Resolution 1761, none of them took the action in explicit reliance on the Resolution. Moreover, even if these States had relied on Resolution 1761, that could only have had a justifying legal effect to the extent that it reflected the current state of general international law.

Finally, the fact that no State protested against the use of third-party countermeasures against South Africa suggests that no State in the 1960’s considered the Security Council to be the exclusive bearer of a right to respond to serious breaches.


In response to a Greek military *coup* on 21 April 1967 in which political parties were dissolved and thousands of dissidents were sent into camps, several Member States of the Council of Europe reacted. In particular, Denmark, Norway, Sweden and the Netherlands lodged complaints before the European Commission on Human Rights asking it to declare Greece responsible for fundamental human rights violations. In its 1969 report in the Greek case, the Commission held Greece responsible for systematically violating political freedoms, as well as for committing acts of torture and other degrading treatment.

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100. C Rousseau, ‘Chronique des faits internationaux’ (1960) 64 *RGDIP* 805–06.
103. For the view that this resolution constitutes evidence of *opinio juris* on third-party countermeasures see statement by J Dugard, *YbILC* (2001) vol I, 44–45 (para 17). Compare Frowein (n 18 above) at 383, 433 who notes that the UNGA Resolutions on South Africa ‘may create a presumption that these boycott measures are lawful under international law’; see also ILC commentary to Art 30 in *YbILC* (1979) vol II/2 119, para 14.
On 16 April 1970, when Greece persisted in violating its fundamental human rights obligations, the Member States of the EC decided to suspend, in part, its 1963 Association Agreement. In particular, the EC Member States suspended financial assistance owed to Greece under Protocol 19 of the Association Agreement. Under these Agreements, the obligation to provide financial assistance was not qualified by an operative so-called human rights clause. Instead, the preamble to the Association Agreement made reference to the ‘ideals underlying the Treaty establishing the European Economic Community’. As Development Commissioner Cheysson would later recognize, this was an indirect reference to human rights.

As for possible justifications, while it is certainly possible to argue that Greece’s human rights violations may have constituted a material breach under Article 60 VCLT and customary international law and hence given the EC a right to suspend the Agreement, it is doubtful whether the indirect reference to human rights in the preamble can be said to have constituted ‘a provision essential to the accomplishment of the object and purpose of the treaty’. In the absence of a Greek material breach of the Agreement, the question arises as to whether the EC could have justified its conduct by unilaterally denouncing or withdrawing from the Agreement. Since there was no denunciation clause in the Agreement and the VCLT had not yet entered into force, any justification for unilateral denunciation would have to be assessed on the basis of general international law. Article 56 VCLT on unilateral denunciation is, however, to a large extent declaratory of customary law but its complex wording is a reflection of the fact that the position in customary law is unclear. While most commentators agree that the main rule under customary law is that no unilateral denunciation is possible the major source of confusion stems from the actual meaning of the exceptions to the general prohibition of denunciation: the intention of the parties, the (in)definite nature of the treaty in question and the period of reasonable notice.

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108 For the text of the Agreement see n 106 above.
The implicit intention of the Association Agreement was arguably that it was only to apply for a specific purpose and hence for a specific amount of time (ie until Greece had formally become a member of the EC). It seems that neither the intention of the parties nor the specific nature of the Agreement allowed the EC to rely on the alternative justification of unilateral denunciation. \textsuperscript{112} In any event, even if the Agreement were subject to unilateral denunciation, no reasonable notice was given by the EC; let alone the \textsuperscript{112} months required by Article 56 VCLT.

In the absence of an operative human rights clause or a denunciation clause, the suspension by the EC of its financial assistance to Greece therefore violated the Association Agreement. As such, and in the absence of other alternative justifications, it could be categorized as a third-party countermeasure.\textsuperscript{113} Moreover, during the time of the EC’s third-party countermeasure, the serious human rights situation in Greece was not on the agenda of the Security Council. It may also be noted that no State protested against the action taken by the EC as violating the exclusive or primary authority of the Security Council under the UN Charter.


On 25 January 1971 Idi Amin seized power in Uganda through a military coup d’état. During his military rule, which came to an end by Tanzania’s military invasion in April 1979, Uganda was infamous for its gross and systematic violations of fundamental human rights. During General Amin’s reign, around 75,000 (mostly British) Asians were expelled and it is estimated that around 300,000 people lost their lives.\textsuperscript{114}

During the eight-year period of his reign, the organized international community failed to take any concrete action against Uganda.\textsuperscript{115} Instead, towards the end of General Amin’s rule, the United States and the EC took unilateral coercive measures designed to put an end to the appalling human rights situation in Uganda.\textsuperscript{116}


\textsuperscript{112} Compare Aust (n 111 above) 235.
\textsuperscript{113} Compare Tams (n 1 above) 91; Dzida (n 10 above) 252.
\textsuperscript{114} Tomaševski (n 86 above) 100–06. See further JJ Jorgensen, \textit{Uganda: A Modern History} (1981), 274, 296–300 and 300–15 (on the dire human rights situation under Idi Amin’s rule).
\textsuperscript{115} For an unsuccessful effort by the Nordic States to adopt a UNGA Resolution condemning Uganda, see United States–Uganda Relations: \textit{Hearings Before the Subcommittee on Africa, International Organizations and International Economic Policy and Trade of the House Committee on Foreign Relations}, 95th Cong., 2nd session (1978), app 3, 61–65 and 104–08 [hereinafter Uganda Hearings]. See also Tomaševski (n 86 above) 101–02 for further references.
\textsuperscript{116} Keessing’s (1979) 2969. The US action against Uganda was in line with the Carter administration’s more proactive stance against serious human rights violations, see further, eg ‘Human Rights: A New Policy by a New Administration’ (1977) \textit{71 ASIL Proc} 68; O Schachter, ‘Les aspects juridiques de la politique américaine en matière des droits de l’homme’ (1977) \textit{23 AFDI} 53; SB Cohen,
On 10 October 1978 US President Carter signed the Uganda Embargo Act into law, imposing a trade embargo on Uganda.117 §5(c) and (d) of the Act imposed a total trade embargo on Uganda, albeit with a humanitarian exception for US agricultural products. According to §5(a) and (b) of the Act, the following considerations were cited in support of the unilateral embargo:

[T]he government of Uganda under the regime of General Idi Amin has committed genocide against Ugandans...[t]he United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide.118

In congressional hearings before a sub-committee of the Committee on Foreign Relations it was acknowledged by US administration officials that the embargo violated US obligations owed to Uganda under GATT; in particular Articles XI and XIII respectively prohibiting quantitative restrictions and the principles of non-discriminatory trade.119 At the same time, it was recognized by the United States that, unlike its previous embargos that had either been justified on the basis of the national security exception in Article XXI GATT120 or adopted pursuant to a Security Council resolution, the Ugandan embargo could not be justified on such a basis.121


117 Uganda Embargo Act, 22 USC s. 2151 (1978). In the previous year the United States had terminated all bilateral development assistance to Uganda. For this and all other US unilateral coercive measures see Uganda Hearings (n 115 above) 59–60 (statement by WC Harrop). On measures adopted by other States (mostly relating to termination of bilateral development assistance) see Tomasevski (n 86 above) 103–05; Hufbauer et al. (n 85 above), 455.

118 Uganda Embargo Act (n 117 above).

119 Uganda Hearings (n 115 above) at 61 and 64 (statements by WC Harrop and RH Meyer). In October 1978 both the United States (1 January 1948) and Uganda (23 October 1962) were members of GATT; see <http://www.wto.org/English/trademem_e.htm>.


This meant that the Embargo Act could only be justified on the basis of general international law, ie as a third-party countermeasure. The Embargo Act is silent on the relationship between the United States and the Security Council in enforcing serious breaches of erga omnes obligations under the UN Charter. It could thus be inferred that the view of the United States was that the actual implementation of the Act was justifiable as a third-party countermeasure without any need for Security Council institutional safeguards.

The position of the United States is further supported by the absence of any diplomatic protest by States, other than the target State, during the seven months in which the Embargo Act was in force. In the absence of any protest or institutional action by the Security Council during this period it may be argued that the international community rejected the need for an institutional safeguard by, albeit tacitly, supporting the legality of individual third-party countermeasures.

A year earlier, the Member States of the EC had also adopted unilateral coercive measures in response to the serious human rights situation in Uganda. As a first step, the Council of Ministers had criticized Uganda’s systematic violations of human rights. On the basis of this determination, EC Member States decided to review their development assistance owed to Uganda under the Lomé I Convention.

In June 1977, upon the insistence of the United Kingdom, the European Council adopted the ‘Uganda Guidelines’ which declared that development assistance under the Convention should not contribute to the serious and continuing Ugandan human rights violations.

122 The ILC commentary to Article 54 cites the application of the Uganda Embargo Act as an example of a third-party countermeasure, see the ILC commentary reproduced in J Crawford (n 3 above) 302–03. Similarly Tam (n 1 above) at 210; Sicilianos (n 9 above) 156; Zoller (n 73 above) 101; C Rucz, ‘Les mesures unilatérales de protection des droits de l’homme devant l’institut de droit international’ (1992) 38 AFDI 604.

123 Compare Zoller (n 73 above) 102–04.


125 Tomaševski (n 86 above) 104.


development assistance on the observance of human rights obligations. A compromise was therefore reached by the Council of Ministers to redirect rather than formally suspend development assistance. However, a result of this redirection was that only five percent of the development assistance owed to Uganda under the Lomé I Convention was paid out by the EC. The substantial reduction of aid arguably constituted a de facto suspension of aid under the Convention.

As for possible justifications, Article 40 of the Lomé I Convention stated that the purpose of development assistance was to ‘contribute essentially to the economic and social development of the [ACP] States…[and] consist in particular in the greater well-being of the population’. However, a statement by Commissioner Cheysson in March 1977 made clear that no lawful action under the Convention could be taken against Uganda; let alone a de facto suspension of development assistance:

The Convention does not provide any measures which we could take at the present time against Uganda: we are linked with that country, as with the other ACP countries, by an international agreement which has been duly ratified by all the contracting parties [emphasis added].

From Cheysson’s statement we can infer that there was no treaty-based right to justify any action against Uganda based on the EC’s human rights concerns. This conclusion is underlined by the Commission’s decision not to invoke the treaty doctrine of fundamental change of circumstances (Article 62 VCLT). Curiously, the wording of the statement even appears to exclude the possibility for the EC to denounce the Convention upon six months notice in accordance with Article 92. More significantly, for present purposes, the wording of the statement suggests that it was limited to purely conventional responses: it arguably did not exclude resort to extra-conventional measures. In other words, by Cheysson’s own admission, a de facto suspension of aid would violate the treaty.

In the absence of any treaty-based justifications, the EC action could have been based on unilateral humanitarian motives. However, the EC’s actions in 1982 have been described as “uncertain and ad hoc” and “insufficient to guarantee the observance of human rights” by the Council of Ministers. Moreover, the EC’s actions were not consistent with the principles of human rights protection as set out in the Lomé Convention. Therefore, the EC’s actions in 1982 cannot be considered as a de facto suspension of the Convention.

This case study shows that the EC’s actions in 1982 were not justified under the terms of the Lomé Convention. The EC’s actions were not consistent with the principles of human rights protection as set out in the Lomé Convention. Therefore, the EC’s actions in 1982 cannot be considered as a de facto suspension of the Convention.


129 Lomé I Convention (n 126 above).


132 Similarly Kamminga (n 131 above) 50–51 who notes that the failure to mention the possibility of denunciation in Article 92 suggests that the EC was unwilling for political reasons to contemplate the use of such a strong sanction.
arguably only be justified as a third-party countermeasure.\textsuperscript{133} As in the case of the Uganda Embargo Act, States voiced no diplomatic protests against any violation of the institutional safeguards in the UN Charter or the possibility of legitimizing individual third-party countermeasures.

5. EC Member States and France—Central African Republic (1979)

On 1 January 1966 Colonel Bokassa assumed power in a military coup which deposed then President Dacko. Soon thereafter Bokassa abolished the 1959 constitution and in December 1976 crowned himself emperor of a new monarchy renamed as the Central African Empire.\textsuperscript{134} His dictatorial reign, which was ended by French military intervention in September 1979,\textsuperscript{135} was marred by serious human rights abuses such as the widespread use of torture. Despite these serious human rights abuses, France as the former colonial power initially maintained a working relationship with Bokassa providing the regime with financial and military support. The French attitude towards the Bokassa regime strongly influenced the EC’s relationship which had also remained intact initially.

The attitude of EC Member States and France in particular changed in April 1979 as a result of the involvement of Bokassa’s personal guard in a massacre that killed at least 85 schoolchildren who were demonstrating in Bangui against the use of school uniforms.\textsuperscript{136} In response to the massacre, EC Member States decided to freeze the further allocation of development assistance owed to the country under the Lomé I Convention.\textsuperscript{137} Admittedly, while EC Member States did not formally suspend the Convention, as in the case above of Uganda, the action constituted a \textit{de facto} suspension of development assistance under the Convention. Moreover, as we have noted in the Ugandan case above, the Convention itself did not explicitly condition the provision of development assistance on the observance of human rights obligations.

As for possible justifications, the 1978 debates in the European Commission on the possible suspension of aid to Uganda and the Central African Empire under the Lomé I Convention gives at least some guidance. During these debates, France was influential in getting the Commission to arrive at the conclusion that the already serious human rights violations committed in the Central African Empire did not constitute a fundamental change of circumstances under customary international law sufficient to

\textsuperscript{133} Compare Tams (n 1 above) 210–11; Oestreich (n 128 above) 442–43. On third-party countermeasures as a basis for the suspension of the Lomé Convention(s), see further King (n 127 above) 91–92.

\textsuperscript{134} C Rousseau, ‘Chronique des faits internationaux’ (1979) 83 \textit{RGDIP} 361–62.

\textsuperscript{135} On ‘Operation Barracuda’, see C Rousseau, ‘Chronique des faits internationaux’ (1979) 83 \textit{RGDIP} 364.

\textsuperscript{136} C Rousseau, ‘Chronique des faits internationaux’ (1979) 83 \textit{RGDIP} 361–64; \textit{Keesing’s} (1979) 29750.

\textsuperscript{137} Oestreich (n 128 above) 316; Bartels (n 128 above) at 12.
justify suspension of the Lomé I Convention.\textsuperscript{138} One year later, when EC Member States finally decided to take action against the Central African Empire, the legal analysis could not have changed significantly. In other words, as the Bokassa regime was merely continuing to commit serious human rights violations, the 1978 legal position that there was no basis in treaty law for the action arguably remained valid for the 1979 decision to freeze development assistance. In the absence of any EC statement on the legal basis for the action, or any denunciation of the Convention in accordance with Article 92, the freeze arguably constituted a violation of the Lomé I Convention. Since there are no other alternative legal justifications for the freezing of development assistance, it appears that the sole remaining legal basis for the action was third-party countermeasures.

In August 1979 France decided to suspend the provision of bilateral economic aid to the country.\textsuperscript{139} In the absence of any treaty commitments, this could be regarded as a measure of retribution. More significantly, in May 1979, France decided to suspend the application of a 1960 bilateral Agreement Concerning Technical Military Assistance.\textsuperscript{140} While no military aid had been given to the Central African Empire’s armed forces since 1976, this treaty was still formally in force when France suspended its application.\textsuperscript{141} This treaty did not condition military assistance on the observance of human rights or include a denunciation clause. Hence, its suspension could not be justified under the terms of the treaty but required a justification under general international law.

Apart from referring to the Central African Empire’s serious human rights violations, the legal basis upon which France justified its action remains unclear. However, from its position regarding the Lomé I Convention above, it can be assumed that France discarded the application of the customary law doctrine of fundamental change of circumstances as a possible justification for its conduct. As for the alternative justification of unilateral denunciation the situation is more complex. As developed above in the example of the EC-Greece Association Agreement, there is a strong presumption against the possibility of unilateral denunciation in the absence of a treaty-specific right. Nevertheless, several commentators have singled out treaties on military co-operation and treaties not otherwise intended to be of a permanent nature such as commercial, cultural or technical treaties as examples of exceptions to the general prohibition on unilateral denunciation.\textsuperscript{142} While a treaty on military assistance could thus conceivably be denounced, reasonable notice

\begin{footnotesize}
\textsuperscript{138} OJ 1978 C 199/27; Fierro (n 130 above) at 46; Bartels (n 128 above) 11–12. In the \textit{Fisheries Jurisdiction} case [1973] ICJ Rep 3, para 36 the Court held that Article 62 VCLT was largely declaratory of customary international law on the subject.

\textsuperscript{139} C Rousseau, ‘Chronique des faits internationaux’ (1980) 84 \textit{RGDIP} 363–64.

\textsuperscript{140} 821 UNTS 266 (entry into force 27 January 1961).

\textsuperscript{141} \textit{Kesing’s (1979)} 29750.

\textsuperscript{142} See, eg H Waldock, ‘Second Report on the Law of Treaty’, UN Doc A/CN.4/156, para 63 (his Draft Article 8.3(ii) referring to a treaty of military co-operation). For further references see Widdows (n 110 above) 85–88, 106–08; Aust (n 111 above) 234; Bastid (n 111 above) 202.
\end{footnotesize}
would still have to be given in order to constitute a lawful denunciation. While it is not clear if France gave the Bokassa regime any prior notice of its intentions, and bearing in mind the requirement of 12 months notice under Article 56.2 VCLT, it is doubtful whether the single month that passed between the Bangui massacre and the suspension would have been regarded as reasonable notice under general international law.\footnote{In the Nicaragua case (Jurisdiction) [1984] ICJ Rep 392 at 420 the ICJ noted, by analogy with the law of treaties, that the principle of good faith required that reasonable notice be given for unilateral denunciation: the US optional clause declaration could thus not be denounced upon merely three days notice. See also the ICJ’s Advisory Opinion in the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt [1980] ICJ Rep 73 at 95–96.}

In the absence of any indication that France considered the suspension as illegal outright or of any other viable treaty-based justification it is submitted that France can be said to have relied, albeit implicitly, on the doctrine of third-party countermeasures.\footnote{Compare (albeit without any identification of the 1960 treaty) G Arangio-Ruiz, ‘Fourth Report on State Responsibility’, YbILC (1992) vol II/1, 38 (his n 267); Focarelli (n 85 above) 121–122; Sicilianos, (n 9 above), 262; F Lattanzi, Garanzie dei diritto dell’uomo ne diritto internazionale (1983) 322; R Provost, ‘Reciprocity in Human Rights and Humanitarian Law’ (1994) 65 BYIL 432.} Finally, during the period in question, the UN took no action and no State voiced any protest against the EC or the French measures.

