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The Use of Force and the Law of State Responsibility

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THÈSE DE DOCTORAT

Le recours à la force et le droit de la
responsabilité de l'État

Bernardo MAGESTE CASTELAR CAMPOS

Laboratoire de Droit International et Européen

**Présentée en vue de l'obtention
du grade de docteur en droit
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et de l'Università degli Studi di Milano-
Bicocca**
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LE RECOURS A LA FORCE ET LE DROIT DE LA
RESPONSABILITE DE L'ÉTAT

THE USE OF FORCE AND THE LAW OF STATE
RESPONSIBILITY

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TITRE : Le recours à la force et le droit de la responsabilité de l'Etat

RESUME :

La recherche analyse la relation entre les règles générales du droit international concernant la responsabilité des États et la régulation du recours à la force par le droit international. Comme hypothèses initiales, la recherche considère que la régulation du recours à la force a contribué à l'élaboration de certaines règles générales de la responsabilité des États et qu'un tel régime prévoit des règles spéciales adaptées aux circonstances particulières de la violation de l'interdiction du recours à la force en dérogeant l'ensemble des règles générales sur la responsabilité internationale. Par conséquent, la recherche vise à démontrer que les normes juridiques établies ou les mécanismes conçus à l'origine pour donner effet à la régulation du recours à la force sont adaptés à d'autres violations du droit international et, en même temps, certaines particularités sont maintenues en raison de la gravité des intérêts en jeu par le recours à la force armée.

MOTS CLES : Responsabilité des États, Prohibition de l'emploi de la force, Droit international

TITLE: The Use of Force and the Law of State Responsibility

ABSTRACT:

The research analyses the relationship between the international rules of State responsibility and the regulation of the use of force by international law. It is assumed as initial hypotheses that the law of the use of force has contributed to the development of some general rules of State responsibility and that such a regime provides special rules adapted to the specific circumstances of the violation of the prohibition of the use of force derogating from the set of general rules on international responsibility. Therefore, the research aims to demonstrate that established legal norms or mechanisms originally designed to give effect to the regulation of the use of force are adapted to other violations of international law and, at the same time, some particularities are maintained because of the gravity of the interests involved in the use of armed force.

KEYWORDS: State responsibility, Prohibition of the Use of Force, International law

CONTENTS

INTRODUCTION	1
1. Outline of the Work.....	1
2. The ‘contribution’ of the use of force to the law of State responsibility.....	2
3. The ‘derogation’ of the general rules of State responsibility from ‘special rules’ of the law of the use of force	3
4. Methodological Choices.....	4
CHAPTER 1 – ELEMENTS OF INTERNATIONALLY WRONGFUL ACTS	6
Part I – Contribution of the Prohibition of the Use of Force to the Determination of the General Elements of an Internationally Wrongful Act	6
1. Introduction	6
2. Use of Force and General Rules of Attribution of State Responsibility	6
2.1. Use of Force and the Concept of ‘Organs of a State’	7
2.2. Use of Force and the Concept of ‘Conduct Directed or Controlled by a State’	10
3. Use of Force and the Objective Element of State Responsibility	12
4. Use of Force and the Psychological Element of the Wrongful Act	14
5. Use of Force and Responsibility of a State in Connection with the Act of Another State	17
6. Conclusion.....	23
Part II – The Derogation of the Elements of an Internationally Wrongful Act by the Prohibition of the Use of Force	24
1. Introduction	24
2. Special Rules of Attribution regarding the Prohibition of the Use of Force....	24
2.3. The Character of the General Rules of Attribution of State Responsibility and Lex Specialis.....	25
2.4. Special Rules of Attribution regarding Aggression.....	27
2.5. Special Rules of Attribution of the International Humanitarian Law	30
2.6. Special Rules of Attribution regarding the Use of Force against Terrorism	33
3. The Breach of the Prohibition of the Use of Force	36
3.1. The Prohibition of the Use of Force and the Breach of the Duties of Protection and Prevention.....	37
3.2. Illegal Use of Force as an Act of Continuing Character.....	41

4. Special Intent as a Component of the Act of Aggression.....	45
5. Special Rule regarding Complicity to Aggression	50
6. Conclusion.....	53
CHAPTER 2 – CIRCUMSTANCES PRECLUDING WRONGFULNESS	55
Part I – Contribution of the Prohibition of the Use of Force to Self-Defence as a Circumstance Precluding Wrongfulness	55
1. Introduction	55
2. Self-defence as a ‘Primary Rule’	56
2.1. Self-defence as an ‘Inherent Right’	56
2.2. Self-defence as Liberty of Resistance Against an Armed Attack	57
3. Self-defence as a Circumstance Precluding Wrongfulness	58
3.1. Preclusion of the Violation of the Prohibition of the Use of Force	59
3.2. Preclusion of the Wrongfulness of the Violation of the Prohibition of the Use of Force and Other Related Violations.....	59
3.3. Preclusion of the Wrongfulness of Collateral Violations of the Use of Force	61
4. The Range of Violations Precluded by Self-Defence in Practice	63
4.1. Other Obligations Affected by Self-Defence as a Circumstance Precluding Wrongfulness.....	64
4.2. Effect on Third States	65
5. Conclusion.....	70
Part II – The Derogation of the General Rules regarding Circumstances Precluding Wrongfulness.....	72
1. Introduction	72
2. Consent to the Use of Force	73
2.1. State Practice	76
2.2. Analysis	78
3. Armed Countermeasures	79
3.1. State Practice	82
3.2. Analysis	86
4. Humanitarian Intervention and Necessity	87
4.1. State Practice	89
4.2. Analysis	92
5. Intervention to Rescue Nationals Abroad	93
5.1. State Practice	95
5.2. Analysis	98