6. EC and ECOWAS Member States—Liberia (1980)

On 12 April 1980 a bloody military coup led by army sergeant Samuel Doe was staged in Liberia. In its aftermath, political parties were banned and 13 senior officials of the ousted government were publicly executed on Doe’s orders.\footnote{Keesing’s (1980) 30405–07; C Rousseau, ‘Chronique des faits internationaux’ (1980) 84 RGDIP 1144–45.} The then 16 Member States of the Economic Community of West African States (ECOWAS) and the 10 Member States of the EC responded to the situation by adopting unilateral coercive measures against Liberia.

The first response came two weeks after the coup when the Member States of ECOWAS decided not to allow President Doe’s participation in the fifth annual conference of the organization.\footnote{C Rousseau, ‘Chronique des faits internationaux’ (1980) 84 RGDIP 1144–45.} This act arguably amounted to a \textit{de facto} suspension of Liberia from the organization. On the face of it, the suspension could be categorized as an act of retorsion, an institutional sanction or a (third-party) countermeasure. In order to be characterized as a (third-party) countermeasure, the suspension must be considered to have affected rights belonging to Liberia which in 1980 was a member of the organization.

In this respect, it can be observed that ECOWAS was founded by treaty as an international organization in 1975 with corresponding rights and obligations incumbent upon Member States.\footnote{1910 UNTS 17 (signed at Lagos 28 May 1975) (see Article 60 on ECOWAS’ status as an international organization). In July 1993, the ECOWAS Treaty was revised to include \textit{inter alia}
membership right is the right to vote. The right to vote arguably includes a derivative right to participate in meetings of the organization.\textsuperscript{148} As for possible justifications, it can be noted that the constitutive ECOWAS Treaty does not include any rule on suspension of membership. The suspension thus \textit{prima facie} violated the ECOWAS Treaty and could not be categorized either as an institutional sanction or as retraction. As the act of suspension was attributable to the sixteen Member States, they were severally responsible for their unlawful conduct under general international law. We could therefore categorize the suspension as a third-party countermeasure.\textsuperscript{149}

As for the EC, in the light of the human rights situation in Liberia, the European Commission announced that development assistance under the Lomé I Convention would be suspended.\textsuperscript{150} As in the cases of Uganda and the Central African Empire, this measure could not be supported on the basis of the treaty; nor was the latter denounced in accordance with Article 92. Hence, the suspension required justification based on general international law.\textsuperscript{151} Finally, it can be noted that, while ECOWAS and EC Member States took these actions, the situation in Liberia was not on the agenda of the Security Council.

7. \textit{Western Countries—Soviet Union (1980)}

In December 1979 armed forces of the Soviet Union invaded Afghanistan. At the time of the invasion the Afghani communist regime, headed by Prime Minister Amin, was effectively in the throes of a civil war against anti-communist rebels.\textsuperscript{152} In debates before the Security Council, the Soviet Union claimed that the forcible intervention was justified on the basis of Article 4 of a 1978 bilateral Treaty of Friendship, Good-neighbourliness and Co-operation following a request from the Afghani regime to repel foreign-armed intervention by China, the United States and other Western governments.\textsuperscript{153} However, the available facts did not bear out the Soviet justification based on genuine prior request and forcible foreign intervention.\textsuperscript{154} In response, while any action by the

\textsuperscript{148} See, eg Art 5 of the 1975 ECOWAS Treaty (n 147 above).
\textsuperscript{149} Compare Sands and Klein (n 126 above) 546–47.
\textsuperscript{151} Compare Oestreich (n 128 above) 447–49; Tams (n 1 above) 211.
\textsuperscript{153} UNyB (1980) 296 at 298–99. Before the General Assembly, however, the Soviet Union instead invoked a right to collective self-defence (ibid). For the treaty see 1145 UNTS 332 (signed at Moscow 5 December 1978) reproduced in (1980) 19 ILM 1; and for a brief summary, \textit{Keesing’s} (1978) 29459.
\textsuperscript{154} The request for forcible intervention had in fact come from the new Soviet installed Afghani Government headed by President Karmal (see UNyB (1980) 296).
Security Council was blocked by Soviet veto,\textsuperscript{155} the General Assembly and the EC Council of Ministers strongly condemned the Soviet invasion as a violation of fundamental principles of international law.\textsuperscript{156} In other words, the international community agreed that the Soviet Union had committed a serious violation of international law but the General Assembly and EC Council of Ministers stopped short of recommending the use of sanctions.

In response to this serious violation of international law, and in the absence of any institutional action, several Western States adopted a variety of retorsive acts and third-party countermeasures against the Soviet Union. Unsurprisingly, the most comprehensive unilateral coercive measures were imposed by the United States.\textsuperscript{157} While most of these acts, such as the freeze on exports of high-technology goods, or the embargo on phosphates used for fertilisers and the 1980 Moscow Olympics’ embargo, were undoubtedly measures of retorsion, other measures were more controversial. The best example is the total grain embargo. In fulfillment of a 1975 US-Soviet Grain Agreement, the US exported eight million metric tonnes of wheat and corn to the Soviet Union. Sicilianos has questioned the legality of the grain embargo that went beyond the 1975 Agreement as contrary to US unilateral commitments towards the Soviet Union.\textsuperscript{158} However, on the basis of the available evidence, the more prudent view seems to be that, in the absence of demonstrable US commitments, the grain export embargo should be categorized as a measure of retorsion.\textsuperscript{159}

\textsuperscript{155} SC Res 462 (9 January 1980) thus called for an emergency special session of the UN General Assembly. For a brief summary see further C Rousseau, ‘Chronique des faits internationaux’ (1980) 84 RGDIP 84-41.


\textsuperscript{159} Similarly Tams (n 1 above) 229 (his n 156). Sicilianos (n 39 above) 158 (his n 309), relying on a single doctrinal source, has claimed that the grain embargo was contrary to a unilateral commitment assumed by the United States to supply 21.8 million metric tonnes of grain to the Soviet Union thus categorizing it as a third-party countermeasure. While such an assertion of course remains entirely possible, it has not proved possible to verify this claim in the absence of adequate documentation and we have therefore categorized the grain export embargo as a measure of retorsion. While expressing similar concerns, several commentators have nonetheless relied on Sicilianos’ categorization of the additional cereal embargo as a third-party countermeasure, see further J Crawford, ‘Third Report on State Responsibility’, UN Doc A/CN.4/507/Add.4 para 393 (his n 784); Focarelli (n 8 above) at 49 (his n 49); Frowein (n 18 above) 417; J Petman, ‘Resort to Economic Sanctions by not Directly Affected States’ in L Picchio Forlati and L-A Sicilianos (eds), Economic Sanctions in International Law (2004) 363.
By contrast, while the US relied exclusively on measures of retorsion, some unilateral coercive measures imposed by Canada and New Zealand in response to the Soviet invasion of Afghanistan arguably went further than mere acts of retorsion. On 11 January 1980 Canada took action by inter alia suspending Soviet fishing rights in its EEZ. These fishing rights had been granted to the Soviet Union under a 1976 Agreement on their Mutual Fisheries’ Relations. The complete Canadian suspension of the Agreement was in prima facie violation of Article 2 which granted the Soviet Union general fishing rights in Canada’s EEZ subject to the specific allocation of possible surpluses of total allowable catches. Additionally, the almost immediate suspension of the Agreement, effective less than three weeks after the Soviet invasion of Afghanistan, prima facie contravened the denunciation clause in Article 7 which stipulated that any such action was impermissible for the first six years (and thereafter only permissible upon at least 12 months notice).

An identical action was adopted by New Zealand. On 23 February 1980 it suspended a 1978 Agreement on Fisheries with the Soviet Union. As in the case of Canada, the complete suspension of the Agreement was in prima facie violation of Article 2 under which the Soviet Union enjoyed general fishing rights in New Zealand’s EEZ. Additionally, the suspension, effective less than two months after the Soviet invasion, was in prima facie violation of the denunciation clause in Article 12 which required at least 12 months prior notice. Against this background, and in the absence of other available alternative treaty-based justifications, we may categorize Canada’s and New Zealand’s actions as third-party countermeasures. Finally, as for the EC, while the Council of Ministers had condemned the Soviet invasion as a serious breach of international law, it was reluctant for mainly economic reasons to impose any unilateral coercive measures. Instead, the European Parliament urged the Council to ‘immediately reconsider all economic relations’ with the Soviet Union. The reference in the resolution to ‘all economic relations’ suggests that a right to resort to third-party countermeasures was implied.

162 1132 UNTS 139 (signed and entered into force at Moscow on 19 May 1976).
164 1151 UNTS 277 (signed and entered into force at Wellington on 4 April 1978); C Rousseau, ‘Chronique des faits internationaux’ (1980) 84 RGIDIP 837.
165 Compare Focarelli (n 85 above) 112; Sicilianos (n 9 above) 158 (although neither of them invoke the cited treaties nn 162 and 164 above).
168 Similarly Sicilianos (n 9 above) 159.
Admittedly, the third-party countermeasures imposed by Canada and New Zealand against the Soviet Union were based on bilateral treaties; thereby rendering any legal evaluation by other States more difficult. Nonetheless, it might still be useful to note that no diplomatic protests, either by individual States or in the context of the Security Council, were recorded against the use of these third-party countermeasures.

8. Western Countries—Poland and the Soviet Union (1981)

On 13 December 1981 the Polish government under General Jaruzelski imposed martial law in an effort to prevent the trade union Solidarnosc from gaining popularity and attendant political power in the country and to minimize the risk of direct Soviet interference in its internal affairs. During the year that martial law was officially in force, it is estimated that around 12,500 critics of the regime were arrested and put into internment camps without trial.¹⁶⁹

Faced with the prospect of a Soviet military intervention in Poland, President Reagan expressed the view that ‘[t]he Soviet Union, through its threats and pressures, deserves a major share of blame for the developments in Poland’.¹⁷⁰ In the absence of any immediate improvement of the situation, the United States responded by imposing a range of different economic measures of retorsion on Poland and the Soviet Union.¹⁷¹

In addition, on 23 December 1981, President Reagan announced that he was suspending a 1976 bilateral Agreement concerning Fisheries off the Coasts of the United States.¹⁷² The complete US suspension of the Agreement was in prima facie violation of its Article 3 which granted Poland general fishing rights in US waters subject to the specific allocation of possible surpluses of total allowable catches. The immediate suspension also violated the denunciation clause in Article 16 of the Agreement which required at least 12 months prior notice. Hence, as in the cases above of Canada and New Zealand, we may categorize the suspension of the fishing treaty as a third-party countermeasure.

In a better known example the United States also suspended, with immediate effect, a 1972 bilateral treaty on civil aviation under which the Polish national airline LOT enjoyed landing rights.¹⁷³ Under Article XV of the Agreement it could only be terminated by giving at least 12 months

¹⁷¹ For a study of all adopted US unilateral measures see Nash (n 170 above) at 379–82; C Rousseau, ‘Chronique des faits internationaux’ (1982) 86 RGDIP 606, 608–09; Moyer and Mabry (n 157 above) 64–75.
notice. In communications with the US Civil Aeronautics Board (CAB) LOT representatives argued that the US action violated the denunciation clause in Article XV of the Agreement. In its report it was made clear by the CAB that in order to justify its decision the US Government did not rely on a treaty-specific right of immediate suspension. Instead, the United States appeared to justify the suspension as a third-party countermeasure by noting that:

[A]s a response to exceedingly serious world events…there resides in the…US Government ample authority to suspend application of an [aviation agreement]…whether or not such suspension is provided for under the specific terms of the Agreement.  

In identical fashion, the United States proceeded to an immediate suspension of its 1966 bilateral civil aviation treaty with the Soviet Union under which its national air carrier Aeroflot enjoyed landing rights. Since Article XVII of the Agreement required at least 6 months notice the US suspension could not be justified under the terms of the treaty. On the basis of its statement in relation to its immediate suspension of LOT landing rights, it could be argued that the United States justified its action as a third-party countermeasure.

The response of the Member States of the EC was more hesitant. EC Foreign Ministers initially responded by denouncing Poland’s serious human rights violations, calling for an immediate suspension of the martial law and cautioning the Soviet Union against any interference in internal Polish affairs. However, EC Member States were initially opposed to imposing unilateral coercive measures. Eventually, the EC expressed an intention to consider withholding economic assistance and imposed measures of retorsion against Poland and the Soviet Union.

More significantly, while no European State acted against Aeroflot, six European countries suspended LOT landing rights under their respective bilateral civil aviation treaties with Poland. At least in the case of Switzerland the suspension contravened the denunciation clause in the treaty and could be regarded as a third-party countermeasure. All these unilateral coercive measures were taken without any diplomatic protests from other States and in the absence of any institutional action by the Security Council or the General Assembly.

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174 The relevant part of the CAB report (93 CAB Reports 479, 1981) is reproduced in Nash (n 170 above) at 381.
175 See Nash (n 170 above) 382. The US-USSR Air Transport Agreement (signed at Washington on 4 November 1966) is reproduced in 6 ILM (1967) 82. For the amendment to the Agreement (signed at Moscow 6 May 1968) see (1968) 7 ILM 571.
176 EC Bull 1981, No 12, para 1.4.2.
177 ibid. See also EC Bull 1982 No 1–2, paras 2.2.38 and 2.2.44. For a survey and evaluation of the unilateral coercive measures imposed on Poland and the Soviet Union see Moyer and Mabry (n 157 above) at 78–86. For further references on the EC action against the Soviet Union see Sicilianos (n 9 above) 162 (his n 331); Focarelli (n 85 above) 52 (his n 53).
179 Amtliche Sammlung (Switzerland), 1977, 1659.

On 2 April 1982 Argentina invaded the Falkland/Malvinas islands. The following day, and acting under Chapter VII of the UN Charter, the Argentinean action was condemned by the Security Council. Referring to the Argentinean conduct as an invasion, the Council passed a resolution determining that there had been a breach of the peace and calling for the withdrawal of its forces from the islands. The Council did not impose any mandatory sanctions on Argentina in order to ensure a more effective implementation of the resolution. Immediately after the adoption of Security Council Resolution 502, the United Kingdom invoked its inherent right of self-defense under Article 51 of the UN Charter and commenced military operations against Argentina in the South Atlantic.

In the absence of any effective implementation of Resolution 502 or any mandated sanctions by the Security Council, several Western countries imposed unilateral coercive measures against Argentina. Most of these unilateral coercive measures were retorsions and did not as such affect any international obligations owed to Argentina. However, on 16 April 1982, at the express request of the United Kingdom and in prima facie violation of obligations owed to Argentina under GATT, EC Member States imposed a total import embargo.

The total import embargo, apart from a prima facie violation of GATT obligations, effectively constituted an illegal suspension of rights enjoyed by Argentina under two sectoral agreements with the EC on trade in textiles and lamb and mutton. For these agreements, the security exception in Article XXI GATT did not apply. Canada and Australia joined in the EC action and imposed an identical import embargo. In response to a formal British request, New Zealand went even further and imposed a

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180 The invasion followed a decades long request by the international community for the parties to negotiate a peaceful settlement to the dispute, see further, eg GA Res 2065 (XX) (16 December 1965).


182 See generally UNYB (1982), 1320–47.


185 Suspension under the textiles and lamb and mutton agreements required three (Art 16) and 12 months notice (Clause 14) respectively. For the treaties see OJ 1979, L/298/2 (26 November 1979: textiles) and OJ 1986, L/275/14 (14 October 1980: lamb and mutton). For an assessment of the possible application of Art XXI GATT see P-J Kuyper, ‘Community Sanctions against Argentina: Lawfulness under Community and International Law’ in D O’Keefe and HG Schermers (eds), Essays in European Law and Integration (1982) 141 at 154; and ILC commentary reproduced in Crawford (n 3 above) 303.
total import and export embargo and suspended its bilateral civil aviation agreement with Argentina. Similarly, the latter measure was also adopted by Germany.\textsuperscript{186} The total import embargo imposed by the EC, Australia and Canada was widely discussed in three different international fora. One such forum was the Organization of American States (OAS). At a meeting of OAS Foreign Ministers a Declaration was adopted denouncing the import embargo as:

not covered by resolution 502 of the United Nations Security Council and... incompatible with the [C]harter of the United Nations... and the General Agreement on Tariffs and Trade.\textsuperscript{187}

The OAS Resolution notes that the Security Council has exclusive authority under the UN Charter to impose sanctions for serious breaches; unilateral action is prohibited.\textsuperscript{188} In any case, it should be pointed out that the OAS Resolution fully accepted Argentinean sovereignty over the disputed islands\textsuperscript{189}; however, this only acts to reinforce the OAS view of Security Council exclusivity as covering both unilateral coercive measures of retorsion as well as third-party countermeasures.

Second, the debates leading up to the adoption of Security Council Resolution 505 on the Falklands crisis are also informative on the relationship between unilateral and institutional enforcement in response to serious breaches.\textsuperscript{190} During the Security Council debates, several (mostly OAS) States denounced the unilateral nature of the import embargo and made clear that they considered it a violation of the exclusive authority of the Security Council to take sanctions under Chapter VII of the UN Charter.\textsuperscript{191} Panama, aside from declaring the embargo an act of illegal


\textsuperscript{187} See OAS Resolution I on ‘Serious Situation in the South Atlantic’ (28 April 1982), op para 6 reproduced in (1982) 21 ILM 669 at 670–01. In 1990 and 1962, the OAS had come to the opposite conclusion when it had held that no Security Council authorization was necessary in relation to its action against Cuba and the Dominican Republic. The analysis of the term ‘enforcement action’ and the relationship between regional organizations and the SC under Article 53 UNC is, however, beyond the scope of this study. For the Security Council debates supporting the OAS position on Cuba see UN Docs S/PV 874–75. For further references see, eg M Akehurst, ‘Enforcement Action by Regional Agencies, with special reference to the Organization of American States’ (1967) 42 BYIL 175 at 185–97; J Wolf, ‘Regional arrangements and the UN Charter’ in R Bernhardt (ed), ENPIL (1983), vol 6, 289–95.

\textsuperscript{188} For a similar conclusion Azevedo (n 183 above) at 343.

\textsuperscript{189} See op para 3 (n 187 above).

\textsuperscript{190} SC Res 505 (26 May 1982).