6. Conclusion.....	99
CHAPTER 3 – THE USE OF FORCE AND LEGAL CONSEQUENCES OF INTERNATIONALLY WRONGFUL ACTS.....	101
Part I – Contribution of the Prohibition of the Use of Force to the General Legal Consequences of Internationally Wrongful Acts.....	101
1. Introduction	101
2. Legal Consequences of the Illegal Use of Force	102
2.1. Obligations of Cessation and Non-repetition	103
2.2. Obligation of Reparation	105
3. Aggravated Consequences of the Illegal Use of Force	111
3.1. The Influence of the Prohibition of the Use of Force in the Development of the Regime of Aggravated Responsibility	111
3.2. Obligation of Cooperation	115
3.3. Obligation of Non-Recognition	117
3.4. Obligation of Non-Assistance	121
4. Conclusions	123
Part II – The Regime of the Use of Force and the Derogation from the General Legal Consequences of Internationally Wrongful Acts	124
1. Introduction	124
2. War Reparations	125
2.1. Modern Regime of War Reparations.....	125
2.2. War Reparations and State Responsibility	127
2.3. Limits to War Reparations considering the Wrongdoer’s Economic Capacity.....	131
3. Legal Consequences Not Involving the Use of Armed Force.....	133
3.1. Punitive Damages	133
3.2. Limitation on Armed Forces and Weapons.....	135
3.3. Demilitarization of Territory	136
3.4. Establishment of Fact-Finding Operations	138
3.5. Arrest and Penal Consequences for Organs of the State	139
3.6. Forcible Change of Regime and Political Measures	144
4. Legal Consequences Involving the Use of Armed Force.....	146
4.1. Imposition of Blockades.....	146
4.2. Imposition of No-Fly Zones	147
4.3. Occupation and Cession of Territory.....	147
5. Conclusion.....	149

CHAPTER 4 – THE USE OF FORCE AND THE IMPLEMENTATION OF STATE RESPONSIBILITY 151

Part I – Contribution of the Prohibition of the Use of Force to the General Rules of Implementation of State Responsibility 151

1. Introduction 151
2. Invocation of the Responsibility of a State 152
 - 2.1. Invocation of the Responsibility by an Injured State 152
 - 2.2. Invocation of the Responsibility by a State other than an Injured State. 155
3. Resort to Unilateral Countermeasures..... 158
 - 3.1. Countermeasures as Measures Originated from Armed Reprisals..... 158
 - 3.2. Countermeasures and the Requirements of Necessity and Proportionality
160
4. Resort to Collective Countermeasures 165
 - 4.1. The Request of the Injured State for the Exercise of Collective Self-Defence 165
 - 4.2. Collective Countermeasures and the Request of the Injured State..... 167
5. Conclusion..... 172

Part II – The Derogation from the General Rules on the Implementation of State Responsibility by the Rules Related to the Prohibition of the Use of Force 173

1. Introduction 173
2. Special Means of Implementation of Responsibility for Violations of the Prohibition of the Use of Force 174
 - 2.1. Measures of Self-Defence 174
 - 2.2. Armed Countermeasures 180
3. Special Rules on the Implementation of State Responsibility under the Charter of the United Nations..... 183
 - 3.1. The Security Council and the Implementation of State Responsibility for Breaches of Article 2(4) of the UN Charter 184
 - 3.2. Coercive Measures and Collective Countermeasures 187
 - 3.3. Article 59 and the Speciality of the Rules regarding Collective Security
190
4. The relationship between Measures of Collective Security and Countermeasures 192
5. Conclusion..... 197

CONCLUSIONS..... 198

Bibliography..... 201

ABBREVIATIONS

AFDI – *Annuaire français de droit international*

AJIL – American Journal of International Law

ARSIWA – Articles on the Responsibility of States for Internationally Wrongful Acts

BYIL – British Yearbook of International Law

CUP – Cambridge University Press

EECC – Eritrea-Ethiopia Claims Commission

EJIL – European Journal of International Law

ICJ – International Court of Justice

ICRC – International Committee of the Red Cross

ILC – International Law Commission

JCSL – Journal of Conflict & Security Law

LJIL – Leiden Journal of International Law

MPEPIL – Max Planck Encyclopedia of Public International Law

OUP – Oxford University Press

PCIJ – Permanent Court of International Justice

PYIL – Polish Yearbook of International Law

QIL – Questions of International Law

RCADI – *Recueil des Cours de l'Académie de Droit International*

RDI – *Rivista di diritto internazionale*

RGDIP – *Revue générale de droit international public*

RIAA – Reports of International Arbitral Awards

TIAR – Inter-American Treaty of Reciprocal Assistance

UN – United Nations

UNCC – United Nations Compensation Commission

UNGA – United Nations General Assembly

UNSC – United Nations Security Council

VCLT – Vienna Convention on the Law of Treaties (1969)

ZaöRV – *Festschrift für Ausländisches Öffentliches Recht und Völkerr*

INTRODUCTION

The law of State responsibility and the regulation of the use of force by States are two of the most controversial subjects of international law. This can be easily explained if one thinks about the way how the rules on international responsibility and the use of force affect the interests of States and limit their freedom of action. As observed by an author, ‘State responsibility is a highly sensitive, politicized subject, together with the non-use of force and non-intervention, to which it is closely related, perhaps the most highly politically charged part of international law’.¹ The controversial aspect of both subjects is even more apparent in their intertwining.

Having as motivation the close relationship between the prohibition of the use of force by States and the rules determining the legal relations that arise for States from the breach of an obligation imposed by international law, the present research proposes to analyse how the law of the use of force affects the international rules of State responsibility. As an initial hypothesis is assumed that the law of the use of force, on one side, has contributed to the development of some general rules of State responsibility. On the other side, it is assumed that the law of the use of force provides special rules adapted to the specific circumstances of the violation of the prohibition of the use of force, which derogate from the set of general rules on international responsibility. The research, therefore, outlines the existence of an ambiguous relationship between the two regimes of international law. It demonstrates that established legal norms or mechanisms originally designed to give effect to the regulation of the use of force are adapted to other violations of international law and, at the same time, some particularities are maintained because of the gravity of the interests involved by the use of armed force.

1. Outline of the Work

The present work delineates such a relationship based on the general rules of the law of State responsibility codified by the International Law Commission (ILC) of the United Nations in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) of 2001. The analysis is divided into four chapters dealing with the core aspects of the law of State responsibility against which the rules of the law of the use of force are confronted.