\textsuperscript{191} The relevant debates are reproduced in UN Doc S/PV 2362 (22 May 1982), paras 62, 75 (Venezuela); ibid paras 101–02 (USSR); ibid para 120 (Mexico) and ibid para 190 (Panama). See also UN Doc S/PV 2363 (23 May 1982), para 15 (Poland); ibid para 46 (Nicaragua); ibid para 118 (El Salvador).
economic coercion under Article 32 of the Charter of Economic Rights and Duties of States, was particularly clear in its denunciation of the embargo’s unilateral features and in support of the exclusivity thesis:

The European Economic Community has...obviously committed a flagrant violation of Articles 39 and 41 of the United Nations Charter by adopting sanctions of an economic character against Argentina, since the Security Council, and the Security Council alone, is the only body competent to impose economic sanctions of this nature.192

Belgium, speaking on behalf of the EC Member States, completely rejected this view. Indeed, it appeared to justify the embargo as a third-party countermeasure without any need for institutional safeguards:

In many statements we have heard attacks on the economic sanctions decided upon by the members of the European Community. An entirely new idea, it seems, was even invoked whereby this decision was said to be a violation of Article 41 of the Charter, which it was claimed would give the Security Council a monopoly on deciding on sanctions. In joining in these sanctions, Belgium intended, like its partners, to give specific form to the grave view it takes of violations of the Charter.193

Third, Argentina lodged a complaint before the GATT Council under the dispute settlement mechanism in Article XXIII(ii) GATT and the import embargo generated a lot of debate amongst its members.194 In a joint statement on behalf of the EC, Australia and Canada, it was conceded that the import embargo affected Argentinean rights under GATT but was nonetheless exceptionally justified ‘on the basis of their inherent rights, of which article XXI of the General Agreement is a reflection’.195 The reference to ‘inherent rights’ in the statement would suggest that these countries were referring to a customary right rather than to the treaty-specific exception in Article XXI GATT. A statement by the EC representative in which it was observed that ‘inherent rights constituted a general exception to the GATT’ reinforces this impression.196 This leads us to the conclusion that, although it remained possible to rely on the

192 UN Doc S/14978 (14 April 1982) 4 (letter by Panama to the President of the Security Council).
193 UN Doc S/PV 2363, paras 131–32 (Belgium on behalf of the EC).
194 For the debates see GATT Docs L/5317; L/5336; C/M/157; C/M/159. For the GATT Council report see GATT Doc L/5414. The GATT debates on the Argentinian trade embargo resulted in the adoption of a Ministerial Declaration which called for the contracting parties to refrain from taking restrictive unilateral trade measures for non-economic purposes inconsistent with the General Agreement. See GATT Doc L/5442 (para 7 (iii) (29 November 1982), 29S/9, 11. This particular declaration has been repeatedly reaffirmed by the General Assembly in resolutions condemning economic coercion; particularly in the context of the US trade embargo against Nicaragua (see below Section IIIA.12).
196 GATT Doc C/M/157, 10.
treaty exception in Article XXI GATT, the EC, Australia and Canada relied on customary international law in order to justify its violations of GATT law. The question then becomes to evaluate which of the generally available justifications in customary international law these countries can be said to have relied upon.

At first glance, this approach does not seem consonant with the ICJ’s reasoning in *Oil Platforms*. In this case, the Court appears to have suggested that any attempt at a distinction between treaty-based national security exceptions (such as Article XXI GATT) and customary law justifications such as collective self-defence might be misplaced. This inference is based on the Court’s observation that even if a unilateral coercive measure is based on a national security exception clause under a specific treaty, it cannot be interpreted in any way that is contrary to peremptory rules of general international law such as the law of self-defence. In other words, a unilateral coercive measure adopted, for example, under Article XXI GATT, is only lawful to the extent that it complies with the relevant rules of *jus cogens*.

The situation in the *Oil Platforms* case can, however, be distinguished from the present example of the import embargo against Argentina. In *Oil Platforms* the Court assessed whether the US use of force against Iran could be justified on the basis of the national security exception in Article XX.1(d) of the 1955 Iran-US Treaty of Amity, Economic Relations and Consular Rights. The Court declared that the legitimate scope of Article XX.1(d) was necessarily limited by its compatibility with peremptory norms relating to the law of self-defence. In contrast, as a peaceful unilateral coercive measure, the adoption of the import embargo against Argentina does not involve questions of compatibility with peremptory norms. On that basis, it is still useful to make a distinction between Article XXI GATT and customary law justifications where the latter do not directly involve issues of compatibility with peremptory norms.

Hence, in response to what Security Council Resolution 502 had categorized as an invasion, the Argentinean armed attack made it possible for the import embargo to be based on the alternative justifications of collective self-defence and third-party countermeasures. This should be contrasted with the more straightforward situation of an illegal use

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197 This was controversial and disputed by some GATT members; see the statements of Spain and Brazil in GATT Doc C/M/157, 5–6. For a discussion on possible judicial review of unilateral coercive measures adopted under Art XXI GATT see further D Akande and S Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’ (2002–03) 43 VJIL 365.
198 See Tams (n 1 above) 194–95 for a similar conclusion.
199 *Oil Platforms* case, Merits, Judgment of 6 November 2003, General List No 90, paras 41–45.
of force below the level of armed attack where only one of the two justifications remains theoretically available. As is known, in such circumstances the doctrine of collective self-defence cannot be relied upon as a justification.\footnote{Nicaragua case [1986] ICJ Rep 14, para 195. For an assessment see Frowein (n 18 above) 371–76.}

Regrettably, in the absence of any clear justifying statements by States to the contrary, an attempt is rarely made by commentators to distinguish between the two alternative justifications of collective self-defence and third-party countermeasures.\footnote{For an exception see Kuyper (n 185 above) 162–66. See also T Stein, ‘Observations on “Crimes of States”’, in Weiler, Cassese, and Spinedi (n 1 above) 197.} The absence of any such distinction has led some commentators to apply what we may describe as a converging justification; invariably describing unilateral peaceful measures as lawful in circumstances that justify the use of collective self-defence.\footnote{See, eg E David, ‘Les sanctions économiques prises contre l’Argentine dans l’affaire des Malouines’ (1984–85) 18 RBDI (162, 165; Frowein (n 18 above) 370–71. Compare Akehurst (n 29 above) 16–17.} As we will see below, this confusion is also found in State practice and poignantly expressed in the present example.

The absence of any clear distinction between these two separate legal categories begs the question of the \textit{prima facie} different legal safeguards applicable to collective self-defence and third-party countermeasures. It therefore bears emphasizing that a clear distinction should be drawn, when analyzing State practice, between the separate, albeit alternative, legal categories of collective self-defence and third-party countermeasures. In particular, it is far from clear that the safeguards of reporting to the Security Council and the requirement of consent by the directly affected State apply without distinction to collective self-defence and third-party countermeasures.

In the case of the import embargo against Argentina it is certainly true that neither country expressly justified its action either as collective self-defence on the basis of Article 51 of the UN Charter or as a third-party countermeasure. However, the language of ‘inherent rights’ suggests that the embargoing States justified their actions on the basis of collective self-defence, at least before the GATT Council.\footnote{For a similar conclusion see Hahn (n 120 above) 573; Tams (n 1 above) 195.} This impression is reinforced by three observations.

First, whereas self-defence is referred to in Article 51 of the UN Charter as an inherent right, as a nascent doctrine of international law, it would be difficult to categorize the alternative justification of third-party countermeasures as such.\footnote{For a similar conclusion see Kuyper (n 185 above) 154–56; P Fisher and G Hafner, ‘Aktuelle österreichische Praxis zum Völkerrecht’, 33 \textit{Österreichische Zeitschrift für öff. Recht und Völkerrecht} (1982) 389–92; Zoller (n 18 above) 105 and J-L Dewost, ‘La communauté, les Dix et les “sanctions” économiques: de la crise iranienne à la crise des Malouines’ (1982) 28 \textit{AFDI} 215 at 231. \textit{Contra} Tams (n 1 above) 195 who refers to the general justification (which did not make a direct reference to Article 51 UNC) before the GATT Council. Retorsion could also be described as an ‘inherent’} Second, with the exception of a dissenting
opinion by Judge Higgins in the Wall case, the dominant view in the doctrine appears to be that by applying the maxim of ‘qui peut le plus peut le moins’ it may be possible to adopt unilateral peaceful measures on the basis of (collective) self-defence.\footnote{See the ICJ’s advisory opinion of 9 July 2004 in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, General List No 131 (para 139) and Diss Op Judge Higgins in ibid para 135 (not recognizing the application of non-military measures on the basis of Art 51 UNC). For an affirmative view see Tams (n 1 above) 21, 216, 300-02; Frowein (n 18 above) 370-71; Kuyper (n 185 above) 162; Weschke (n 101 above) 105; D Bowett, ’Reprisals Involving Recourse to Armed Force’, 66 AJIL (1972) 2–3; D Alland, ‘International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules governing International Responsibility’, in M Spinedi and B Simma (eds), United Nations Codification of State Responsibility (1987) 143 at 177; Dzida (n 10 above) 251; David (n 203 above) 158; A de Guttry, ‘Some Recent Cases of Unilateral Countermeasures and The Problem of their Lawfulness in International Law’ (1986-87) 7 IYIL 188; B Simma and A Verdross, Universelles Völkerrecht (1984) § 1343; Oellers-Frahm (n 9 above) 34; Hillgruber (n 72 above) 281.}

Third, the EC, Australia and Canada imposed the import embargo with the express consent of the directly injured State\footnote{UN Doc S/14976 (14 April 1982).} (ie the United Kingdom) and, in the case of the EC, even reported the imposition of the embargo to the Security Council.\footnote{Nicaragua case [1986] ICJ Rep 14, para 199 (requirement of consent by the directly injured State). However, according to the ICJ in the same case, the duty to report to the Security Council under Art 51 UNC is not a requirement of customary international law (ibid para 200).} In other words, on the face of it, the import embargo complied with all the requirements of collective self-defence under Article 51 of the UN Charter and general international law.\footnote{H-H Lindemann, ‘Die Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahr 1982’, 44 Zeitschrift für das öffentliche Recht (1984) 557–58.}‘Taken together, these observations create a strong presumption in favour of EC Member States, Australia and Canada relying on collective self-defence as the basis of the import embargo before the GATT Council. This should be contrasted, at least in the case of the EC, with its justification of the embargo before the Security Council as a third-party countermeasure. Equally, at least Germany did not invoke a right of collective self-defence but relied on an extra-conventional right to suspend its bilateral civil aviation agreement with Argentina and no State protested against its action.\footnote{While the embargosing States may have justified their action on the dual basis of collective self-defense and third-party countermeasures, the protests against the embargo as expressed in the OAS and Security Council debates amply demonstrate a focus on the concept of third-party countermeasures and institutional safeguards against abuse. Consequently, despite the embargo being justified alternatively as collective self-defence and a third-party countermeasure, at least the opinio juris expressed in those debates makes the example of the EC import embargo relevant to (or sovereign) right but, as we have seen, the facts indicate that this particular customary law justification was unavailable since all parties were members of GATT at the time of the embargo.}

The embargoing States may have justified their action on the dual basis of collective self-defense and third-party countermeasures, the protests against the embargo as expressed in the OAS and Security Council debates amply demonstrate a focus on the concept of third-party countermeasures and institutional safeguards against abuse. Consequently, despite the embargo being justified alternatively as collective self-defence and a third-party countermeasure, at least the opinio juris expressed in those debates makes the example of the EC import embargo relevant to
an analysis of the existing institutional safeguards against abuse for both third-party countermeasures and retorsion.

10. Western Countries—Soviet Union (1983)

On 1 September 1983 a Soviet fighter jet shot down a South Korean airliner that had entered Soviet air space. The incident caused the death of all 269 passengers and crew. The incident, which gave rise to a significant debate within the Security Council, focused more on the determination of international responsibility than on any question of imposing sanctions. While a Security Council resolution was blocked by the use of a veto on 12 September, a majority of Council Members condemned the Soviet action as a serious breach of international law.211 The action was equally condemned as a serious violation of international law by the ICAO Council in language similar to that of the Security Council.212

The response against the Soviet Union did not stop with verbal condemnations.213 On 9 September NATO recommended its Member States to suspend their respective bilateral civil aviation agreements with the Soviet Union. From 7 September and onwards, upon the recommendation of the International Federation of Airline Pilots (IFALPA), many national pilot associations refused to fly to the Soviet Union for a period of up to 60 days.214 A problem with this action was that the blanket refusal by national pilot associations necessarily included State owned airlines. Hence, it can be argued that the actions of pilots of national airlines were attributable to the national governments concerned; and since no agreement allowed for immediate suspension, this action constituted a prima facie violation of their respective bilateral civil aviation treaties with the Soviet Union.215 Examples of countries that violated their Aeroflot agreements in this way included Finland, France, Germany, the Netherlands, Spain, Sweden, and the United Kingdom.216 While several of these countries were admittedly forced into this action by their respective national pilot associations, only France and Germany explicitly stated that their action was politically...

215 See Art 8 ASR and the corresponding ILC commentary thereto reproduced in Crawford (n 3 above) 110–13.
216 For an assessment see Keesing’s (1983) 32516. For the respective USSR bilateral aviation agreements see 353 UNTS 193 (Finland); 1578 UNTS 355 (France); 972 UNTS 115 (Germany); 335 UNTS 99 (the Netherlands); 1663 UNTS 185 (Spain); 259 UNTS 239 (Sweden) and 351 UNTS 235 (United Kingdom).
motivated since their respective bilateral aviation agreements did not foresee any right of immediate suspension.\textsuperscript{217} Other countries that suspended their bilateral aviation agreements with the Soviet Union, independently of any national pilot boycott, included Canada, Japan, South Korea, Switzerland and the United States.\textsuperscript{218}

Of all these States, Canada, Japan, South Korea, Sweden, the United Kingdom and the United States were directly injured and thus adopted bilateral countermeasures.\textsuperscript{219} However, no such individual injury was present in the cases of Finland, France, Germany, Spain and Switzerland. Moreover, since the Soviet Union was not responsible for an armed attack in the meaning of Article 51 of the UN Charter, it was not possible to rely on the doctrine of collective self-defence. In order to immediately suspend their bilateral aviation agreements with the Soviet Union, these acts could therefore be categorized as third-party countermeasures.

It is interesting to note that all these third-party countermeasures were taken while the Security Council was still debating the adoption of a resolution against the Soviet Union. In other words, a significant number of States took third-party countermeasures even as the Security Council was actively seized of the matter. The only State opposed to an aviation boycott while the Security Council and ICAO were seized of the matter appears to have been France.\textsuperscript{220} We can thus conclude that, apart from one exception, States did not consider the Security Council as an institutional safeguard against abusive uses of unilateral third-party countermeasures.\textsuperscript{221}

This recognition of third-party countermeasures and the irrelevance of the Security Council as an institutional safeguard against abuse are also reinforced by a resolution by the ICAO Council on the incident in 1984. The Council noted that ‘such use of force [as in the case of the shooting down of KAL flight 007] constitutes a violation of international law, and invokes generally recognised legal consequences’. This ICAO Resolution, together with the views expressed by a majority of Security Council Members in the debates leading up to the vetoed resolution, can be understood as an affirmation of State practice on third-party countermeasures and the absence of an institutional safeguard in the case of the shooting down of KAL flight 007.\textsuperscript{222}


\textsuperscript{218} For the respective agreements see 835 UNTS 54 (Canada) Amtliche Sammlung (1968), 1068 (Switzerland); 6 ILM (1967) 82 (United States); 12 Japanese Annual of International Law (1968), 236 (Japan).

\textsuperscript{219} See Keesing’s (1983) 32514; (1983) 22 ILM 1199 (Canada); ibid 1201 (Japan); ibid 1205 (United States); ibid 1197 (South Korea); UN Doc S/PV.2471, para 77 (statement by Sweden). For a survey of national measures see 22 ILM (1983) 1199–1217.

\textsuperscript{220} Lakehal (n 213 above) 180 (his n 39) citing Le Monde, 8–9 September 1983 (supplement).

\textsuperscript{221} Compare Lakehal (n 213 above) 181.

\textsuperscript{222} (1984) 23 ILM 937, op para 4 and for the Security Council debates above n 211. For a similar conclusion see Frowein (n 18 above) 420; Tams (n 1 above) 215.
II. Western Countries—South Africa (1985–1986)

We have already observed how in the 1960’s nine developing countries took third-party countermeasures against South Africa in response to its apartheid policy. In the 1980’s, South Africa’s continued illegal policy of apartheid, and in particular its declaration of a state of emergency in July 1985, led to renewed calls for adoption of mandatory sanctions by the Security Council. In spite of numerous calls by the General Assembly, the Security Council did not adopt a Chapter VII resolution imposing economic sanctions against South Africa. Instead, in response to the imposition of a state of emergency by the South African regime and the repeatedly declared illegal policy of apartheid, the Security Council adopted a resolution recommending economic and political sanctions against South Africa. Moreover, it also commended those States that had already imposed unilateral coercive measures.

As indicated, the General Assembly had long called on the Security Council to go further and impose a mandatory sanctions regime against South Africa. While it is not surprising to find that the relevant General Assembly resolutions expressed a preference for mandatory institutional sanctions they nonetheless recommended the adoption of comprehensive unilateral coercive measures against South Africa in the absence of a compulsory (ie effective) Security Council response. It can be observed that many of these General Assembly resolutions preceded the adoption of Security Council Resolution 569 recommending inter alia a total investment ban.

In particular, when recommending comprehensive unilateral coercive measures in 1981, the General Assembly made two interesting observations. By commending those States which had broken off any relations with South Africa the Member States of the United Nations appeared to suggest that the Security Council was not the exclusive bearer of a right of response and that conduct which was prima facie unlawful could be taken by individual States in response to a serious breach of international law. This view is reinforced by the position of the General Assembly to ‘urge all States that ha[d] not yet done so to adopt separate and collective measures for comprehensive sanctions against South Africa, pending action by the Security Council’ [emphasis added].

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224 SC Res 569 (26 July 1985), especially op paras 6 and 7 for a survey of recommended unilateral measures and commendation of already adopted unilateral coercive measures. The range of recommended unilateral coercive measures was widened by SC Res 591 (28 November 1986).

225 See, eg GA Res 34/93 (12 December 1979); ibid 35/266 (16 December 1980) and ibid 36/172 (17 December 1981).

Identical requests were reiterated by General Assembly resolutions in the following year. The argument could thus be made that the views of the Member States of the UN appear to be that, in the absence of an effective Security Council, it is consistent with the relevant provisions of the UN Charter for individual States to take unilateral coercive measures such as third-party countermeasures. This view, with one notable exception, is also consistent with the actions of other international organizations and individual States.

For example, EC Member States followed the recommendations in Security Council Resolution 569 and imposed unilateral coercive measures against South Africa. As such, their action was not mandated by the UN Charter but could only be justified on the basis of general international law. For an exception see the Declaration of the ASEAN Foreign Ministers on the Situation in Southern Africa (Manilla 23 June 1986), para 3, available at <www.aseansec.org/1614.htm>.