Chapter 1 addresses the impact of the law on the use of force on the general principles governing the ‘origin’ of State responsibility, i.e. the criteria according to which a wrongful conduct can be attributed to a State and the cases in which the conduct at stake can be considered a violation of an international obligation of a State. It also analyses the association of the law of the use of force with the role of fault as an element of the wrongful act and the responsibility of a State in connection with the act of another State. Chapter 2 addresses the hypothesis of circumstances precluding wrongfulness, i.e. the

¹ K Zemanek, ‘Appropriate Instruments for Codification: Reflections on the ILC Draft on State Responsibility’ in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, vol 2 (Editoriale Scientifica 2004) 897, 918.

situations which may excuse or justify the breach of an international obligation by a State. The consequences of State Responsibility and the content of the legal relationship created by the violation of a legal obligation in international law are addressed in Chapter 3. Chapter 4 is directed to the rules of implementation of State responsibility, the *mise en oeuvre* of the consequences of the violation of an international obligation and the invocation of the responsibility of a State. This arrangement was inspired by the division of the ARSIWA.²

Each chapter is divided into two parts, dealing respectively with the contribution of the law of the use of force to the consolidation of the general rules of State responsibility (Part One) and the possible derogations to the latter regime that can arise from the violation of the general prohibition to use force in international relations (Part Two). The division emphasizes the duality of the relationship between both subjects on each set of rules of State responsibility. Nevertheless, there is no perfect mirroring between the two parts and different general rules of State responsibility were chosen as a reference in each part of the same chapter.

The term ‘law of the use of force’ (or ‘law of armed force’) is adopted throughout the research as a reference to the set of international rules which regulate aspects related to the use of force by States, generally including justifications for the use of force such as self-defence and the transition from peacetime to armed conflict (*jus ad bellum*). The research also covers other rules which are not traditionally considered to be included in the concept of *jus ad bellum* but are related to the regulation of the use of force by States, such as rules of collective security, including certain aspects of the law of the United Nations; and rules traditionally included in the corpus of the *jus in bello* governing the conduct of States during armed conflicts, such as the conduct of States vis-à-vis other belligerent States, the law of neutrality and the law of belligerent occupation. The term ‘law of State responsibility’ is understood as the system of secondary rules which determines the legal relationships created by the violation of an international obligation by States, such as the general elements required for the establishment of an internationally wrongful act, possible excuses and justifications for the wrongful conduct, its general consequences and rules on the implementation of responsibility.

2. The ‘contribution’ of the use of force to the law of State responsibility

Part One of each chapter analyses the contribution of the law of the use of force in the development of the law of State responsibility. The term ‘contribution’ is adopted in a broad sense to refer to the impact of the regime of use of force in the development of the customary general rules of State responsibility. Although it is clear that the rules of State responsibility flow as a consequence of the existence of rights and duties of States in

² Chapter 1 corresponds to Chapters I to IV of Part One of the ARSIWA (Articles 1 to 19) which establishes the general requirements for the existence of the responsibility of a State in international law. Chapter 2 addresses the circumstances precluding wrongfulness codified by Chapter V of Part One of the ARSIWA (Articles 20 to 27) and in the present work they are analysed separately from the other rules of Part One due to its importance, particularly in relation to the role of justifications to the law of the use of force. Chapter 3 corresponds to Part Two of the ARSIWA (Articles 28 to 41), addressing the content of the international responsibility of a State. The rules on the implementation of State responsibility addressed by Chapter 4 are dealt with by Part Three of the ARSIWA (Articles 42 to 54). The general provisions of Part Four of the ARSIWA (Articles 55 to 59) are addressed among the four chapters.

international law,³ some rules dealing with specific aspects of State responsibility, such as the forms of reparation for wrongful conducts, the invocation of responsibility or its implementation only began to crystallize in the late nineteenth century and are still being developed.⁴ Therefore, the general rules of State responsibility were developed considering the contemporaneous international legal framework and the reactions to violations of certain international obligations. This is especially relevant in the case of the regulation of the use of force by States, one of the most traditional subjects of international law and a compelling influence for dealing with relations of power between States.

The contribution of the rules of the use of force on the law of State responsibility is concretely observed in the development of the theory of State responsibility and the process of codification and progressive development of this regime carried out by the International Law Commission between 1955 and 2001. This contribution is evident in the choice of the topic by the UN General Assembly, which considered ‘desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified’.⁵ The regulation of the use of force was also determinant for the change in the methodological approach carried out in 1963 by the Commission, in which the subject of the responsibility of States for injuries caused to aliens was replaced by the codification of the general rules of State responsibility to deal also with ‘acts contrary to the purposes and principles of the United Nations Charter, and especially acts constituting a threat to international peace and security’.⁶

3. The ‘derogation’ of the general rules of State responsibility from ‘special rules’ of the law of the use of force

Part Two addresses the derogatory effect that the regulation of the use of force in international law may have on the general rules of State responsibility. This derogatory

³ D Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Lumachi 1902) 25; H Accioly, ‘Principes généraux de la responsabilité internationale d’après la doctrine et la jurisprudence’ (1959) 96 *RCADI* 349, 353; P M Dupuy, ‘Le fait générateur de la responsabilité internationale des États’ (1984) 188 *RCADI* 9, 21; A Pellet, ‘The Definition of Responsibility in International Law’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 3, 4.

⁴ R Kolb, ‘Le Droit International Comme Corps de “Droit Privé” et de “Droit Public”’ (2021) 419 *RCADI* 9, 305.

⁵ UNGA Res 799 (VIII) (7 December 1953) preambular para 1.

⁶ R Ago, First Report on State Responsibility, ILC Yearbook 1969, Vol II, 138 (para 86). The focus of the codification effort of the Commission on the responsibility of the State for injuries caused in its territory to the person or property of aliens carried out by the Special Rapporteur Francisco García-Amador between 1956 and 1961 was criticized by several States in the Sixth Committee of the UN General Assembly, which suggested a change on the Commission’s approach on the subject. In 1962 the ILC established a Sub-Committee to discuss the way of approaching the subject and the aspects that should be considered on the codification of State responsibility and in the following year Roberto Ago, the head of the Sub-Committee, was appointed by the Commission as Special Rapporteur. Such shift of the approach was reflected in UNGA Res 1765 (XVII) of 20 November 1962, in which the organ recommended the ILC to ‘continue its work on State responsibility taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations’ (para 3(b)). A similar recommendation is contained in UNGA Res 1902 (XVIII) of 18 November 1963 (para 4(a)).

effect may represent an application of the *lex specialis* principle to the law of State responsibility, as covered by Article 55 of the ARSIWA:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

The ARSIWA are intended to apply to the violation of most of the primary rules of international law, but exceptionally they may give way to special secondary rules, attributing to them a normative priority over the general rules of State responsibility.⁷ The normative priority given to special secondary norms is explained by their purpose of increasing the compliance of certain primary rules by States and the consequent effectiveness of the international legal system. Thus, the existence of special secondary rule presupposes the derogation from the general rules of State responsibility, since ‘for the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other’.⁸ In other words, the special character of a rule depends on the existence of an antinomy or conflict with a general rule, in this case, a general rule of responsibility of States as codified by the ARSIWA.⁹

4. Methodological Choices

The ARSIWA are adopted as reference for the analysis of the subject as they are considered to fairly reflect the general customary rules of State responsibility.¹⁰ The

⁷ J Crawford, First Report on State Responsibility, ILC Yearbook 1998, Vol II(1) 7 (para 17); ILC, ‘Report of the Study Group on the Fragmentation of International Law, Finalized by Martti Koskenniemi’ (13 April 2006) UN Doc A/CN.4/L.682, 38 (para 64).

⁸ Commentaries to Article 55, para 4. The *lex specialis* principle is understood in this case as a legal tool of conflict solution applicable in case of conflict between general and special rules, both valid and potentially applicable to the same situation, according to the maxim *lex specialis derogat generali* (or *generalia specialibus non derogant*). It is also possible to conceive the *lex specialis* as a principle of interpretation and application of norms, in which the special rule elaborates or specifies the application of a general rule in a specific case. In this situation, there is no normative conflict but an ‘accumulation’, in which the general rule is not set aside by the special rule but complements or qualifies it. J Pauwelin, *Conflict of Norms in Public International Law* (Cambridge 2003) 161; ILC, ‘Report of the Study Group on the Fragmentation of International Law’ (n 7) 54 (para 98).

⁹ The ILC differentiates ‘strong’ from ‘weak’ forms of *lex specialis*, respectively ‘self-contained regimes’, and specific treaty provisions. The existence of self-contained regimes in total exclusion of general norms of international law is highly unlikely, although it is possible to conceive the existence of treaty-based regimes composed by primary and secondary rules which ‘contracts out’ some general rules of State responsibility but which inevitably ‘fall back’ on the general rules of State responsibility when necessary, in order to fill the areas not regulated by it. For a discussion regarding self-contained regimes and different forms of *lex specialis*, see W Riphagen, Third Report on State Responsibility, ILC Yearbook 1982, Vol II(1) 28-34 (paras 46-77); B Simma, ‘Self-Contained Regimes’ (1985) 16 *NYIL* 111-136; KC Wellens, ‘Diversity in secondary rules and the unity of international law: some reflections on current trends’ (1994) 25 *NYIL* 3-37; Pauwelin (n 8) 212-218; ILC, ‘Report of the Study Group on the Fragmentation of International Law’ (n 7) 83 (para 154).

¹⁰ This position is shared by the majority of the doctrine and by international courts and tribunals, even if the customary character of some provisions is debatable. J Crawford, *State Responsibility* (CUP 2013) 43; M Arcari, ‘Forma o sostanza per gli Articoli sulla responsabilità internazionale dello Stato?’ in A Annoni, S Forlati and P Franzina (eds), *Il Diritto internazionale come sistema di valori* (Jovene 2021) 195, 210.

Commentaries to the ARSIWA, reports of Special Rapporteurs, discussions in the International Law Commission and the Sixth Committee of the UN General Assembly are used as auxiliary means of interpretation of the rules of State responsibility.¹¹

The rules of the law of the use of force are analysed mainly through conventional and customary rules as evidenced by State practice. The legal justifications adopted to justify the use of force and international reactions to it, especially through institutionalized means and the United Nations, are used to establish the application and the content of such rules.¹²

¹¹ On the interpretation of the ARSIWA, see G Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2016) 85 *BYIL* 10-20.

¹² For the role of State practice in the analysis of the rules of the law of the use of force, see E Cannizzaro and P Palchetti, 'Customary International Law on the Use of Force... at a Time of Perplexity' in E Cannizzaro and P Palchetti (eds), *Customary International Law on The Use of Force* (Brill 2005) 1-6.

CHAPTER 1 – ELEMENTS OF INTERNATIONALLY WRONGFUL ACTS

The origin of State responsibility is shaped by rules of international law determining how and when a State may be deemed responsible for a wrongful act. In the ARSIWA such conditions are covered by Chapters I to IV of Part One, which deal with general principles establishing basic elements of an internationally wrongful act, rules of attribution of conduct to a State, the determination of a breach of an international obligation, and the responsibility of a State in connection with the act of another State. The present chapter intends to analyse how primary rules related to the prohibition of the use of force may affect such basic elements of the State responsibility, either by influencing their determination (part one) or by deviating from rules regarding it (part two).

Part I – Contribution of the Prohibition of the Use of Force to the Determination of the General Elements of an Internationally Wrongful Act

1. Introduction

The basic elements necessary to originate the responsibility of a State in international law are the existence of conduct that constitutes a breach of an international obligation of the State (the ‘objective element’) and the attribution of such conduct to it (the ‘subjective element’). The influence of the rules prohibiting the use of force in international law may be verified not specifically in the establishment of such basic elements, but in the development of concepts connected to it. In the case of the subjective element, for instance, the increased activity of armed groups and non-State actors in the last decades may have been contributed to the transformation of the classic rules of attribution of conduct to States (section 2). Such influence is evident in the qualification of the breach of certain international obligations of due diligence established by the law of neutrality (section 3). Such influence may also be verified regarding the doctrinal approaches regarding the role of the psychological element as a third necessary component of State responsibility, in special by providing examples of rules on the verge of the objective and subjective theories (section 4). It is also possible to verify that the rules related to the use of force by States may have been the base for the development of the modern notion of indirect responsibility, especially regarding the situation of military or belligerent occupation (section 5).

2. Use of Force and General Rules of Attribution of State Responsibility

The influence of the prohibition of the use of force over the general rules of attribution of State responsibility may be verified especially in situations in which a link exists between private entities making use of illegal force and a State. In this sense, situations in which a State tries to conceal the use of groups or individuals operating under its command as proxies in the pursuit of its interests have influenced the formulation of a general rule encompassing such situation also for other types of conduct. Such possibility is analysed in the present section, in particular regarding the nature of such link and the level of control required under the hypothesis of conduct of organs of a State, covered by Article

4 of the ARSIWA (section 2.1), and that of conduct ‘directed or controlled by a State’, covered by Article 8 (section 2.2).