In similar fashion, albeit not strictly relying on Resolution 569, the Commonwealth recommended the application of unilateral measures against South Africa. In particular, §7 of the Nassau Declaration called inter alia for the suspension of bilateral civil aviation agreements with South Africa, an investment ban and an import embargo on agricultural products. On 5 August 1986 at a review meeting of the Commonwealth in London following the Nassau initiatives, a Declaration was adopted which inter alia recommended that Member States immediately suspend their respective aviation agreements: a reference that implies that States had a right to engage in conduct that would otherwise be unlawful.

As for individual measures, on 21 August, Australia implemented the London Declaration and inter alia suspended its bilateral civil aviation treaty with South Africa in prima facie contravention of the denunciation clause in Article 12 requiring 12 months notice. As observed above, in the absence of any treaty-specific justification (eg Articles XIX–XXII GATT or Article 12 of the Aviation Agreement), these measures can only be justified on the basis of general international law. Before that, on 15 June, Denmark had prohibited all trade with South Africa and did not justify its action on the basis of the exceptions in Articles XIX–XXI.


\[229\] EC Bull (1985), No 9, para 2.5.1 (10 September 1985); EC Bull (1986), No 9, para 2.4.2 (16 September 1986).


\[231\] Keesing’s (1986) 34647–51.


\[233\] For the Australia-South Africa aviation treaty see 335 UNTS 127 (signed and entered into force at Pretoria 2 April 1970). See also C Rousseau, ‘Chronique des faits internationaux’ (1986) 90 RGDIP 949 and Sicilianos (n 9 above) 166.
GATT. In similar fashion, on 9 July, Norway had introduced a limited import embargo on South African fruits and vegetables.234

However, the response of the United States is perhaps the most striking and well-known example of unilateral coercive action. The United States Congress, in adopting the 1986 Anti-Apartheid Act, went beyond the recommendations of Security Council Resolution 569 and adopted measures that *prima facie* violated international law.235 In particular, Section 306 of the Act prohibited any civil air transportation with South Africa.236 Section 306(2a) authorized the US President to suspend, with 10 days notice, a 1947 bilateral civil aviation treaty between the United States and South Africa.237 Article XI of the Agreement provided that it could only be suspended upon 12 months’ notice. Consequently, as representatives of South African Airways made clear in hearings before the US Department of Transportation, the US suspension violated Article XI of the Agreement.238 The US justification for this *prima facie* unlawful act was that it should lead the South African regime ‘to adopt measures leading toward the establishment of a non-racial democracy’.239 As in the case of the immediate US suspension of LOT and Aeroflot landing rights the measure could be justified as a third-party countermeasure.


While it is true that the United States did not expressly rely on third-party countermeasures before the ICJ and the Court did not analyze whether the embargo was justifiable on that basis it may nonetheless be useful to explore the questions left open by the judgment in this study. As previously, two questions are of particular concern to our inquiry: the legal categorization of the unilateral trade embargo and the relationship between unilateral coercive measures and the institutional safeguard of the Security Council in the case of a serious breach.

As to the legal categorization of the embargo, the justification of collective self-defence as a basis for the embargo was unavailable to the United States since Nicaragua had not been responsible for an armed

234 C Rousseau, ‘Chronique des faits internationaux’ (1986) 90 RGDIP 930–51. Australia, Denmark and Norway were all parties to GATT in 1986. It should be noted that many other countries have adopted unilateral coercive measures against South Africa since 1946 when India became the first country to take action. Regrettably, in the absence of adequate documentation, it has not been possible to assess these actions. For a survey of examples see further Tomaševski (n 86 above) 51–53.
236 The Act is reproduced in 26 ILM (1987) 79. For section 306 see ibid at 80.
237 For the Implementation Order of the US Secretary of Transportation (1987) 26 ILM 104.
238 For the 1947 United States-South Africa Aviation Treaty see 66 UNTS 233 (signed and entered into force at Cape Town, 23 May 1947).
attack in the meaning of Article 51 of the UN Charter. Since the US justifications for the embargo and the denial of entry rights for Nicaraguan vessels remain unclear from the judgment (partly in view of its absence from the proceedings on the merits) we will thus have to evaluate which of the alternative justifications of the security exceptions in Articles XXI of the GATT and the FCN Treaty, economic coercion, retorsion and third-party countermeasures was relied upon by the United States before international bodies other than the ICJ. In fact, the US trade embargo sparked widespread protests and significant debate, mainly at the United Nations. These UN debates shed light on the legal classification of the embargo as a unilateral coercive measure in response to a serious breach of a fundamental obligation and the issue of the Security Council as an institutional safeguard against abuse in such circumstances. Before we evaluate these debates it may be useful to briefly recall the facts.

After the overthrow of the Somoza regime the US attitude to the new Sandinista government was initially positive. The US attitude gradually changed, as Nicaragua allied itself to Cuba and the Soviet Union and started supporting insurrectionary movements in the neighbouring countries of Costa Rica, El Salvador and Honduras. In response to these Nicaraguan policies, the United States adopted several coercive unilateral acts of retorsion as well as prima facie illegal measures. On 1 April 1981, in response to Nicaragua’s active support for insurrectionary movements in El Salvador, the United States terminated its economic aid to the country. On 23 September 1983, apart from its clandestine mining of Nicaraguan ports and support for the Contras guerilla, the United States unilaterally reduced the Nicaraguan sugar import quota by 90 per cent. Finally, on 1 May 1985, the US President declared that Nicaragua’s activities constituted an ‘unusual and extraordinary threat to the national security of the United States’ under the terms of section 1701 of the International Emergency Economic Powers Act (IEEPA).

As a consequence of this determination, and in the absence of explicit consent by the directly injured States (ie Costa Rica, El Salvador and Honduras), the United States imposed a total trade embargo, suspended Nicaraguan aircrafts and vessels from gaining entry to the US, and gave

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242 For an analysis see, eg, de Guttry (n 206 above) 169. See also Tomaševski (n 48 above) 128–32.
243 The ICJ held in the Nicaragua case that this act did not defeat the object and purpose of the FCN Treaty and should thus be categorized as a lawful measure of retorsion. See Nicaragua case [1986] ICJ Rep 14, paras 123 and 276.
245 For President Reagan’s Executive Order see (1985) 24 ILM 810. For the IEEPA see 50 USC (28 October 1977), ss1701–06, reproduced in (1978) 17 ILM 140. For an overview of the IEEPA see Carter (n 235 above) 1229–42.
12 month's notice of termination of its FCN Treaty with Nicaragua in accordance with Article XXV.\(^{246}\)

In contrast to the imposition of the sugar quota and the suspension of aircraft and vessel entry rights, the total trade embargo was widely discussed and criticized in several international fora other than the ICJ.\(^{247}\) In relation to the trade embargo, Nicaragua requested an urgent convocation of the Security Council as well as that of a GATT panel.\(^{248}\) In its efforts, Nicaragua received support from several international organizations such as the Coordinating Bureau of the Non-Aligned Countries\(^{249}\) (G77), the then 23 Member States of the Latin American Economic System\(^{250}\) (SELA) and the then 13 Member States of the Caribbean Community\(^{251}\) (CARICOM) who all condemned the US trade embargo before the Security Council.\(^{252}\) These international organizations categorized the trade embargo as an act of economic coercion prohibited \textit{inter alia} under the Friendly Relations Declaration\(^{253}\) and the Charter of Economic Rights and Duties of States.\(^{254}\)

During the debates in the Security Council Nicaragua argued that the embargo, apart from \textit{inter alia} violating Articles I, II, V, XI, XIII and Part IV of GATT, constituted an act of economic coercion in violation of the Friendly Relations Declaration and the Charter of Economic Rights and Duties of States.\(^{255}\) In contrast, during the same debates, the United States expressed the view that the trade embargo was legal since it had not violated the security exception in Article XXI of the FCN treaty and was, in any event, justified under Article XXI GATT. The United States cited the examples of the unilateral trade embargos against Argentina and South Africa and noted that few States had protested against those


\(^{247}\) The sugar quota was however also discussed by the GATT Council; see GATT Doc L/5607 (report adopted on 13 March 1984).

\(^{248}\) See UN Doc S/17156 (6 May 1985) for Nicaragua’s letter to the President of the Security Council.

\(^{249}\) For more information see, eg, KP Sauvant, \textit{The Group of 77: evolution, structure, organization} (1981); P Willets, \textit{The non-aligned movement: the origins of a Third World alliance} (1978) and <http://www.g77.org>.

\(^{250}\) For more information on SELA see, eg, Sands and Klein (n 126 above) 218; the 1975 Agreement of Panama establishing the organization is reproduced in (1976) 15 ILM 1081. See further <http://www.sela.org>.


\(^{252}\) See UN Doc S/17163 (G77 7 May 1985); UN Doc S/17200 (SELA 17 May 1985); UN Doc S/17171 (CARICOM 9 May 1985); and for an account of the events, 31 Keesing’s (1985) 33971.

\(^{253}\) GA Res 2625 (XXV) (24 October 1970).

\(^{254}\) GA Res 3281 (XXIX) (12 December 1974).

\(^{255}\) Nicaragua also argued that the embargo violated the prohibition on economic coercion in Art 19 of the OAS Charter. For the Security Council debates leading up to the adoption of SC Res 562 (30 May 1985) see UN Doc S/PV 2577–80; and for Nicaragua’s numerous reasons for the illegality of the embargo see UN Doc S/PV 2577, paras 45–52 and GATT Doc C/M/188, 4.
embargos. Consequently, from its statement it can be inferred that the US did not consider that the Security Council was the exclusive bearer of a right of response under the UN Charter for serious breaches of fundamental norms. Moreover, it can be inferred that the US view was that the Charter had not prohibited resort to any type of peaceful unilateral coercive measure in such circumstances, (ie including countermeasures, economic coercion and retorsion). In other words, while Nicaragua categorized the embargo as an illegal act of economic coercion, the United States justified the trade embargo as a lawful measure of retorsion (based on a treaty right) without the need for any institutional safeguard against abuse.

As we have already seen however, most members of the Security Council shared Nicaragua’s view of the illegality of the embargo and categorized it as an act of economic coercion. Only two States explicitly expressed disagreement with this analysis during the Security Council debates. While most of the States supporting the Nicaraguan position on economic coercion were members of the G77, SELA and CARICOM, several of the individual declarations went further than the respective institutional statements and shed light on the question of the role of the Security Council as an institutional safeguard against abuse in relation to serious breaches. For example, Mexico appears to have adhered to the exclusivity thesis for any type of unilateral coercive measure when it noted that the embargo was an act of economic coercion taken in violation of Chapter VII of the UN Charter. Similarly, without any distinction as to the type of unilateral coercive measure, Cuba, Poland and Zimbabwe noted that the imposition of a trade embargo simpliciter fell within the exclusive competence of the Security Council under Chapter VII of the UN Charter.

On 10 May 1985, as a result of these debates, the Security Council adopted Resolution 562 in which it indirectly categorized the trade embargo as an illegal act of economic coercion under the Friendly

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256 UN Doc S/PV 2578 (9 May 1985), paras 47–9 and 200 (United States). See also the US notification of the trade embargo to the contracting parties of GATT in GATT Doc L/5823; UN Doc S/17156 (6 May 1985) for Nicaragua’s letter to the President of the Security Council.

257 For statements denouncing the embargo as an illegal act of economic coercion violating *inter alia* the Friendly Relations Declaration and the Charter of Economic Rights and Duties of States, see, eg UN Doc S/PV 2578, para 9 (India); ibid para 19 (Peru); ibid para 66 (Mexico); ibid para 186 (Algeria); UN Doc S/PV 2579, para 24 (Ethiopia); ibid para 47 (Ukraine); ibid para 61 (Madagascar); ibid para 75 (Bolivia); UN Doc S/PV 2582 paras 40, 44 (Zimbabwe); ibid para 96 (Guyana) and ibid para 147 (Argentina). See also UN Doc S/17166 (8 May 1985) (Brazil).

258 See the statements by Denmark (UN Doc S/PV 2578, para 95) who noted that ‘[unilateral] economic sanctions do not violate general international law’ and Thailand (UN Doc S/PV 2580, para 252) who made reference to its ‘sovereign right to take sanctions against South Africa’.

259 Mexico’s statement is reproduced in UN Doc S/PV 2578 paras 63 (referring to Chapter VII UNC) and 66 (citing the Friendly Relations Declaration and the prohibition on economic coercion). The Mexican position on Security Council exclusivity does not only apply to acts of economic coercion but also to third-party countermeasures, see UN Doc A/CN.4/515/Add.1, 9–10 (2001).

260 UN Doc S/PV 2578, para 150 (Cuba); ibid paras 160–70 (Poland); UN Doc S/PV 2580, para 32 (Zimbabwe).
Relations Declaration and called on the United States to refrain from taking any unilateral measures which might impede the Central American peace talks underway in the Contadora process. For its part, the General Assembly adopted several resolutions denouncing the US embargo as an illegal use of economic coercion which also violated Article XXI GATT and called for its immediate revocation. But none of these General Assembly resolutions, which characterize the trade embargo as a violation of both general international law and specific GATT obligations, refer to any privileged role of the Security Council as an exclusive or primary bearer of a right to take sanctions in response to serious breaches.

Finally, in July 1985, the trade embargo was discussed in the context of the GATT as a result of Nicaragua’s request for the establishment of a GATT panel. As before the Security Council, Nicaragua argued that the embargo was illegal under several provisions of the GATT. It also again categorized the embargo as an act of illegal economic coercion by noting that its imposition ‘was not a matter of national security but one of coercion’. For its part, consistent with its position before the Security Council, the United States notified the contracting parties of the GATT of the embargo and justified its legality before the GATT panel by reference to the national security exception in Article XXI(b) (iii) GATT. The GATT panel made it clear in an unadopted report that its terms of reference prevented it from evaluating the legality of the US embargo. Consequently, the unadopted panel report does not shed further light on the questions of the legality of the embargo and the relationship between unilateral trade restrictions and the Security Council. In any event, as the Security Council debates have shown, we can conclude that the United States relied on Article XXI GATT and not on an extra-conventional right such as collective self-defence or third-party countermeasures in order to justify the trade embargo. Hence, evaluated in its proper context, and in contrast to several commentators who appear to limit their inquiry to the dispute before the ICJ, the facts underlying the US motivation for the embargo do

\[\text{Ref: See in particular GA Res 40/188 (17 December 1985) calling for an end to the trade embargo; ibid 41/31 (3 November 1986) and 41/164 (5 December 1986). See also on the more general topic of economic coercion during the relevant period ibid 38/197 (20 December 1985); ibid 39/210 (18 December 1984); ibid 40/185 (17 December 1985) and ibid 41/165 (5 December 1986).}\]
\[\text{Ref: For the 1984 GATT Panel report on ‘United States—Imports of Sugar from Nicaragua’ see GATT Doc L/5607 (adopted on 13 March 1984).}\]
\[\text{Ref: For Nicaragua’s position see n 255 above.}\]
\[\text{Ref: GATT Doc C/M/188, 4, 16.}\]
\[\text{Ref: GATT Doc C/M/191, 41, 46. For the US notification to the contracting parties see GATT Doc L/5863. For the lifting of the embargo in 1990, GATT Doc C/M/240, 31; L/6661.}\]
not support the conclusion that it can be categorized as a third-party countermeasure. As a result, the absence of consent by Costa Rica, El Salvador and Honduras at the relevant time of the application of the embargo cannot properly be used as evidence to suggest a formative rule of customary law whereby the rule on consent by the directly injured States in the case of collective self-defence is not applicable (by analogy) to third-party countermeasures.\textsuperscript{268}

It bears emphasizing however that, although the trade embargo was justified by the United States as retorsion based on a treaty right and was regarded as illegal by many States as an act of economic coercion, it is nonetheless relevant to our inquiry for the views expressed in the Security Council debates on the Council’s exclusive authority to decide on sanctions in response to serious breaches. These debates suggest that no distinction was drawn as to the nature of the unilateral coercive measure in question. In other words, according to this view, the Security Council has exclusive authority to take sanctions in response to serious breaches not only for (third-party) countermeasures but also for measures of retorsion and economic coercion.


Through a military coup on 26 February 1988 the then Panamanian President Delvalle was deposed by General Noriega. While Noriega had been indicted \textit{in absentia} on drugs charges in the United States another major concern of the US Government was the deteriorating political and human rights situation in Panama.\textsuperscript{269} With the aim of inducing the Panamanian Government to end its human rights abuses and restoring democracy the United States suspended its military and economic assistance to the country.\textsuperscript{270} In the absence of any specific treaty commitments, these unilateral acts can be categorized as measures of retorsion. However, the unilateral measures taken by the United States in order to restore democratic governance went beyond mere acts of retorsion. On 8 April 1988 President Reagan declared a national emergency by noting that the ‘illegitimate Noriega regime’ constituted an unusual and extraordinary threat to the national security of the United States under the terms of section 1701 of the IEEPA. As a consequence of this determination the United States decided \textit{inter alia} to freeze all Panamanian assets in the United States and suspend payment of 7 million US dollars due


\textsuperscript{270} Dept of State Bulletin (October 1987) 11, 13.
later that month to the Panama Canal Commission. The former act was in *prima facie* violation of general international law. The latter act arguably violated US treaty obligations under Article 3(5) of the Panama Canal Treaty.

The United States yet again justified the freeze order and the suspension of payment by reference to principles of democratic governance and the worsening human rights situation in Panama. However, the United States was not bilaterally injured by Panama’s alleged serious human rights violations. Consequently, in the absence of any explicit US justification to act in defense of a community interest, we could categorize these unilateral coercive acts as third-party countermeasures.

The freeze order did not have the intended effect on the Noriega regime. Instead, as is known, on 20 December 1989, the United States launched Operation Just Cause by invading Panama in order, effectively, to restore democratic governance in the country. While the Security Council was blocked by veto threats and the debates on a draft resolution did not make any reference to the freeze order and the suspension of payments, the General Assembly passed a resolution in December 1989 condemning the invasion. This resolution did not mention any of the unilateral coercive measures imposed by the United States which were all still in force at the time of its adoption.


On 2 August 1990 Iraqi forces invaded and occupied Kuwait. As is known, this act provoked a large number of Security Council resolutions which *inter alia* characterized the invasion as a breach of international peace and security and authorized the use of military force against Iraq.

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274 Compare Focarelli (n 1 above) 52 at 56 (referring to the US freeze order).