2.1. Use of Force and the Concept of ‘Organs of a State’

The most basilar principle of attribution of State responsibility is the one according to which a State is responsible for the conduct of its organs. The rule is deemed to reflect customary international law and is expressed by Article 4(1) of the ARSIWA, according to which ‘the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State’.¹³

The reading of Article 4 suggests that its application depends on the concept of State organ, which in principle is determined by the internal law of the State, as provided for under paragraph 2 of the same provision. It is clear that, among the entities which are widely regarded as State organs, the armed forces of the State are a primary example that is encompassed by Article 4 of the ARSIWA.¹⁴ On the other hand, the employment of armed groups may not be adequately dealt with by such provision. In the last years of its work on the codification of State responsibility, the ILC enlarged the manner in which the concept of State organ is defined in order to make it broad enough to encompass every type of organ having an institutional link with the State. This fact may be related to the operation of entities employing armed force in the interests of a State, which may not be considered as State organs under its domestic law and at the same time act under its control. The hypothesis of the act of such entities, usually nominated as armed bands or groups, irregulars or volunteers, will be analysed in the present section.

The notion of State organ adopted by the Commission in the First Reading of the Draft Articles in 1996 was based on a restrictive conception, which considered the domestic law of the State as the only relevant criteria to determine the concept of State organ.¹⁵ The concept adopted in 2001 by the ARSIWA in Article 4 is considerably broader, as its paragraph 2 provides that ‘an organ includes any person or entity which has that status in accordance with the internal law of the State’. The Commission, therefore, admitted that the domestic law is not the exclusive criteria for identifying a State organ but does not establish what other criteria may be used to identify it, which leaves room for admitting

¹³ R Ago, Third Report on State Responsibility, ILC Yearbook 1971, Vol II(1) 233-234. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, 87 (para 62); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43, 202 (para 385).

¹⁴ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, 50-53 (paras 86 and 91) and 128 (para 251); *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168, 242 (para 214).

¹⁵ Draft Article 5 [1996] establishes that ‘conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question’. Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, Report of the ILC on the work of its forty-eighth session, UN Doc A/51/10, ILC Yearbook 1996, Vol II(2) UN Doc A/CN.4/SER.A/1996 Add. 1 (Part 2), Draft Article 5; P Palchetti, *L’organo di fatto dello Stato nell’illecito internazionale* (Giuffrè 2007) 23, 25-30.

the existence of organs *de facto*.¹⁶ It is not entirely clear why the Commission changed its approach, although it is possible to suppose that the concept of organs *de facto* was adopted to attribute the conduct of groups of irregulars to a State, in special situations in which the State uses persons or groups to perform covered public tasks abroad.¹⁷ Such a situation may be covered not only by Article 4 but also by Article 8 (as analysed in the next section), depending on the existence of a factual link.

The use of armed groups by a State in order to interfere in internal affairs abroad is an ancient question in international law, sometimes encompassed under the concept of indirect aggression.¹⁸ UN General Assembly Resolution 3314 (XXIX) (1974) listed as acts of aggression ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein’.¹⁹ In this sense, it is well established in international law that the control of a State over such groups will determine its responsibility for their actions.²⁰

The notion of ‘complete dependence’ was adopted by the ICJ in the *Nicaragua* case (1986) to solve this problem. In the case the Court analysed the possibility of considering the *contras* as a State organ of the United States without referring to any specific conduct, determining ‘whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government’.²¹ After establishing that there was no evidence of the ‘complete dependence’ of the *contras* on United States aid and ‘that the United States having exercise such a degree of control in all fields as to justify treating the *contras* as acting on its behalf’ (although having a potential of control for such), the Court concluded that it was unable to determine ‘that the *contra* force may be equated for legal purposes with the forces of the United States’.²²

A similar approach was adopted in the *Armed Activities* case (2005) concerning the attribution of conducts of the Congo Liberation Movement (MLC) to Uganda, in which the ICJ concluded that ‘the conduct of the MLC was not that of “an organ” of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001)’. The Court also analysed and rejected the hypothesis of attribution to Uganda of acts of the MLC under Articles 5 (Conduct of persons or entities exercising elements of governmental authority) and 8 (Conduct directed or controlled by a State).²³ In the *Bosnian Genocide* case (2007), the Court adopted again such an approach to verify if the genocide committed in Srebrenica ‘were perpetrated by

¹⁶ Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (n 14) 24.

¹⁷ R Kolb, *The International Law of State Responsibility* (Elgar 2017) 79.

¹⁸ See for instance the report of the UN Secretary General of 1952 according to which ‘the characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreign or nationals seemingly acting on their own initiative’ (Question of defining aggression: report of the Secretary-General (1952) UN Doc A/2211, 56 (para 414)).

¹⁹ UNGA Res 3314 (XXIX) (14 December 1974), Article 3(g).

²⁰ I Brownlie, *International Law and the Use of Force by States* (OUP 1963) 370.

²¹ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 62 (para 109).

²² *Ibid*, 62-63 (para 110).

²³ *Armed Activities on the Territory of the Congo* (n 14) 226 (para 160).

organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action'. The Court applied the 'complete dependence' threshold to determine whether several entities connected to the Republika Srpska might be considered as *de facto* organs of the Federal Republic of Yugoslavia, rejecting the attribution and asserting that the equation of *de facto* organs to *de jure* organs 'must be exceptional' in the sense that 'it requires proof of a particularly great degree of State control over them'.²⁴

Although the attribution of the conduct of armed groups to States is frequently analysed regarding their characterization of *de facto* organs, rarely they are confirmed as such. In none of the cited cases of the ICJ, an armed group was considered to be a *de facto* organ of the State against which the responsibility is invoked. Part of the reason for this is related to difficulties in proving the factual link between armed groups and States. On the other hand, it is also possible to consider that the concept of a *de facto* organ is not appropriate for such armed groups, and attribution through the rule in Article 8 of the ARSIWA is preferable. Having in mind such a conclusion, it will be improper to consider that the use of force by armed groups is the main inspiration for the concept of *de facto* organs.

As explained by Palchetti, the reason for the change of the approach of the Commission and the introduction of Article 4(2) may be practical, linked with the intention to reduce the risk of abuse of the concept of 'internal law' of former Draft Article 5 [1996].²⁵ The justification provided for by the Commission is that the mere reference to the internal law for the status of State organs would not be sufficient since 'in some systems the status and functions of various entities are determined not only by law but also by practice'.²⁶ Nevertheless, this explanation seems not to be enough, since the former Draft Article 5 [1996] did not exclude the possibility of a broad interpretation of the concept of internal law.²⁷

It is possible to conclude that the concept of *de facto* organs of States adopted by the ILC in Article 4(2) of the ARSIWA was not established under the particular influence of the activities of armed groups. On the other hand, such may be the case of Article 8, analysed in the next section.

²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 13) 201-205 (paras 386-393).

²⁵ Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (n 14) 33. This hypothesis is confirmed by Special Rapporteur Crawford, according to which 'it was not unusual for States to rely on their internal law to escape their international responsibility'. 2553rd meeting (31 July 1998), ILC Yearbook 1998, Vol I, 233 (para 37).

²⁶ Commentaries to Article 4, para 11 (note 122). The Commission mentioned cases in which entities *prima facie* State organs do not have such status under the domestic law of the State. Likewise, Special Rapporteur Crawford also referred to arbitral awards in which States claimed not to be responsible for actions done by *de facto* organs. 2553rd meeting (31 July 1998), ILC Yearbook 1998, Vol I, 233 (para 37).

²⁷ In this sense, former Article 5 [1996] did not exclude the possibility of a broad interpretation of the concept of internal law. Special Rapporteur Ago also mentioned the example of armed groups as *de facto* organs whose actions are directly attributed to the State. R Ago, Fourth Report on State Responsibility, ILC Yearbook 1972, Vol II 120 (para 136). See also Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (n 14) 31-32.

2.2. Use of Force and the Concept of 'Conduct Directed or Controlled by a State'

Article 8 of the ARSIWA establishes that 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. According to the Commission:

Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as 'volunteers' to neighbouring countries, or who are instructed to carry out particular missions abroad.²⁸

Article 8 establishes a rule for attributing acts of private persons to the State and is considered by some authors as a relatively recent development in the law of State responsibility.²⁹ It can be assumed that this rule is related to or has been influenced by the phenomenon of the use of armed groups as a proxy for the action of States abroad, which may commit wrongful conducts and at the same time avoid the attribution of their conduct by the classical principle of attribution of Article 4.

Article 8 establishes that the rule applies to a *conduct* complained by the injured State, while Article 4 applies to all the *conducts* of the State organ. The decision to establish a separate rule dealing with the attribution of specific conducts of private persons to a State seems to be closely linked with the decision of the ICJ in the *Nicaragua* case regarding the attribution of the conduct of paramilitary groups to a State, as mentioned in the previous section. After rejecting the characterization of the *contras* as an organ of the United States due to the lack of complete dependence on it, the Court considered that specific conducts violating human rights and humanitarian law committed by the irregular forces might, in theory, be attributed to the United States if proved that 'that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed'.³⁰ The criterion of 'effective control' adopted by the Court as a determinant of the degree of control that must be exercised by a State for the conduct of a private person to be attributed to it is implicitly adopted by the Commission in the Commentaries to Article 8.³¹

²⁸ Commentaries to Article 8, para 2.

²⁹ L Condorelli and C Kress, 'The Rules of Attribution: General Considerations' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 221, 227; C de Stefano, *Attribution in International Law and Arbitration* (OUP 2020) 67-68.

³⁰ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 62-65 (paras 109-110 and 115).

³¹ According to the Commission, 'the conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation' (para 3). It also criticised the decision of the Appeals Chamber of the ICTY in the *Tadić* case opposing the criterion adopted by the ICJ in the *Nicaragua* case (para 4). As observed by Arangio-Ruiz, the commentary on paragraph 3 requiring the direction or control of the 'specific operation' is inconsistent with the requirement of control over the 'conduct' expressed by the text of Draft Article 8. G Arangio-Ruiz, 'State Responsibility Revisited. The Factual Nature of the Attribution of Conduct to the State' (2017) 100 (Supplement to Issue No. 1) *RDI* 1-162, 84.

Although the decision of the Commission to introduce the rule of Article 8 of the ARSIWA was particularly inspired by the problem of the attribution of the conduct of armed groups to a State, it is difficult to sustain that the principle expressed by it was originated in such a situation. In the first place, before 1998 the Commission had already been made aware of the problem of attributing the conduct of non-State armed groups and established a solution to it based on the classical principles of attribution of conduct. Article 8 [2001] was inspired by Draft Article 8(a) [1996], which established that ‘the conduct of a person or group of persons shall also be considered as an act of the State under international law if (...) it is established that such person or group of persons was in fact acting on behalf of that State’.³²

The main difference between the two provisions is that the 1996 version considered the entity exercising the conduct attributable to the State as a *de facto* organ of it, while Article 8 adopted in 2001 considered it exclusively as a private person. In other words, Draft Article 8 [1996] was understood as a ‘supplement’ of the principle according to which the State is responsible only for the conduct of its organs and consider that private persons may be equated as *de facto* State organs,³³ while Article 8 [2001] seems to provide an exception to the fact that the conduct of private persons may not be attributed to a State.³⁴ In this case, since the private person is not an organ of a State, only specific conducts could be attributed to it. It is possible to conclude that the attribution of conduct to armed groups was dealt with by the Commission using the rules codified in the First Reading of the ARSIWA in 1996.

Secondly, the use of the *Nicaragua* case as an authoritative source for establishing the existence of the rule of Article 8 of the ARSIWA or as the main rule to deal with armed groups may be misleading. In the decision of 1986, the ICJ analysed whether the *contras* could be equated to *de facto* organs of the United States before adopting the principle later expressed in Article 8 [2001],³⁵ opting first for the consolidated rule of attribution in order to deal with the conduct of armed groups. The decision is also criticised for not being grounded on a clear customary rule or not having explained the grounds for it.³⁶

A third consideration that points out to the exclusion of the influence of such specific situation for the establishment of the rule of Article 8 is that it was also elaborated having in mind the situation of State-owned companies. As in the case of the conduct of armed groups, the Commission considers the possibility of ‘fraud and evasion’ by a State in the

³² The provision was proposed by Special Rapporteur Ago in 1971 based on international practice and would comprise the hypothesis of ‘private persons or groups used as auxiliaries in the police or armed forces, or sent as “volunteers” to neighbouring countries’ and of ‘persons employed to carry out certain assignments in foreign territory, which may or may not be acknowledged’. Ago, Third Report (n 13) 264 (para 191).