275 The United States offered a range of political and legal justifications for the invasion. While the former related mainly to the restoration of democracy the latter was based on self-defence and the protection of the neutrality of the Panama Canal enshrined in Article 1 of the Treaty Concerning the Permanent Neutrality of the Panama Canal, 1161 UNTS 182 (signed at Washington 7 September 1977 and entered into force 1 October 1979). For the US justifications see UN Doc S/21035 (20 December 1989); UN Doc S/PV 2902 (23 December 1989), 7–16 (United States); M Nash, ‘Contemporary Practice of the United States Relating to International Law’ (1990) 84 *AJIL* 545–49.

after 15 January 1991. For our purposes, Security Council Resolution 661 of 6 August 1990 is the most relevant as it authorized mandatory sanctions under Chapter VII of the UN Charter. However, in the absence of any mandate from the Security Council, in the four days leading up to the adoption of the resolution, a large number of States had already adopted unilateral coercive measures. These unilateral coercive measures consisted, most significantly, in the freezing of Iraqi assets. In other words, a prima facie violation of international law that requires specific treaty or customary law justification.

On 2 August 1990 President Bush, declaring that Iraq’s invasion constituted a national security threat to the United States under section 1701 IEEPA, decided to impose a total trade embargo on Iraq and proceeded to freeze its assets. Interestingly, the US statement to the Security Council on the implementation of Resolution 661 explicitly recognizes that these unilateral measures were taken before its adoption at a time when the Council was actively seized of the issue of possible enforcement action against Iraq. The statement suggests that, in the absence of any explicit justification for these prima facie illegal unilateral coercive measures (other than under section 1701 IEEPA), the United States did not consider the legality of its actions to be in any doubt. On 4–5 August the then 12 Member States of the EC and Japan followed suit and inter alia decided to freeze Iraqi assets within their respective jurisdictions. Japan also introduced an export embargo on all goods emanating from Iraq and Kuwait. Similarly, a day after the adoption of Resolution 661, Switzerland issued a freeze order. Since Switzerland had not yet become a member of the United Nations it could not rely on the resolution but instead had to rely on an extra-conventional justification for its unilateral action.

Although the freeze orders were implemented within days of the adoption of Resolution 661 it is noteworthy that no State that took part in the debate, with one notable exception, denounced them; let alone discussed the relationship between institutional and decentralized enforcement in

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280 UN Doc S/21444 (6 August 1990) (Italy on behalf of the EC); UN Doc S/21449 (5 August 1990) (Japan). The EC also suspended the application of the Generalised System of Preferences (GSP) to Iraq. As a unilateral system of trade preferences, this act can be categorized as a measure of retorsion. The EC and Japanese statements are reproduced in D Bethlehem and H Lauterpacht (eds), The Kuwait Crisis: Sanctions and Their Economic Consequences, vol 1 (1991), 111–12 (EC), 204 (Japan).
281 UN Doc S/21585 (7 August 1990). The Swiss note verbale and the Ordinance instituting the measure are reproduced in Bethlehem and Lauterpacht (n 280 above) 307–08.
As for the sanctioning States, although Iraq had been deemed responsible for an armed attack in similar terms to Argentina for its invasion of the Falklands, none of the statements attempted to justify the *prima facie* illegal freeze orders on the basis of collective self-defence. Equally, the US and Japanese trade embargoes were neither discussed before the GATT nor justified on the basis of Article XXI GATT. The apparent informal attitude of States in this case may be explained by the brief intervening period between the adoption of the freeze orders and Resolution 661. While this makes it more difficult to evaluate the relevant *opinio juris*, the chronology of events renders a justification based on general international law necessary.

As for the actual justifications of the sanctioning States we can observe that the difficulties of evaluating alternative and converging justifications in response to an armed attack that we observed in the Falklands example are not present in this case. The facts thus leave the freeze orders and the trade embargoes open to the remaining alternative justification of third-party countermeasures. Finally, an important aspect to note in relation to the freeze orders is that, in contrast to the irrelevance of El Salvadorian consent for third-party countermeasures observed in the case of the US trade embargo against Nicaragua, the third-party countermeasures in this case were adopted with the prior consent of Kuwait. Hence, the Iraq crisis in August 1990 is relevant to the debate about the requirement of consent by the directly injured State as a safeguard for abuse in relation to third-party countermeasures.


The annulment of the Nigerian democratic elections in June 1993 led to great civil unrest in the country which *inter alia* resulted in the arrest of political activists and the death of hundreds of demonstrators. A military government led by General Abacha took power in November 1993 under whose rule the policy of serious human rights violations continued. However, it was only after a Nigerian special military tribunal had imposed death sentences on the famous author and Ogoni human rights campaigner Ken Saro-Wiwa and eight other fellow activists, and the sentences were executed on 10 November 1995, that individual States started imposing more comprehensive unilateral coercive measures.

The Member States of the EC, Member States of the Commonwealth and the United States adopted several measures of retorsion against

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282 For the SC debate see UN Doc S/PV 2933 (6 August 1990). The statement made by Cuba (ibid 38), albeit in imprecise language, was critical of the *fait accompli* of these unilateral coercive measures which in its view had been adopted by ‘the principal developed Powers of the world’.


284 Similarly ILC commentary reproduced in Crawford (n 3 above) 304.
Nigeria which included travel restrictions and an arms embargo.\textsuperscript{285} However, the unilateral coercive measures adopted in defense of a community interest went beyond mere acts of retorsion and included both statements of intent and actual measures. Upon the recommendation of Sweden, EC Member States considered freezing Nigerian assets but ultimately decided against it after most of the financial assets had already been transferred to Swiss bank accounts.\textsuperscript{286} In similar fashion, the Member States of the Commonwealth considered \textit{inter alia} freezing assets belonging to members of the Nigerian regime and imposing a flight ban but equally decided against it.\textsuperscript{287} Similarly, in a Draft Bill of the US Congress (the Nigeria Democracy Act), a freeze order and an immediate flight ban were proposed but never adopted by the United States.\textsuperscript{288} The intention behind these measures suggests that these countries were willing to commit \textit{prima facie} violations of general international law. As such, these violations could have been justified as third-party countermeasures.

In terms of actually adopted unilateral coercive measures the situation is more complex. The most publicized measure is perhaps the one adopted by Commonwealth Member States on 11 November 1995 whereby they suspended Nigeria from the organization and even threatened to expel it if it did not return to democratic rule.\textsuperscript{289} On the face of it, the suspension could arguably be categorized as an act of retorsion, an institutional sanction, or a third-party countermeasure. Of course, in order to be characterized as a third-party countermeasure, the suspension must be considered to have affected rights belonging to Nigeria; particularly voting rights. Such rights may emanate from a treaty establishing an international organization or from declarations of a more informal association of States creative of a rule of custom.

\textsuperscript{285} Tomaševski (n 86 above) 288–93; M Torelli, ‘Chronique des faits internationaux’ (1996) 100 \textit{RGDIP} 234–6. The imposition of probably the most effective measure of retorsion on Nigeria, an oil embargo, was rejected by the United Kingdom and the Netherlands (see ibid Tomaševski 289–91 and ibid Torrelli 235).


\textsuperscript{288} For the proposed \textit{Nigeria Democracy Act} (esp section 4) see HR 2697 (30 November 1995). While the asset freeze would have violated general international law, the flight ban would have violated the US-Nigeria Air Services Agreement (256 UNTS 1979) whose Art 17 only allows for denunciation upon 12 months’ notice.

Although the Commonwealth was not founded by treaty, the dominant view among commentators is that it can nonetheless be characterized as an international organization. More significantly, at least since the 1979 Lusaka Declaration, the Commonwealth refers to itself as an international organization.

Against this background, the suspension affected Nigeria’s voting rights and arguably its derivative right to participate in intergovernmental meetings. Consequently, it required some form of legal justification.

The two constitutional documents of the Commonwealth, the 1971 Singapore Declaration of Commonwealth Principles and the 1991 Harare Commonwealth Declaration, articulate the basic rules of the organization (largely relating to the promotion and protection of democracy and fundamental human rights) but do not refer to the question of suspension of membership. In the absence of an express provision in the Declarations, the suspension would thus have to be justifiable on the basis of general international law. As the decision to suspend is attributable to the fifty-three Commonwealth States, as opposed to an organ of the institution acting ex officio, we could characterize the suspension as a third-party countermeasure.

As for institutional action by the United Nations, although the Security Council did not discuss the issue, the General Assembly condemned the Nigerian regime for its serious human rights violations. Significantly, on 22 December 1995, apart from welcoming the various retorsive measures taken by various States, the General Assembly welcomed the

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291 See, eg, J Fawcett, The British Commonwealth in International Law (1963) 88; J Crawford, The Creation of States in International Law (1979) 240; Dale (n 290 above) 451; Duxbury (n 287 above) 346–9; Sands and Klein (n 126 above) 145–46.


294 For an account of how the suspension affected Nigerian rights, see the statement by the First Meeting of the Commonwealth Ministerial Action Group on the Harare Declaration (20 December 1995) available at <http://www.thecommonwealth.org>; and further Magliveras (n 77 above) 102–94.

295 On the constitutional significance of these declarations, see Duxbury (n 287 above) 353–57; Dale (n 290 above) 463–65.

Commonwealth suspension of Nigeria (ie a third-party countermeasure) and noted that it was ‘consistent with international law’. 297


In 1993 Burundi held its first democratic elections since gaining independence from Belgium in 1961. Since independence the country had been ruled by the ethnic Tutsi minority but as a result of the elections, President Ndadaye, himself a member of the ethnic Hutu majority in the country, assumed office. Within months, the election led to a military coup in which President Ndadaye was assassinated by sections of the Tutsi dominated military forces. 298 This act in turn sparked a civil war in which tens of thousands of people were killed and left hundreds of thousands displaced. 299 Despite condemnations by the UN and the First Arusha Summit of East African States the situation deteriorated significantly in 1996. 300 However, it was not until the former military ruler, Pierre Buyoya, seized power in a military coup on 25 July 1996 inter alia suspending parliament and banning political parties that seven African States adopted unilateral coercive measures against Burundi. 301

At the Second Arusha Summit on 31 July 1996, apart from demanding the restoration of democratic rule, Ethiopia, Kenya, Rwanda, Tanzania, Uganda and Zaire (now Democratic Republic of the Congo) agreed to ‘exert maximum pressure on the regime in Bujumbura’ and to this effect, inter alia, imposed a total trade embargo. 302 A month later, Zambia followed suit and imposed a total trade embargo. 303 With the exception of Ethiopia and then Zaire, Burundi and the five other embargoeing States were members of GATT in August 1996. 304 Hence, the trade embargo constituted a prima facie violation of GATT, particularly Burundi’s rights under Articles XI and XIII GATT. None of the embargoeing States invoked Article XXI GATT as a justification for the violation of GATT law. As for Zaire and Rwanda, their trade embargo prima facie violated obligations owed to Burundi under the


298 Keeling’s Record (1993) 39496–97, 39672. For an overview, see Tomaševski (n 86 above) 238–47.

299 UNYB (1993) 262. The civil war was further intensified after President Ntaryamira was killed in a plane crash, UNYB (1994) 276.


302 Joint Communiqué of the Second Arusha Summit (para 11), UN Doc A/51/264-S/1996/620. Similar language was used to justify the trade embargo at the Third Arusha Summit, UN Doc A/51/513-S/1996/837 (para 9).

303 For a survey of retaliatory measures see Keeling’s Record (1996) 41214 and ibid for Zambia’s participation.

304 On GATT membership see <http://www.wto.org/english/tratop_e/gattmem_e.htm>.
1976 Convention establishing the Economic Community of the Great Lakes Countries (CEPGL) which is aimed at promoting regional economic integration.\(^{305}\)

The only possibility for Zaire and Rwanda to justify the embargo under the treaty would have been to first denounce it in accordance with Article 39. However, a lawful denunciation under the treaty would have required three years notice; it could therefore not serve as an alternative justification for the trade embargo. In the absence of any treaty-based justifications, the total trade embargo could thus be categorized as a third-party countermeasure. In any case, as Tams correctly points out, the language of the resolutions allowing for ‘maximum pressure’ or ‘necessary pressure’ suggests that the embargoing States considered otherwise unlawful acts to have been justified.\(^{306}\)

For its part, Burundi denounced the trade embargo as an illegal measure ‘which is in every respect contrary to the Charter of the United Nations, the Charter of the Organization of African Unity, and to international law as a whole’.\(^{307}\)

As for the institutional response, the Security Council, in spite of repeated threats to do so, never adopted mandatory sanctions against Burundi.\(^{308}\) More significantly for present purposes, even in the absence of a Security Council mandate, it appears that it approved of the unilateral trade embargo by ‘[expressing] its strong support for the efforts of regional leaders…at their meeting at Arusha on 31 July 1996’.\(^{309}\) Moreover, a week before the imposition of the trade embargo, the Heads of Government of the OAU (now AU) urged the international community, as well as individual member States, to impose sanctions against Burundi and later commended the imposition of the trade embargo.\(^{310}\)

In similar fashion, the European Parliament expressed support for the trade embargo.\(^{311}\) Conversely, it would appear that, with the exception of the target State itself, no State protested against the trade embargo. This suggests that States in the Burundi case supported the legality of unilateral third-party countermeasures without any legal requirement for the Security Council to act as an institutional safeguard against abuse.


\(^{306}\) Tams (n 1 above) 222.

\(^{307}\) UN Doc A/51/409-S/1996/788 (second preambular paragraph). See also Burundi’s previous protest considering the embargo to be ‘in all respects contrary to international law’, UN Doc S/1996/690.

\(^{308}\) See, eg SC Res 1072 (30 August 1996).

\(^{309}\) SC Res 1072 (30 August 1996), op para 2.


On 3 November 1997 the United States adopted a range of unilateral coercive measures against Sudan for inter alia supporting rebel groups in neighbouring Uganda and committing serious human rights violations, including slavery and denial of religious freedom. Apart from imposing a trade embargo and an investment ban, the US also decided to freeze Sudanese government assets. As we have seen above, the Nicaragua case makes clear that, in the absence of specific treaty commitments, an embargo does not as such violate international law.

Consequently, since Sudan is not a member of GATT/WTO and no bilateral treaties are at issue, the two former measures could be categorized as retorsion. However, in the absence of any treaty specific justification, the asset freeze could be characterized as a third-party countermeasure.

As for institutional action by the Security Council, the first mandatory sanctions against Sudan were imposed in April 1996 by Resolution 1054. However, it should be noted that the US asset freeze was not covered by the terms of the resolution and was therefore illegal in the absence of a basis in general international law. This unilateral asset freeze was in force until 29 March 2005 when, in response to the dire humanitarian situation in the Darfur region, it was effectively multilateralized by Security Council Resolution 1591. It was only after the adoption of Resolution 1591 that EC Member States imposed an asset freeze against Sudan. While the EC action was authorized by a mandatory Security Council resolution it can be observed that, before 29 March 2005, the United States acted outside the Security Council sanctions regime. Moreover, the debates leading up to the adoption of mandatory sanctions against Sudan did not make any reference to the prima facie illegal asset freeze adopted by the United States.

Burma (or Myanmar) has been ruled by a military dictatorship since 1962. All that looked set to change in May 1990 when the main opposition leader Aun San Suu Kyi won the parliamentary elections after receiving huge popular support. However, the results of the election have never been honoured by the Burmese military regime. After the elections the regime continued its policies of repression and violence against dissidents. In response to these and other serious human rights violations several agencies of the UN (eg UNHCHR and ILO) have condemned Burma’s human rights violations. The EC and the United States responded by adopting a range of unilateral coercive measures against the Burmese regime.

For example, in October 1996, EC Member States imposed a travel ban on members of the Burmese junta, suspended application of the Generalised System of Preferences (GSP) and renewed an arms embargo in place since 1991. On 24 May 2000, the EC sanctions regime was broadened to include a freeze on Burmese Government assets. The EC asset freeze, which was last renewed in April 2005, was actively supported by 21 additional States that pledged to ensure its implementation. Before that, in May 1997, the United States had also imposed inter alia a freeze on Burmese government assets. Moreover, on 28 July 2003, the US Congress adopted the Burmese Freedom and Democracy Act which renewed and broadened the unilateral sanctions regime. As we have seen above, in the absence of a treaty-specific justification, the asset freeze may be categorized as a third-party countermeasure.

During this period, it can be noted that the Security Council did not take any action against Burma. Moreover, the General Assembly, which

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318 For further references to institutional and unilateral action against Burma see, eg Damrosch (n 85 above) 91–9; Petman (n 159 above) 374–75.
321 Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Hungary, Iceland, Latvia, Liechtenstein, Lithuania, Macedonia, Malta, Norway, Poland, Romania, Serbia and Montenegro, the Slovak Republic, Slovenia and Turkey. For the statement see EC Bull No 2 (2004), para 1.6.33. For an extension of the unilateral coercive measures adopted, see Common Position 2004/423/CFSP (26 April 2004) and for the last annual renewal of the EC freeze order see OJ L 108/88 (29 April 2005).

has condemned Burma’s human rights record in annual resolutions from 1991 onwards, has not made any reference to the comprehensive and widespread unilateral coercive measures adopted by the thirty-seven States discussed above.324

As the armed conflict in the Kosovo province of Yugoslavia escalated in 1998 and the humanitarian situation deteriorated sharply the international community decided to take concerted action against Yugoslavia. On 31 March 1998, the Security Council imposed a mandatory arms embargo on Yugoslavia.325 However, although the mandatory sanctions regime was later extended on 23 September 1998, no comprehensive sanctions regime was adopted.326 Instead, EC Member States adopted unilateral coercive measures which went beyond the arms embargo.

On 7 May and 29 June 1998, apart from imposing inter alia an investment ban and a travel ban, EC Member States responded to the repression of ethnic Albanians in Kosovo by freezing Yugoslavian assets and imposing an immediate flight ban upon the country.327 While the freezing of assets constitutes a violation of general international law, the flight ban, in the cases of France and the United Kingdom, violated their respective civil aviation agreements with Yugoslavia since neither of them allowed for immediate suspension.328 It should be noted that the United Kingdom was at first only willing to terminate the treaty by giving twelve months notice under the terms of Article XVII. When the UK later reversed its position, after pressure from its European partners, then Foreign Minister Cook noted that the immediate flight ban had been adopted as a result of:

President Milosevic’s...worsening record on human rights [which] means that, on moral and political grounds, he has forfeited the right...to insist upon the 12 months notice which would normally apply.329

The UK’s apparent admission in the above statement of a lack of any international legal basis for the flight ban is somewhat surprising; in particular given its acceptance of the EC freeze order on Yugoslav assets but also in light of its previous actions in the cases of Uganda, Liberia,
Iraq, Nigeria and Burma examined above. For its part, France did not question the legality of the flight ban. However, as Article XVI in the France-Yugoslavia bilateral aviation treaty contains a dispute settlement mechanism the French position appears inconsistent with its categorical assertion in the Air Services case in which it had (unsuccessfully) argued that the mere presence of a dispute settlement mechanism in a treaty excluded the use of countermeasures. It could also be noted that in the debates leading up to the adoption of Security Council Resolution 1199 in September, no State protested against the third-party countermeasures adopted by the EC Member States. A year later, when G77 Member States, albeit indirectly, condemned NATO Member States for their humanitarian intervention in Kosovo, no reference was made to the flight embargo or the asset freeze.


During 2002 Zimbabwe’s serious human rights violations in relation to its policy of land redistribution continued unabated. However, it was the intimidation of opposition groups leading up to the presidential election in March, supported by an authoritarian electoral law effectively stifling all democratic debate, which prompted the international community to take action against President Mugabe’s regime. In order to attempt to redress the human rights situation in the country, the EC and its Associated States, the Commonwealth and the United States responded by adopting a number of unilateral coercive measures against Zimbabwe.

At a Council of Ministers meeting on 18 February 1998, EC Member States decided to impose an arms embargo on Zimbabwe and a travel ban on members of its government. In addition to these measures of retribution, EC Member States also decided to suspend financial aid and development assistance owed to Zimbabwe under the Cotonou Agreement (which replaces the earlier Lomé Conventions) and to freeze assets belonging to members of the Zimbabwean Government. A month later, with the exception of Poland, the then remaining nine Central and Eastern

330 For an apparent reversal back to its ‘original’ policy see the active stance of the UK in seeking to impose third-party countermeasures on Zimbabwe below Section III.A.20.
331 See Case Concerning the Air Services Agreement of 27 March 1946 (United States v France) 54 I.L.R. (1979) 304. For the SC debate see UN Doc S/PV 2930 (23 September 1998). For the categorization of the EC unilateral coercive measures as third-party countermeasures see, eg ILC commentary to Art 54 ASR reproduced in Crawford (n 3 above) 364; Tams (n 1 above) 223; Petman (n 159 above) 375–76.
332 For an analysis of the unilateral coercive measures adopted by the EC see further AP Pillitu, ‘Le sanzioni dell’Unione e della Comunità Europea nei confronti dello Zimbabwe e di esponenti del suo governo per gravi violazioni dei diritti umani e dei principi democratici’, 86 Rivista di diritto internazionale (2003) 55.
European countries associated with the EC, the associated countries of Cyprus and Malta and the EFTA country of Lichtenstein declared that they would also impose the unilateral coercive measures decided by the EC in February; notably the freezing of Zimbabwean assets. As for the Commonwealth, after insistence by the United Kingdom, its Member States decided on 19 March 2002 to immediately suspend Zimbabwe from the organization. Finally, while the United States quickly expressed support for the EC action, it was not until 7 March 2003 that the United States decided inter alia to freeze assets and impose a travel ban on members of the Zimbabwean Government.

It should be noted that the unilateral coercive measures adopted by EC Member States and the United States in 2002 have since been renewed in response to Zimbabwe's continuing and serious human rights violations. In May 2005, the already dire humanitarian situation in Zimbabwe deteriorated sharply when President Mugabe ordered a slum clearance programme known as Operation Murambatsvina (literally 'drive out rubbish') which it is estimated has left 700,000 Zimbabweans homeless. In response to this policy, which has been condemned by UN-HABITAT as a serious violation of international law and by the UN Secretary General as a 'catastrophic injustice', the 25 Member States of the EC and the United States recently renewed and extended the personal scope of their respective freeze orders.

As for possible justifications, in contrast to the Lomé Conventions examined above, Article 96(c) of the Cotonou Agreement enables State parties to take 'appropriate measures' where another party does not fulfill its obligations relating to human rights, principles of democratic values, and so on.
governance and the rule of law. Further to this provision, the EC suspension of development assistance could be categorized as a measure of retorsion. In terms of the Commonwealth suspension of Zimbabwe, the same argument developed above in relation to Nigeria is applicable. Hence, Zimbabwe’s suspension violated its membership rights and could not be justified under the rules of the Commonwealth. In other words, it required a justification based on general international law such as third-party countermeasures. In relation to the EC asset freeze it can be observed that, since this measure violates rights belonging to Zimbabwe under general international law as opposed to the Cotonou Agreement, it cannot be justified under Article 96. Since the EC and US asset freezes cannot be justified under any other treaty they could therefore also be categorized as third-party countermeasures.

Significantly, no Security Council action was taken against Zimbabwe during 2002–2005. However, this did not mean that Zimbabwe was not discussed by the Security Council during this period. Interestingly, the only letter by EC Member States to the President of the Security Council following the adoption of unilateral coercive measures makes no reference to them. Rather, the letter refers in imprecise terms to the possibility of ‘additional targeted measures’ against the Mugabe regime. Moreover, the UK initiated a private meeting of the Security Council on 27 July 2005 to discuss the UN-HABITAT report. However, no further institutional action has since been taken by the Security Council.

Finally, it may be worth pointing out that, in the absence of any diplomatic protest or institutional sanctions by the Security Council, the fact that such a substantial number of States have adopted prima facie illegal measures (still currently in force) suggests that States consider third-party countermeasures permissible. It also suggests that the international community does not consider that the Security Council has exclusive authority to take sanctions in response to serious breaches of international law.

On 12 December 2003, with the aim of inter alia halting Syrian support for terrorism and ending its occupation of Lebanon, President Bush signed into law the Syria Accountability and Lebanese Sovereignty
Restoration Act. Section 5 of the Act gives the US President the authority to impose unilateral coercive measures against Syria, including the right to ban civil aviation and freeze Syrian assets. On 11 May 2004 President Bush imposed sweeping unilateral coercive measures against Syria, including an export embargo and the freezing of Syrian assets in the United States. Since Syria is not a member of GATT/WTO, the same argument developed above in relation to Sudan applies to the export embargo. Hence, the export embargo can be categorized as a measure of retorsion. Conversely, the asset freeze does not find support in any treaty and was not mandated by the Security Council. We could therefore consider it as another example of a third-party countermeasure.


Finally, as the action taken by EC Member States and the United States against Belarus include both clear statements of intent as well as actual measures it is proposed to address both issues together in this section. In response to the flawed parliamentary elections and constitutional referendum in October 2004 and the deteriorating human rights situation in Belarus, EC Member States imposed inter alia a limited travel ban on members of President Lukashenko’s regime. More significantly, apart from this measure of retorsion, and in an attempt to increase the pressure on President Lukashenko to guarantee that the March 2006 presidential elections would be free and fair, the European Parliament and the Council of Ministers made several clear statements implying a right to resort to third-party countermeasures.

In March 2005, the European Parliament strongly condemned the practice of political violence in Belarus, including arbitrary detentions and disappearances of political opponents. As for concrete measures, it ‘called on the Council and the Member States to identify and freeze the personal assets of President Lukashenko’. At a Council of Ministers meeting in November 2005, citing identical concerns, a number of delegations headed by Poland also stressed the need for an asset freeze. As President of the Council, then UK Foreign Minister Straw noted in a press statement that ‘in the event of failure to uphold international standards [in the 2006 Presidential elections], the draft conclusions make it clear that measures such as asset freezes

348 EU-Bull No 3 (10 March 2005), 1.2.4. The call for an asset freeze was reiterated in February 2006, see EU-Bull No 1/2 2006 (16 February 2006), 1.32.26.
or visa bans could be taken against those responsible.\textsuperscript{350} No decision on an asset freeze was taken at this stage but the formal conclusions of the Council meeting nevertheless mentioned it as a possible future strategy against Belarus.\textsuperscript{351} In response to 'violations of international electoral standards... and international human rights law' following the March 2006 Presidential elections the EC Member States extended their travel ban to thirty-one State officials, including President Lukashenko.\textsuperscript{352} While the European Council did not formally decide to freeze President Lukashenko's assets the statement reiterates yet again that such a decision may be taken in the future.

On 19 June 2006, the United States, which had previously warned Belarus of the possible application of unilateral coercive measures following the rationale of its European partners,\textsuperscript{353} took action by freezing Lukashenko's assets.\textsuperscript{354} As we have seen above, the freezing of assets, including those of acting Heads of State, constitutes a \textit{prima facie} violation of international law and thus requires justification.

\textbf{B. Statements implying a right to resort to third-party countermeasures}

In addition to the examples of actually adopted third-party countermeasures, States have also occasionally made abstract statements expressing a right to resort to such action. While all examples cited below of actually adopted measures may be categorized as acts of retorsion the circumstances of each case suggest that a broader right of resorting to third-party countermeasures was implied. Naturally, abstract statements are more difficult to assess in legal terms than actually adopted unilateral coercive measures. However, it is well known that abstract statements may also be evidence of \textit{opinio juris};\textsuperscript{355} therefore they also merit inclusion in this study. Apart from the OAU/AU, EC and Commonwealth Declarations implying a right to take third-party countermeasures against South Africa, the Soviet Union, Nigeria, Burundi and Belarus observed above, the following examples may be cited.

\textsuperscript{350} The statement is available on the website of \textit{Radio Free Europe} at <http://www.rferl.org/featuresarticle/2005/11/75ebcch8-b75b-4f09-aq86-367290652b47.html> (last checked 20 July 2007).


\textsuperscript{352} For the press release see 7930/06 Press 95 (16 April 2006) available at <http://www.ue.eu.int/Newsroom>.


\textsuperscript{354} President Bush's Executive Order 'Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus' is available at <http://www.treas.gov/offices/enforcement/ofac/programs/belarus/belarus.pdf>.

\textsuperscript{355} See, eg \textit{North Sea Continental Shelf} cases [1969] ICJ Rep 3. See further, eg Akehurst (n 124 above) 1; JL Brierly, \textit{The Outlook for International Law} (1944) 4.
1. OAU and UN—Portugal (1963–1975)
In May 1963 the Heads of State and Government of the newly created OAU met for their first meeting in Addis Ababa. At this summit, a resolution was adopted—later reaffirmed at the 1964 Cairo and the 1973 Addis Ababa summits—that encouraged Member States to impose an import embargo on Portugal for its refusal to grant independence to its administered territories in Africa.

As for actually adopted measures, Ghana, Algeria and Guinea had imposed trade embargos against Portugal in the 1960s but these measures did not go beyond mere acts of retorsion. In the case of Ghana it relied explicitly on the national security exception in Article XXI GATT. In the cases of Algeria and Guinea the trade embargos can also be regarded as acts of retorsion since neither of them were members of GATT. However, by 1973, 25 member States of the OAU had also become Members of GATT. Their position on the trade embargo should thus arguably be understood as an implicit recognition of a right to resort to third-party countermeasures in response to a serious breach of international law.

The serious Portuguese violations of the principle of self-determination had been repeatedly affirmed by the General Assembly and the Security Council. In December 1965, in response to continued Portuguese military activities in its overseas colonies, the General Assembly adopted Resolution 2107 recommending inter alia the imposition of a total trade embargo against Portugal. While no UN Member State (apart from Algeria and Guinea) actually imposed a trade embargo on Portugal, the Resolution is still significant to our inquiry since many Members of the

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358 See GATT Doc SR 19/12, 196 reproduced in Guide to GATT Law (n 98 above) 554.

359 Keesing’s (1963–64) 19699; Focarelli (n 85 above) 39–40; N Ronzitti, Le guerre di liberazione nazionale e il diritto internazionale (1974) 150–52. For a brief summary and further references, see Hubbauer (n 77 above) 389–94.

360 Benin (then Dahomey), Burkina Faso (then Upper Volta), Burundi, Cameroon, Central African Republic, Chad, Congo, Côte d’Ivoire, Egypt, Gambia, Gabon, Ghana, Kenya, Madagascar, Malawi, Mauritania, Mauritius, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Tanzania, Togo and Uganda. For GATT membership see <http://www.wto.org/english/theWTO_e/gattmem_e.htm>.

361 For the recognition of a general right of self-determination for the Portuguese colonies see GA Res 1514 (XV) and more specifically ibid 1542 (XV). For General Assembly condemnation of the blatant denial of the right of self-determination see GA Res 2107 (XX); ibid 2270 (XXII); ibid 2395 (XXIII); ibid 2707 (XXV); ibid 2795 (XXVI); ibid 3113 (XXVIII). For Security Council condemnation see Res 180 (1963); ibid 183 (1963); ibid 218 (1965); ibid 312 (1972); ibid 322 (1972).

362 GA Res 2107 (XX) op para 7 (e) (21 December 1965). Similar resolutions were reintroduced yearly until December 1973; for a brief summary of the debates see, eg Keesing’s (1966) 21238; ibid (1967), 21869. The rationale for further resolutions disappeared in May 1974 when General de Spinola deposed Portuguese Prime Minister Caetano in a military coup and promised to grant independence to the overseas territories.
UN were also Members of GATT in 1965. Hence, Resolution 2107 may also be understood as an implicit recognition of a right to resort to third-party countermeasures.

2. **OAU—Israel, Portugal and South Africa (1973)**

Faced with the continued Israeli occupation of parts of Egyptian territory resulting from the Arab-Israeli war of 1967, OAU Heads of State and Government convened at the tenth annual OAU summit in Addis Ababa in April 1973 to discuss the ongoing crisis in the Middle East. The formal summit resolution warned Israel that unless it withdrew to its 1967 borders with Egypt:

OAU member States [might] . . . take, at the African level, individually or collectively, political and economic measures against it [Israel], in conformity with the principles contained in the OAU and UN Charters.\(^{363}\)

OAU ministers were soon given an opportunity to express themselves more decisively against Israel. In response to the October 1973 Arab-Israeli War, OAU ministers met in November 1973 to discuss what action to take against Israel’s occupation of Egypt’s Sinai desert. In a unanimously adopted Resolution OAU ministers appealed to all Member States of the OAU and all friendly countries to ‘impose a total economic embargo, and in particular an oil embargo, against Israel’.\(^{364}\)

In the same Resolution, OAU ministers also reaffirmed their 1960 and 1963 calls for the imposition of a total trade embargo against Portugal and South Africa which were then Members of GATT (as was Israel).\(^{365}\) Additionally, by November 1973, many OAU Member States were also Members of GATT.

The recommendation therefore arguably implied a willingness of at least those States to engage in conduct otherwise unlawful, ie third-party countermeasures. It is true that this conclusion is somewhat weakened by the fact that the trade embargos imposed by Ghana, Algeria and Guinea constituted mere acts of retorsion.\(^{366}\) However, as we have seen above, the impression given by the 1973 OAU Resolutions (ie that the willingness to contemplate the use of third-party countermeasures was implied) is reinforced by the fact that, in the case of South Africa, five OAU Member States had actually imposed a trade embargo in violation of their GATT obligations in the 1960s. In these cases, as we have

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364 Keesing’s (1973) 26246.

365 ibid. In the case of Portugal, the OAU call for a trade embargo was given added impetus by the adoption of GA Res 3061 (XXVIII) which, albeit condemning the continued illegal Portuguese military occupation of parts of Guinea-Bissau, did not recommend any concrete action. In the case of South Africa, the renewed call for a trade embargo was given added poignancy by the conclusion of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973 UNTS 243); see further GA Res 3068 (XVIII).

366 See n 358 above.
already seen, no reference was made by any of these States to the general exceptions in GATT and hence we categorized the trade embargos as third-party countermeasures.

Additionally, by making reference to the use of unilateral trade embargos and their ‘compatibility with the UN Charter’, the 1973 OAU Resolutions strongly suggest the view that the Security Council does not operate as a formal institutional safeguard against abusive uses of third-party countermeasures. On the basis of these antecedents, the 1973 OAU Resolutions should be understood as a reaffirmation of OAU Member States’ original 1960’s position on the legitimacy of the use of third-party countermeasures without any legal requirement of Security Council safeguards.


In July 1978 the G7 Heads of State and Government met in Bonn to discuss intensified joint efforts to combat international terrorism. As is clear from the Bonn Declaration adopted by the G7 States at the summit—and confirmed by the Ottawa and Tokyo Declarations—the response by third States to the hijacking of aircrafts was deemed particularly significant.367 The Bonn Declaration, with which at least South Africa formally associated itself,368 expressed that where a State did not extradite or prosecute hijackers, the G7 States would ‘take immediate action to cease all flights to that country . . . [and] halt all incoming flights from that country or from any country by the airlines of the country concerned’.369

This wording was arguably intended to cover the immediate suspension of aviation agreements.370 As we have seen above, bilateral aviation agreements do not normally allow for immediate suspension. Similarly, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft does not provide for a right of immediate suspension.371 Hence, any such suspension would have to be justified under general international law.

As for actually adopted measures, at the 1981 Ottawa summit G7 leaders declared that Afghanistan had violated its obligations under Article 7 of the 1970 Hague Convention by giving refuge to the hijackers of a Pakistani aircraft.372 As a result, and following unfulfilled demands

369 (1978) 17 ILM 1285.
371 860 UNTS 105 (signed at The Hague on 16 December 1970). The Convention is reproduced in 10 ILM (1971) 133. See also Bussutil (n 368 above) 479–81.
on Afghanistan to comply with its Article 7 obligations, the G7 States proposed to suspend all flights to and from the country. However, of the seven States, only France, Germany, and the United Kingdom had aviation agreements with Afghanistan. Hence, while the acts of the four other members could be categorized as retorsion, the acts of the other three required a conventional or customary international law justification. While the United States favoured an immediate suspension, France, Germany, and the United Kingdom expressed the view that to do so would violate their bilateral aviation agreements with Afghanistan. Consequently, these States only suspended their respective agreements after giving one year’s notice under the relevant terms of their respective treaties.

Admittedly, these exceptional justifications raise questions about France’s, Germany’s and the UK’s otherwise consistent views examined above in relation to the perceived legality of third-party countermeasures. What can nonetheless be argued is that, while the Bonn Declaration has never been used to justify the suspension of bilateral aviation agreements by third States, at least in the cases of the four other Member States of the G7, the Declaration can still be considered as an implicit recognition of a broader right to resort to third-party countermeasures.