³³ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 32 (Commentary 1 to Article 8).

³⁴ Commentaries to Article 8, para 1.

³⁵ The same procedure had been adopted by the Court in the *United States Diplomatic and Consular Staff in Tehran* case of 1980, in which the Court considered that the conduct of the militants which attacked the American Embassy ‘might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation’. *United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) [1980] ICJ Rep 3, 29 (para 58).

³⁶ A Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *EJIL* 649-668, 653-654.

use of such companies.³⁷ This problem, which is not the concern of the present study, was analysed by Roberto Ago in 1971 and addressed in Draft Article 7 [1996] approved in First Reading in 1996, also based on its consideration as a State organ.³⁸

As observed by some authors, in reality, the rule expressed in Article 8 seems to be inspired by or is a specific provision of Article 4(2), since it considers the private person indeed a *de facto* organ of the State, although using more rigorous criteria.³⁹ In this sense, it is not possible to assert that it is a rule which was exclusively inspired by the action of armed groups in international relations.

3. Use of Force and the Objective Element of State Responsibility

The second essential element of an internationally wrongful act is that the conduct constitutes a breach of an international obligation of the State. The qualification of the breach of an international obligation is an operation that not only has theoretical value but is also important for determining the *tempus commissi delicti* and the consequences of the wrongful conduct, such as the faculty to adopt countermeasures. Some of the aspects relevant for the purposes of determining whether certain obligations may be deemed as breached were developed by doctrine from the end of the nineteenth century relying on elements drawn from practice concerning the use of force by States.

As an example that fostered a discussion one may mention the law of neutrality, in particular the obligation of neutral States to adopt measures to avoid the breach of neutrality. This question was analysed regarding the responsibility of the United Kingdom for the use of warships built in its territory and used by the Confederates during the American Civil War, as discussed in the *Alabama Claims* arbitration. The Treaty of Washington of 1871 between the United States and the United Kingdom concerning the creation of an arbitral tribunal to settle the question established that the arbitrators should decide in light of three obligations for a neutral State: ‘to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace’ or to prevent the departure from its jurisdiction; ‘not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other’; and ‘to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties’.⁴⁰

³⁷ Commentaries to Article 8, para 6.

³⁸ The provision was proposed by Special Rapporteur Roberto Ago in 1971. Ago, Third Report (n 13) 262 (para 185, Article 7); ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 31 (Commentary 18 to Article 7).

³⁹ C Kress, ‘L’organe de facto en droit international public’ (2001) 105 *RGDIP* 93, 127-132; Palchetti, *L’organo di fatto dello Stato nell’illecito internazionale* (n 14) 37; G Cahin, ‘The Responsibility of Other Entities: Armed Bands and Criminal Groups’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 331-342, 333; Arangio-Ruiz, ‘State Responsibility Revisited’ (n 31) 147.

⁴⁰ *Treaty Between Great Britain and the United States for the Amicable Settlement of All Causes of Difference Between the two Countries* (adopted 8 May 1871, entered into force 17 June 1871) 143 CTS 145, Article VI.

The arbitral tribunal confirmed that as a neutral, the United Kingdom has ‘failed to use due diligence in the performance of its neutral obligations; and especially that it omitted (...) to take in due time any effective measures of prevention’ concerning the construction, equipment, and armament of the CSS Alabama.⁴¹ The case is considered as the first major account of the concept of due diligence in international law and generated legal debates over its content.⁴² The responsibility of the United Kingdom in the case was considered by different authors to be derived from an omission,⁴³ negligence,⁴⁴ or both.⁴⁵ As the nature of the obligation of due diligence breached was unclear, issues such as the possibility of attribution of the conduct of particulars to a State and the existence of the psychological element (as analysed in the next section) were considered together by doctrine.

Even today there is not a clear definition of due diligence in international law. The concept was addressed indirectly by the works of the ILC on State responsibility concerning the notions of obligations of conduct and obligations ‘to prevent an event’ in the classification of obligations proposed by Special Rapporteur Roberto Ago, a distinction particularly important for determining the *tempus commissi delicti* and the consequences of the wrongful conduct.⁴⁶ Due to several criticisms, the distinction was dropped out in the final version of the ARSIWA,⁴⁷ and due diligence was considered by the Commission as a standard of conduct which may ‘vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation’.⁴⁸

In this sense, due diligence is generally considered as a standard of conduct constituting an element of the primary rule (or an ‘identifier’ for international obligations).⁴⁹ In the case of the law of neutrality, the duty is better understood as an obligation of the neutral State to adopt efforts to prevent activities detrimental to other States. Even if there are

⁴¹ *Alabama claims of the United States of America against Great Britain* (United States v United Kingdom) (1872) 29 RIAA 125-134, 130.

⁴² A Ouedraogo, ‘La Neutralité et l’Emergence du Concept de Due Diligence en Droit International. L’Affaire de l’Alabama Revisitée’ (2013) 13 *Journal of the History of International Law* 307, 335; G Bartolini, ‘The Historical Roots of the Due Diligence Standard’ in H Krieger, A Peters and L Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 23, 27; A Ollino, *Due Diligence Obligations in International Law: A Theoretical Study* (CUP 2022, forthcoming) Chapter 3, Section 3.2.1.

⁴³ J C Bluntschli, ‘Opinion impartiale sur la question de l’Alabama et sur la manière de la résoudre’ (1870) 2 *Revue de droit international et de législation comparée* 452, 473.

⁴⁴ E S Creasy, *First Platform of International Law* (John van Voorst, 1876) 317 (para 339)

⁴⁵ C Calvo, *Le droit international théorique et pratique*, Tome IV (4th edn, Guillaumin 1888) 476 (para 2581).