As is known, the hostage crisis at the American embassy in Tehran in 1979–80 led the ICJ and the Security Council to denounce the unlawful Iranian conduct. Following these condemnations, EC Member States and other Western States adopted a range of unilateral coercive measures against Iran. These unilateral measures were based on an unsuccessful US attempt to adopt a mandatory Security Council resolution imposing a total trade embargo and various political sanctions against Iran. Hence, following a Soviet veto of the draft resolution, EC Member States and other Western States decided to unilaterally suspend all commercial contracts entered into with Iran after 4 November 1979 (the date

375 Similarly J Crawford, 'Third Report on State Responsibility', UN Doc A/CN.4/507/Add.4, para 394; Tams (n 1 above) 225–26 (these commentators do not however make the distinction referred to above).
376 SC Res 457 (4 December 1979); ibid 461 (31 December 1979) and the ICJ’s order of interim measures of protection [1979] ICJ Rep 7.
377 For further analysis of the unilateral coercive measures adopted see Focarelli (n 85 above) 45–8; Frowein (n 18 above) 417; de Guttry (n 121 above), 100–09; M Schröder, 'Wirtschaftssanktionen der Europäischen Gemeinschaft gegenüber Drittstaaten' (1986) 23 GYIL 111 at 121–24; Sicilianos (n 9 above) 159–60.
of the hostage-taking). As for possible justifications, since Iran was not a member of GATT and no bilateral treaties were at issue, these actions could be categorized as measures of retorsion.

While the actual suspensions of commercial contracts may be considered as measures of retorsion, statements made by the European Parliament and the Council of Ministers suggest that the possibility of adopting third-party countermeasures was implied; moreover, it was also made clear that the Security Council did not operate as a formal safeguard against abuse for unilateral coercive measures. As for these statements, the European Parliament explicitly invited States to take ‘all measures necessary’ in order to obtain the release of the hostages The Council of Ministers expressed the view that, irrespective of the vetoed Security Council Resolution (which would have imposed a total trade embargo on Iran), it would recommend its implementation to national parliaments stressing that such an action would accord with general international law.


At the sixth annual meeting of G77 Foreign Ministers in New York in October 1982 some of the issues discussed were the continuing struggle against apartheid, racism and colonialism. On the one hand, the ministers criticized:

the tendency of certain developed countries, taking advantage of their predominant position in the international economy, to adopt economic measures to exert coercive or political pressures against members of the G77... adding an element of injustice and insecurity in international economic relations.

On the other hand, at the same meeting the G77 ministers commended, albeit implicitly, the actual imposition of third-party countermeasures against South Africa by some of its Member States. They appeared to commend the 1973 OAU Resolution recommending a total trade embargo against South Africa, Portugal and Israel and even called for the use of unilateral coercive measures to be widened in the enforcement of serious breaches of international law when:

[T]hey strongly affirmed the legitimacy of the intensification, adoption and application of economic sanctions and other measures in the struggle against apartheid, racism, all forms of racial discrimination and colonialism... In this regard, they emphasized the rights of developing countries, individually and

\footnotesize{\textsuperscript{379} For the range of unilateral coercive measures adopted see C Rousseau, ‘Chronique des faits internationaux’ (1980) 84 \textit{RGDIP} 881–88.}

\footnotesize{\textsuperscript{380} Similarly J Crawford, ‘Third Report on State Responsibility’ UN Doc A/CN.4/507/Add.4, para 394; Frowein (n 18 above) 417; Sicilianos (n 9 above) 160; Tams (n 1 above) 226–27.}

\footnotesize{\textsuperscript{381} EC Bull 1980–84, 1.2.6.}

\footnotesize{\textsuperscript{382} EC Bull 1980–84, 1.2.7–1.2.9. For the range of national implementation measures see ibid 1.5.4.}

collectively, to adopt such sanctions and other measures... The Ministers reaffirmed their strong belief that urgent, more vigorous and concrete steps and actions still remain to be taken, collectively and individually, by all members of the international community.\textsuperscript{384}

This statement was reiterated in a Declaration adopted at the next annual meeting of G\textsuperscript{77} Foreign Ministers in 1983.\textsuperscript{385} Two observations reinforce the view that these G\textsuperscript{77} Declarations should be understood as an implicit affirmation of a right to resort to third-party countermeasures. In view of the reference above to the support expressed by G\textsuperscript{77} Member States for third-party countermeasures in 1960, 1962, 1963, 1965 and 1973 respectively in the context of the OAU (and its informal predecessor) and the UN in, for example, General Assembly Resolutions 1761, 2107 and 36/172 it is submitted that these G\textsuperscript{77} Declarations should be understood as a reaffirmation of those positions. The fact that many G\textsuperscript{77} States were members of the GATT from 1960 onwards (and hence would have violated GATT law if they had imposed a trade embargo) also suggests that a right to resort to third-party countermeasures against South Africa, Portugal (if only retrospectively) and Israel was implied in the 1982–83 G\textsuperscript{77} Declarations.\textsuperscript{386}

\textbf{C. Wrongful conduct justified by reference to concepts other than third-party countermeasures}

States not directly injured by a prior breach of international law have also on occasion relied on the treaty doctrine of \textit{rebus sic stantibus} (Article 62 VCLT) for non-compliance with treaty obligations in circumstances where the concept of third-party countermeasures might have served as an alternative justification. These examples are relevant to our study for two reasons. First, States have relied upon the doctrine of \textit{rebus sic stantibus} in circumstances where the application of the stringent conditions in Article 62 VCLT has remained doubtful.\textsuperscript{387} Hence, some commentators have concluded that, in the absence of other alternative justifications, these acts should have been justified as third-party countermeasures. Second, the explicit reliance on the doctrine of \textit{rebus sic stantibus} in such cases is indicative of States’ preference to rely even upon dubious applications of treaty law doctrine rather than on the concept of third-party countermeasures to justify their conduct. Let us now briefly turn to two examples which illustrate these points.

\textsuperscript{384} Declaration Adopted at the Sixth Annual Meeting of G\textsuperscript{77} Foreign Ministers (6–8 October 1982 New York), reproduced in Sauvant and Müller (n 383 above) 420, para 8.

\textsuperscript{385} Declaration Adopted at the Seventh Annual Meeting of G\textsuperscript{77} Foreign Ministers (6–7, 10 October 1983 New York), reproduced in Sauvant and Müller (n 383 above) 430, para 6.

\textsuperscript{386} Compare Tams (n 1 above) 211–13. See also Sicilianos (n 9 above) 167–69.


Upon gaining independence from its former Dutch colonial masters in 1975, Surinam and the Netherlands entered into a bilateral treaty on development assistance guaranteeing the former financial assistance until 1985. In February 1980, the Surinamese government was ousted in a military coup headed by army chief Bouterse. The Bouterse government soon started repressing the democratic opposition movement in the country and, in December 1982, the political violence culminated when the regime executed 15 leading dissidents.

The Netherlands responded to these serious human rights violations by immediately suspending the 1975 treaty. In terms of justifications, it is clear that the treaty did not include a human rights clause or a right of immediate denunciation. The Dutch could thus not justify its action on the basis of the Agreement. While able to justify its act as a third-party countermeasure, the Dutch government instead relied on the alternative justification available in the form of fundamental change of circumstances.

By contrast, the EC considered itself unable to respond to the situation in Surinam by suspending the Lomé II Convention (to which Surinam was a party). In a statement, the Commission noted that the serious human rights violations committed by the Bouterse regime could not justify a suspension under the Lomé II Convention on the basis of either Article 62 VCLT or any other treaty specific right: ‘The Lomé Convention . . . does not contain a special clause enabling the Commission to unilaterally interrupt the special ties existing under this Convention between the EEC countries and the ACP states.’

As we have seen above in the examples of Uganda, the Central African Republic and Liberia, this statement reiterates the EC position that the Lomé Conventions could not be suspended by reference to principles of treaty law. While certainly not identical, both the Lomé Conventions and the 1975 treaty essentially enshrined an obligation to provide development assistance to Surinam. Hence, the consistent EC position under the Lomé Conventions is arguably relevant in assessing the legitimacy of the Dutch response with regard to the 1975 treaty. Against this background, it is doubtful whether the Dutch response can be said to have met the stringent conditions under Article 62 VCLT. Instead, in view of the dubious Dutch reliance on rebus sic stantibus, some commentators have argued that the suspension of the 1975 treaty should have been justified as a third-party countermeasure.

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390 OJ 1984 C148/26. See further Bartels (n 128 above) 13; Fierro (n 130 above) 55.
2. EC Member States—Yugoslavia (1991)

The crisis of disintegration facing Yugoslavia deepened in the autumn of 1991 when, in violation of a cease-fire agreement agreed between the constituent parts of the country, fighting broke out again. EC Member States responded by immediately suspending, and later denouncing, a 1983 Co-Operation Agreement with Yugoslavia. The action resulted in the repeal of trade preferences on imports and was thus not authorized by Security Council Resolution 713 which had merely imposed a weapons embargo on the country. Equally, the response was not justified under the terms of the Co-Operation Agreement as Article 60.2 only allowed for denunciation upon six months notice. Instead, citing the threat posed to international peace and security, EC Member States alternatively justified their action before international bodies on the basis of the doctrine of fundamental change of circumstances, the national security exception in Article XXI GATT, supervening impossibility of performance and third-party countermeasures.

Initially, in their decision of suspension of 11 November 1991, the European Council referred to a ‘radical change in the conditions under which the Co-Operation Agreement [had been] concluded’ as a legal basis for the action. Later that some month, EC Member States notified the contracting parties of GATT of the suspension decision and informed them that they had done so ‘upon consideration of its essential security interests and based on GATT article XXI’. Then in 1998, when the legality of the measure was under consideration in the Racke case, the Commission stressed before the ECJ that the suspension decision by the Council had not only been based on a fundamental change of circumstances: it was also based on the alternative justifications of supervening impossibility of performance and third-party countermeasures—the latter curiously referred to as a ‘right of retorsion’. In the event, after ‘a delicate political assessment’, the Commission chose to rely primarily on fundamental change of circumstances as a justification and the ECJ

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395 For the suspension decision see OJ 1991 L 315/47.

396 OJ 1991 L 315/47.

397 See GATT Doc L/6948.


399 See the Opinion of Advocate General Jacobs in the Racke case, paras 60, 65 (confusing the concepts of retorsion and countermeasures) and 99 available at <http://www.curia.europa.eu>.

400 See the Opinion of Advocate General Jacobs in the Racke case (n 399 above) para 60.
upheld the termination of the Agreement on that basis.\footnote{Racte case [1998] ECR I-3655, paras 52–59.} By relying too heavily on the Commission’s primary justification for the termination as consistent with treaty law, the Court effectively forestalled any analysis of the subsidiary justification of third-party countermeasures as an alternative source of legitimation.

This view is also implicit in the observations of some commentators who criticize the ECJ’s wide interpretation of the doctrine of fundamental change of circumstances as inconsistent with international law on the subject.\footnote{J Crawford, ‘Third Report on State Responsibility’, UN Doc A/CN.4/527/Add.4, para 396 (his n 789); and further J Klabbers, ‘Case Note: A. Racke GmbH & Co. v. Hauptzollamt Mainz’ 36 Common Market Law R (1999) 179.} In other words, as Klabbers correctly points out, the problem lies ‘not so much in the action chosen, but in the justification chosen’.\footnote{Klabbers (n 402 above) 179 at 187. Klabbers even claims that EC Member States relied on rebus sic stantibus ‘in desperation’ in the absence of other justifications (ibid 189).} In this respect, EC Member States’ explicit preference for a tenuous application of treaty law doctrine is difficult to reconcile with their previous practice on third-party countermeasures: in fact, in the cases assessed above of Uganda, the Central African Republic, Liberia and Surinam, the EC rejected outright a basis in treaty law for the suspension of the Lomé Conventions.

### IV. An Assessment of State Practice

As we noted in the introduction, the complexity of assessing State practice on third-party countermeasures is compounded by the absence in many cases of adequate documentation; in particular clear justifying statements by States of their conduct. It is therefore difficult even to identify all the cases of third-party countermeasures in the modern period, still less to assess them with confidence.

These problems can be seen, for example, in the case of the US grain embargo against the Soviet Union in response to its invasion of Afghanistan examined above where it has not been possible to authoritatively determine whether the US made any binding commitments to the Soviet Union beyond the remit of a 1975 bilateral treaty.\footnote{See discussion above at Section III.A.7.} Equally, it has not been possible to determine with any degree of certainty whether the US decision to freeze North Vietnamese assets in 1964 was justified on the basis of collective self-defence or third-party countermeasures.\footnote{Keesing’s (1964) 20066; Focarelli (n 85 above) 19–20.} Another example concerns South Africa. While we have examined a significant number of third-party countermeasures against the country, it has not been possible to assess all of the unilateral coercive measures taken against it, including a multitude of unilateral trade embargos and membership suspensions from...
international organizations. Finally, in the case of the unilateral Arab League trade embargo imposed against Israel since 1948, it is clear that at least some Arab States have invoked Article XXI GATT but this has not been possible to determine in all cases.

A further difficulty noted in the introduction was that the use of unilateral coercive measures could be justified in a variety of ways: for example, as collective self-defence, the national security exception in Article XXI GATT and the treaty law doctrines of suspension, immediate denunciation and fundamental change of circumstances. From our assessment of international practice it is clear that most of the conduct cannot be explained in legal terms as mere acts of retorsion or sanctions authorized by international organizations. Similarly, the other possible justifications have only served as a legal basis in a very limited number of cases. For the other cases, this leaves open the possibility that States simply considered their conduct illegal. In the absence of any evidence for this, it is clear that the institution of third-party countermeasures is needed to explain this conduct in legal terms.

The ILC concluded, however, that there was not enough evidence in State practice to support the inclusion of a right of third-party countermeasures in Article 54 ASR. This decision was motivated by three legal considerations: the limited, embryonic and selective nature of State practice, the Western dominance of that practice and the absence of opinio juris expressed in the reluctance of States to expressly rely on the concept of third-party countermeasures to justify their conduct. Let us therefore now turn to these considerations and assess whether the ILC’s position is borne out by international practice.

A. The ILC’s criticism of third-party countermeasures

1. Limited, Embryonic and Selective State Practice

A first reason for the ‘agnostic’ formulation of Article 54 ASR is that the ILC identified only six examples of State practice on third-party countermeasures in the period between 1978 and 1998. This led Special Rapporteur Crawford to conclude that international practice on third-party countermeasures was ‘limited and rather embryonic’. The law was therefore said to be ‘uncertain’ and hence there was ‘no clearly recognised entitlement’ to resort to third-party countermeasures under general international

406 For references see n 77 above.
407 For an assessment of the legality of the trade embargo see Feiler (n 77 above) 64–86, and at 74–6 (on Art XXI GATT). See also, ‘Arab Nations quietly bridge the trade gulf with Israelis’, The Times, 7 April 2006, available at <www.timesonline.co.uk>.
law. With a few notable exceptions, this view is not widely shared by commentators. Similarly, the evidence provided by the analysis of 27 examples in this study, including five statements of lesser evidential value, strongly suggests that State practice today is neither limited nor embryonic.

On the basis of the alleged embryonic stage of development of State practice, and in order to secure approval of the Articles on State Responsibility as a whole, Special Rapporteur Crawford suggested that third-party countermeasures should be left to the progressive development of international law. As we noted in the introduction, a savings clause was therefore introduced in Article 54 ASR to this effect. While several commentators have agreed that the law is unclear, they have nonetheless tentatively recognized the legality of third-party countermeasures.

Beyond those statements, this study has arguably demonstrated that State practice has developed in a constant and uniform fashion over the course of the last six decades. International practice could thus hardly be described as still being in a formative stage of development.

Finally, another reason cited by the ILC for not proposing a right to resort to third-party countermeasures in Article 54 was that international practice was deemed to be too selective. Special Rapporteur Crawford noted that:

in the majority of cases involving violations of collective obligations [i.e. those giving rise to a putative right of third-party countermeasures], no reaction at all has been taken, apart from verbal condemnations.

Equally, Cassese has observed that the ‘isolated and sporadic character’ of State practice on third-party countermeasures means that it ‘cannot be indicative of a real trend in the international community’. Other commentators have stressed their ‘caractère aléatoire’ and cited the absence of any third-party countermeasures imposed against Pol Pot’s regime for the genocide in Cambodia as an example. The gist of this argument seems to be that State practice is so isolated and sporadic that it does not amount to a ‘constant and uniform usage’, a necessary element of a rule of customary law.

410 ILC commentary to Art 54 reproduced in Crawford (n 3 above) 305, para 6.
411 See further Dupuy (n 55 above) 505; Sicilianos (n 1 above) 1142-43; Alland (n 1 above) 1239; Villalpando (n 1 above) 411-12; Sicilianos (n 72 above) 458 and Tams (n 1 above) 231 who characterizes the ILC conclusions as ‘over-cautious’.
412 See, eg Sinclair (n 10 above) 241; M Spinedi, ‘International Crimes of State: A Legislative History’, in Weiler, Cassese, and Spinedi (n 1 above) 71-9; K Hailbronner, ‘Sanctions and Third Parties and the Concept of International Public Order’ (1992) 30 AVR 4; Oellers-Frahm (n 9 above) 33; Orakhelashvili (n 1 above) 272.
415 Dupuy (n 55 above) 542. Compare Leben (n 55 above) 76.
Of course, third-party countermeasures have not been taken in response to all serious breaches of international law in the past six decades. However, as Crawford has recognized, they have been taken in response to ‘some of the major political crises of recent times’. In addition to the six examples the ILC had in mind we are reminded of the widespread action taken against the South African policy of apartheid in the 1960s and the serious human rights violations committed in Uganda, the Central African Republic, Liberia, Nigeria, Burundi, Sudan, Burma and Zimbabwe. However, it bears emphasizing that the requirement of ‘constant and uniform usage’ is not a political or moral requirement but a strictly legal one. This is an important observation since countermeasures are conceived of as a legal faculté or right as opposed to a duty.

In other words, what matters is not whether third-party countermeasures have sometimes not been adopted—but whether, once adopted, they respond to the requirements of uniformity and generality.

As we have already suggested that the above study is evidence of a settled practice, the argument of selectivity does not seem convincing.

2. The Dominance of Western Practice

A second reason for the ILC’s position was their observation that Western States dominated international practice. For this reason, practice did not meet the necessary level of generality required to form the basis of a customary rule. While generality cannot be assessed in the abstract, there is no requirement of universality. It is evidence of a widespread acceptance of the practice of States that is normally required. Two factors in particular suggest that the ILC’s assessment of international practice was less straightforward than it had assumed: the actual scope of the practice of developing States and the absence of diplomatic protests against third-party countermeasures in the international community.

First, while international practice may be Western dominated it is certainly not limited to these States. As can be seen from the survey above, in the cases of South Africa, Portugal, Israel, Liberia, Nigeria, Burundi and Zimbabwe, a very significant number of developing States (including all the members of the G77) have either adopted third-party countermeasures.

420 Tams (n 1 above) 234–5; Alland (n 1 above) 1239. This does not mean that practice has to be in rigorous conformity with the putative rule, see further Nicaragua case [1986] ICJ Rep 14 at 98.
countermeasures or expressed a willingness to do so. Additionally, in the cases of Burma and Zimbabwe, over 20 Eastern European States have acted in a similar fashion. In fact, the scope of the available State practice examined above shows that as many as 108 States, from all but the Latin American region, have adopted third-party countermeasures at any one time since 1950. Admittedly, this number includes actions adopted in the context of decisions taken by international organizations such as the Commonwealth suspensions of Nigeria and Zimbabwe and the ECOWAS suspension of Liberia; but as noted above, the actions taken were attributable to the individual member States and therefore deserved to be included in the study. The relevant State practice is thus considerably more extensive and representative than the ILC had assumed.

Second, the absence of diplomatic protests by States other than the target State also needs to be taken into account. In light of the well-known controversy surrounding the debate on third-party countermeasures in the ILC and the UN General Assembly’s Sixth Committee the almost complete absence of protest seems a very surprising feature of international practice. The absence of protest cannot of course automatically be interpreted as tacit acceptance. This is particularly the case where third-party countermeasures have affected rights under less publicized bilateral treaties. This situation is well illustrated by the absence of protests against Canada’s and New Zealand’s suspension of fishing agreements with the Soviet Union in response to its invasion of Afghanistan, or France’s suspension of a treaty on military assistance with the Central African Republic in response to serious human rights violations in the country. However, it is important to stress that in the overwhelming majority of the cases covered by the study, the adopted unilateral coercive measures affected rights under either multilateral treaties (notably GATT) or general international law (freezing of assets). Moreover, the underlying behaviour that triggered the application of third-party countermeasures was, as a serious breach of international law, widely publicized in the world media and thus well-known by members of the international community. These circumstances, underlined by the ‘hue and cry’ evident in many debates in international organizations, afforded States ample opportunity to voice any legal objections.

A clear example of this is where a large group of States has adopted third-party countermeasures that affect multilateral treaty rights or rights

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423 Note however that several major Latin American States have tentatively supported the concept of third-party countermeasures in the work of the ILC; see UN Doc A/C.6/55 SR.17, para 63 (Costa Rica); UN Doc A/C.6/55 SR.17, para 48 (Chile); UN Doc A/CN.4/515/Add.3, 9 (Argentina); UN Doc A/C.6/551 SR.18, para 65 (Brazil).

424 Similarly Tams (n 1 above) 235–37; Sicilianos (n 1 above), 1143; Sicilianos (n 72 above) 497–8.

425 MacGibbon (1953) (n 124 above) 293; MacGibbon (1957) (n 124 above) 115; Akehurst (n 124 above) 38–42; Mendelson (n 124 above) 207–9.

protected under general international law. We are here reminded of the trade embargos and asset freezes imposed against South Africa, Iraq, Burundi, Yugoslavia, Burma, Syria, Zimbabwe and Belarus. In none of these cases have States voiced any legal objections. On the contrary, in the examples of South Africa and Burundi, we have even observed that the OAU, the General Assembly and the Security Council have effectively either encouraged or commended the use of unilateral third-party countermeasures.

The combination of the widespread reliance on *prima facie* unlawful unilateral coercive measures in the public interest; and the tacit acceptance expressed by States, at least in relation to rights affecting multilateral treaties and general international law, arguably constitutes evidence of a settled practice that could form the basis of a rule of customary international law recognizing third-party countermeasures. However, for this to be the case, this State practice needs to be accompanied by a conviction that the action is legally required, *i.e.* opinio juris.

### 3. The absence of opinio juris

A third objection to the legality of third-party countermeasures focuses on the assertion that State practice lacks the requisite opinio juris. In other words, according to this line of argument, political rather than legal considerations have influenced States when adopting *prima facie* unlawful unilateral coercive measures in defence of the most serious breaches of international law. This point is crucial since States have hardly ever expressly relied upon the concept of third-party countermeasures as such in order to justify *prima facie* unlawful unilateral coercive measures in defence of a public interest. Hence, Special Rapporteur Crawford correctly concluded that States had at least an ‘implied preference for other concepts’ when he noted that:

> even if coercive measures were taken, they were not always designated as countermeasures. . . . in some cases governments have preferred to rely on (possibly inapplicable) grounds for the termination of treaties rather than on countermeasures.

Other members of the ILC have been even more explicit and concluded that State practice on third-party countermeasures was simply indicative of ‘politically motivated measures’. The question must thus be asked whether third-party countermeasures can really be said to have any legal significance if States do not explicitly refer to them as a basis for their

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427 See section III.A.2; III.A.11 (South Africa); III.A.16 (Burundi); statement by Dugard (n 103 above).
431 For a summary of views on second reading, see ILC Report (2000), UN Doc A/55/10, para 367. See also Cassese (n 414 above) 207.
conduct. At first glance, the criticism expressed by members of the ILC appears essentially correct and would thus answer this question in the negative. However, two observations strongly suggest that this practice is in fact relevant for the development of the law on third-party countermeasures. Let us now consider them in turn.

First, it is commonplace for States to cite a variety of political and legal justifications for their prima facie unlawful conduct.\textsuperscript{432} Crucially, what is significant in legal terms is arguably not whether States are ‘influenced by considerations of political expediency’, as the ICJ noted somewhat confusingly in the Asylum case, but whether they have actually replaced legal ones in a given case.\textsuperscript{433} The sole example of this in the relevant practice on third-party countermeasures is then British Foreign Minister Cook’s justification for the prima facie unlawful immediate suspension of the UK-Yugoslovak aviation treaty considered above. In a statement the action was justified purely on ‘moral and political grounds’ and hence no reference was made to a legal basis.\textsuperscript{434} Conversely, the only example we have observed above where a legal consideration was clearly dominant was in the refusal of France, Germany and the UK to immediately suspend aviation agreements with Afghanistan in violation of the denunciation clauses in the respective agreements.\textsuperscript{435} However, apart from these exceptions, it is usually a lot more difficult to assess which of these two considerations is the more dominant one.

It is submitted that this complexity can at least be partly explained by the apparent paradox expressed in the desire among States to create a ‘system of multilateral public order’\textsuperscript{436} and their unwillingness, for foreign policy reasons, to formally assume the role of ‘international policeman’ to enforce the most serious breaches; a role individual third-party countermeasures is often thought to perform.\textsuperscript{437} This apparent ambivalence is arguably poignantly expressed in the implicit and explicit legal justifications offered by States for the conduct assessed in this study. In most of these cases, in the absence of alternative justifications or indications of outright illegality, States have only implicitly based their conduct on third-party countermeasures. In other cases, where there has been at least some basis for relying on concepts other than third-party countermeasures, such as the Yugoslav crisis in 1991, States have preferred (after a ‘delicate political assessment’)\textsuperscript{438} to base their conduct primarily on dubious applications of treaty law.

\textsuperscript{432} For an example see n 275 above where we observed that the US used a variety of political and legal justifications for its military invasion of Panama.

\textsuperscript{433} Asylum case [1950] ICJ Rep 1950, 266, 276–77 [emphasis added]; compare Tams (n 1 above) 237–39.

\textsuperscript{434} For the statement see n 329 above. \textsuperscript{435} See Section III.B.3.

\textsuperscript{436} See statement by Brownlie (n 1 above) 311 (para 78).

\textsuperscript{437} See, eg Koskenniemi (n 1 above) 347; W Riphagen, ‘Third Report on State Responsibility’, YbILC (1982) vol II/1, 45 para 142; de Hoogh (n 55 above) 213; or the comments by Russia in UN Doc A/C.6/55/SR.18, 9 (para 51); Botswana (UN Doc A/C.6/55/SR.15, 10, para 63).

\textsuperscript{438} See (n 399 above) para 66 (Advocate General Jacobs’ Opinion).
The unwillingness of States to openly assume the role of international policeman, by expressly relying on third-party countermeasures, has had an unfortunate, albeit predictable, effect on the development of the law in this area: it has significantly clouded the legal issues involved and led to a confusion in the analysis of opinio juris. This confusion is immediately apparent in the legal justifications offered by States for their prima facie unlawful conduct. As one commentator has observed, these have often been ‘ad-hoc, poorly articulated and sometimes unpersuasive’.  

A striking example is again the UK’s conduct against Yugoslavia during the Kosovo crisis. While its flight ban was only justified on ‘moral and political grounds’ no such reservations were expressed in relation to the implementation of the EU-wide freezing order. As a matter of fact, with this single exception, we have noted that pre-dominantly political justifications have not been used by the UK: we are reminded of its unambiguous support for its conduct against Uganda, the Central African Republic, Liberia, Iraq, Nigeria, Burma and Zimbabwe. The pre-dominantly political justification for the Yugoslav flight ban thus stands in stark contrast to other relevant examples of UK practice analyzed above.

Where States have made unambiguous statements (such as France, Germany and the UK in the cases of Afghanistan and Yugoslavia) as to the illegality of a particular act the situation is clear. However, these rare instances are not indicative of a general pattern of behaviour. In fact, in all other instances assessed in this study, it is not clear from available declarations whether pre-dominantly political or legal considerations have ultimately influenced the conduct of States. On the other hand, it is equally clear that, in justifying their conduct, both developed and developing States have made reference to prior serious breaches of international law (both individually and in the context of international organizations) and sought to ensure compliance with the most fundamental obligations in international law. While States have thus not made a direct reference to the concept, the broader justifications offered for their conduct strongly suggest a reliance on the rationale underlying third-party countermeasures. Hence, while States may have been influenced by political considerations, in most cases these have not eclipsed legal ones and do not therefore negate the possible expression of opinio juris. How then, in the absence of explicit statements, should opinio juris be assessed?

As Brownlie points out, this is a question of the burden of proof. For its part, the ICJ has developed two distinct approaches to proving the existence of the relevant opinio juris. In most cases, in the absence of

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439 T Stein, ‘Observations on “Crimes of States”’, in Weiler, Cassese and Spinedi (n 1 above) 194 at 198.
440 Brownlie (n 37 above) 8–10. For the view that opinio juris is a fiction see further, eg H Kelsen, Principles of International Law (1967) 450–51.
any antecedents to the contrary, the Court has presumed that a uniform conduct of States is accompanied by the relevant *opinio juris*. However, in an important minority of cases, the Court has adopted a stricter approach calling for more positive evidence of *opinio juris*. This study bases its assessment of *opinio juris* on the majority approach espoused by the ICJ and doctrine. Significantly, the same approach appears to have been adopted by the ILC in its assessment of State practice on third-party countermeasures and by other commentators.

In reaching their conclusions, the method implicit in their assessment could be described as a process of elimination: in the absence of indications of outright illegality or alternative legal justifications, a particular act has been presumed lawful as a third-party countermeasure. By analyzing alternative and converging legal justifications in detail, it is submitted that the approach adopted in this study is merely a more comprehensive version of the one already applied by the ILC and other commentators. On this basis, by demonstrating that alternative and converging justifications are unavailable in each case, the better view is arguably that there is a presumption of legality attached to the generally uniform conduct assessed in this study.

The view that *prima facie* unlawful unilateral coercive measures taken in defence of the most serious breaches of international law should be regarded as merely ‘politically motivated measures’ is thus not borne out by international practice.

### B. The Security Council as an institutional safeguard

If third-party countermeasures are lawful, the crucial question arises as to whether any institutional or public law safeguards—other than the auto-interpretative and decentralized ones applicable to bilateral countermeasures—apply to their use. As we noted in the introduction, a direct consequence of the ILC’s ‘agnostic’ position expressed in Article 54 ASR was that a formal stance on any possible linkage between third-party countermeasures and the Security Council was never adopted on second reading. We will therefore now assess whether the position espoused by commentators who argue that the use of third-party countermeasures and the Security Council was never adopted on second reading. We will therefore now assess whether the position espoused by commentators who argue that the use of third-party countermeasures is,

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443 See, eg the ILC commentary to Art 54 reproduced in Crawford (n 3 above) 302–05; Tams (n 1 above) 207–28; Sicilianos (n 79 above) 156–69.

444 For a similar approach to assessing *opinio juris* see Lauterpacht (n 441 above) 380.

445 For substantive safeguards see ILC commentary to Art 49 ASR (reversibility), Art 50 (prohibited countermeasures) and Art 51 (proportionality) reproduced in Crawford (n 3 above) 284–96.

or should be, controlled by the international community in the form of the Security Council finds support in international practice.

In the introduction we also noted that for the ILC and most commentators, an essential part of the ‘construction of a multilateral public order’ for the most serious breaches of international law has been the question of the application of possible safeguards of an institutional or public law nature. This question is most clearly expressed in the debate about the linkage between individual third-party countermeasures and the competence of the Security Council under Chapter VII of the UN Charter.\(^448\) While Articles 40 and 47 ASR (as adopted on first reading in 1996) allowed for third-party countermeasures without conferring any formal role for the Security Council, the Special Rapporteurs had on first reading clearly expressed a preference for linking their use to the Council as an institutional safeguard against abuse.\(^449\)

Similarly, the overwhelming majority of commentators envisage some role for the Security Council in the adoption of third-party countermeasures in order to safeguard against the inherent risk of abuse posed by such measures. While the position that third-party countermeasures are only lawful if authorized by the Security Council (or the ‘international community’) is rare among commentators, a significant minority of States have expressed support for this view.\(^450\) Alternatively, it is suggested that while the Security Council may not have an exclusive competence *de lege lata*, such a development would be desirable.\(^451\) However, the majority of commentators who recognize the legality of third-party countermeasures prefer their application to be residual to cases where the Security Council is either unable or unwilling to take appropriate action.\(^452\) Whatever their views are on what the law is, or should be, the crucial question is whether international practice actually

\(^{447}\) See statement by Brownlie (n 1 above) 311 (para 78).

\(^{448}\) For a brief summary of the debate see Klein (n 59 above) 1241.

\(^{449}\) R Ago, ‘Eighth Report on State Responsibility’, YbILC (1979), vol II/1, 3 at 43; commentary to Draft Article 30, YbILC (1979) vol II/2, 118–19 (para 12); see W Riphagen’s Draft Articles 9 and 14.3 in, ‘Sixth Report on State Responsibility’, UN Doc A/CN.4/459/Add.1, 2 and 4; for the ILC commentary to Articles 40 and 47 as adopted on first reading see ILC Report (1996), UN Doc A/51/10, 140 and 144.


\(^{452}\) W Riphagen, ‘Sixth Report on State Responsibility’, UN Doc A/CN.4/459, 14 paras 10–11; Frowein (n 18 above) 424; Oellers-Frahm (n 9 above) 35; de Guttry (n 206 above) 189; Simma (n 1 above) 311; Meron (n 1 above) 287. Compare B Simma, YbILC (2001) vol I, 35.
supports a formal link between the Security Council and third-party countermeasures.

In order to assess this question, the study has evaluated to what extent, if any, the Security Council operates as a safeguard of a public law nature within the regime of third-party countermeasures. A striking feature of the very substantial amount of international practice assessed above is that third-party countermeasures have been largely adopted without any intervention of the Security Council whatsoever. In fact, in several cases, such as those of North Korea and China, Argentina, the Soviet Union (following the shooting down of KAL flight 007), Panama, Iraq, Burundi, Yugoslavia and Sudan, third-party countermeasures have even been adopted while the Security Council has been actively seized of the issues.

With the exception of the cases of Argentina and Nicaragua, where a minority of States other than the target State have protested against the use of unilateral coercive measures without explicit authorization of the Council, the overwhelming majority of States have remained silent on this issue. Arguably, at least some guidance on how to interpret this silence is given by General Assembly Resolution 36/172 in which we observed that the General Assembly explicitly recommended a trade embargo (prima facie an unlawful act at least for GATT members) against South Africa in 1981 ‘pending action by the Security Council’. Hence, taking into account the large amount of actual practice, and following the arguments developed above in relation to the relative absence of diplomatic protests, there is thus considerable support for the view that this constitutes a settled practice. Similarly, following the argument developed above, it can be presumed that this uniform conduct is accompanied by the relevant opinio juris. We can thus conclude that there is strong support for the view that the Security Council does not operate as an institutional safeguard against abuse for third-party countermeasures.

V. Conclusions

This study has demonstrated that the extent and geographical spread of State practice on third-party countermeasures in the modern period has often been underestimated by the ILC and States alike. We have assessed 22 cases relevant to the concept of third-party countermeasures. In all these cases, with the exception of the US trade embargo against Nicaragua, a very large number of States not individually injured have taken third-party countermeasures in response to previous serious breaches of the most fundamental international obligations committed by another State. In at least seven other cases (including Nigeria and Belarus), while not actually adopting third-party countermeasures, a very

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453 See sections IV.A. 2–3.
large number of States not individually injured have claimed a right to do so. While developed States account for most of this extensive practice on third-party countermeasures, a significant minority has been adopted by developing States. Moreover, there is no evidence to support the claim that this practice should be considered as pre-dominantly politically motivated. There is therefore strong support in international practice for the view that States are entitled to take third-party countermeasures in order to protect community interests.

While a degree of hesitation may be understandable in accepting the relevance of this practice to the development of the law on third-party countermeasures, we reiterate that this is an inevitable consequence of the complex interplay between law and politics in this area. This complexity is well expressed in the apparent paradox of the desire of States to increase the effectiveness of international law and their unwillingness to expressly justify their conduct in legally relevant terms and thereby formally assume the role of an international policeman. However, in following the same basic approach as the ILC and other commentators, we hope to have demonstrated that this practice cannot simply be dismissed as pre-dominantly politically motivated because States have relied on the rationale of the concept and no other alternative legal justifications have been available to explain the conduct in legal terms. Finally, international practice has demonstrated that the Security Council does not form part of the regime of third-party countermeasures. The above survey thus strongly supports the conclusion that individual third-party countermeasures are lawful under general international law.

From this study on third-party countermeasures, and the type of public law enforcement it can be said to represent, it can be observed that the emerging constitutionalization of the enforcement function under general international law has not been matched by a corresponding development of institutional safeguards against the exercise of improper or arbitrary uses of third-party countermeasures. The absence of effective safeguards of a public law nature in the current regime is only likely to contribute to States’ marked unwillingness to openly justify their actions in legally relevant terms since they are clearly reluctant, for foreign policy reasons, to formally assume the role of an international policeman. Regrettably, this in turn can only mean that the significant (albeit not decisive) political influence in the adoption of third-party countermeasures will continue to make the development of the law in this field uncertain and difficult to assess in legal terms. It may be that the development of effective institutional safeguards would contribute to making third-party countermeasures more politically acceptable in the international community and thereby made easier to legally evaluate. It is hoped that this study may contribute to an intensified debate about the role of third-party countermeasures and its safeguards regime in a developing system of public law enforcement for international law.