⁴⁶ This obligation was addressed by Draft Article 23 [1978]. R Ago, Seventh Report on State Responsibility, ILC Yearbook 1978, Vol II(1) 32-37. See also M Monnheimer, *Due diligence obligations in international human rights law* (CUP 2021) 102-103.

⁴⁷ See for instance P M Dupuy, ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) 10 *EJIL* 371. For an overview of the critics, see Ollino (n 42).

⁴⁸ Commentaries to Article 2, para 3.

⁴⁹ As observed by Ollino, ‘due diligence in international law works as a tool for assisting in the identification of certain classes of (primary) rules, their interpretation, and their operation in practice. It is, in this sense, a principle, if by principle one intends a ‘cohesive force’ for the convergence of a set of international obligations that acquire a specific meaning and rationale when read through the due diligence lens’. Ollino (n 42) Chapter 1, Section 1.3.2. The author also observed that due diligence can also be understood as a ‘process of risk mitigation’ (see for instance Section 1.4).

doubts regarding its existence in the law of neutrality before 1871,⁵⁰ the obligation of prevention is a corollary of the principle of impartiality of the neutral State regarding any direct relation with the conflict.⁵¹ The duties of a neutral State in the seas were later equated to the duty of vigilance at its borders⁵² and even extended to the protection of foreign States in times of peace.⁵³ In this sense, as observed by Pisillo-Mazzeschi:

State responsibility in the hypothesis (of the breach of the duty to protect) has its origin in the law of neutrality; and more precisely in the general duty of the neutral State not to tolerate the use of its territory by individuals as a base of hostile military operations against a belligerent State.⁵⁴

In conclusion, it is possible to verify that the law of neutrality, in particular the duty of neutral States to prevent activities in breach of the obligation of the impartiality of a State as discussed in the *Alabama* arbitration, has contributed to the differentiation and classification of due diligence obligations in international law.⁵⁵

4. Use of Force and the Psychological Element of the Wrongful Act

It is commonly pointed out that the ARSIWA reflect a process of ‘objectivization’ of State responsibility, in which fault is not considered to be an essential element of the wrongful act and only the existence of a breach of an international obligation of the State and its attribution to the State are sufficient for characterizing wrongful conduct giving rise to State responsibility.⁵⁶ The ARSIWA seem therefore to adopt Anzilotti’s theory of

⁵⁰ The doubts are supported by the fact that the arbitral tribunal based its ruling on the rules established by the Treaty of Washington of 1871 and not customary rules of the law of war. For a critic regarding this point, see T J Lawrence, *Principles of International Law* (D C Heath 1895) 550. On the other hand, international law recognizes duties of neutral States at least since the end of the eighteenth century. See A de La Pradelle, J Politis and A Salomon, *Recueil des Arbitrages Internationaux*, vol 2 (Éditions Internationales 1957) 971-972. In any event, the duty of due diligence regarding the law of neutrality in maritime warfare was later codified by Article 25 of the Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War of 1907, according to which ‘a neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters’. *Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War of 1907* (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 395.

⁵¹ The defence of the impartiality may also be done by force if necessary. P Fauchille, *Traité de droit international public*, Tome II: Guerre et neutralité (Rousseau 1921) 657; M L Padelletti, *Pluralità di Stati nel fatto illecito internazionale* (Giuffrè 1990) 121.

⁵² The obligation was applied also in relation to claims of the United States regarding Confederates operating from the territory of Canada, as evidenced by the cases connected to the *Saint Albans and Lake Erie Raids* analysed by the Mixed Commission between the United States and the United Kingdom. A de La Pradelle, J Politis and A Salomon, *Recueil des Arbitrages Internationaux*, vol 3 (Éditions Internationales 1954) 291.

⁵³ I Brownlie, ‘International Law and the Activities of Armed Bands’ (1958) 7 *International and Comparative Law Quarterly* 712, 723; Padelletti (n 51) 118.

⁵⁴ R Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (1992) 32 *German Yearbook of International Law* 9, 34. As observed by Pisillo-Mazzeschi, at the beginning the general obligation was limited to the duty of States not to tolerate acts of material force against another State. This may be seen as evidence of the transition between the rule of the law of neutrality and the general rule. See also R Pisillo-Mazzeschi, ‘Due diligence’ e responsabilità internazionale degli Stati (Giuffrè 1989) 337; Ollino (n 42) Chapter 1.

⁵⁵ Ouedraogo (n 42) 335; Bartolini (n 42) 27.

⁵⁶ P M Dupuy, ‘The International Law of State Responsibility: Revolution or Evolution?’ (1989) 11 *Michigan Journal of International Law* 105, 126-127.

objective responsibility, according to which the causation link between the violation of an obligation and its attribution to a State is independent of any assessment of the fault of the State organ.⁵⁷ Although the psychological element is not considered by the ARSIWA as an essential element for the characterization of an internationally wrongful act, the Commission recognizes that ‘whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents’.⁵⁸ In this sense, it is possible to say that the ARSIWA adopt an ‘eclectic theory’ in which the psychological element ‘depends on the circumstances, including the content of the primary obligation in question’.⁵⁹

It seems possible to establish a connection between the development of the theories of State responsibility, in particular regarding the psychological element of the wrongful act, and international rules regulating the use of force. Indeed, the debate about the role of fault as an element of wrongful conduct in the late nineteenth and early twentieth centuries was influenced by the rules of the law of neutrality, especially by the interpretation of the rule according to which a State may not tolerate the use of its territory by individuals as a base for hostile military operations against a belligerent State referred to by the previous section. The debate revolved around the role of the authorities’ negligence in characterizing the violation of this basic rule of the law of neutrality, therefore about the existence of the psychological element in State responsibility.

The debate started again on the nature of the responsibility of the United Kingdom in the *Alabama* arbitration. The rule of due diligence endorsed in the award of 1871 was considered by some authors to confirm the subjective theory, in particular as to the negligence by the United Kingdom in preventing private individuals to provide weapons to belligerent States.⁶⁰ Triepel, for instance, opined that the responsibility for lack of due

⁵⁷ Such theory opposes the subjective theory adopted by Grotius and developed by Ago, which understands that fault was an essential element of the wrongful conduct. Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (n 54) 14-15.

⁵⁸ Commentaries to Article 2, para 3. The term ‘psychological element’ was adopted in the present chapter to identify fault *lato senso*, what comprises intent (*means rea* or *dolus*) and fault strict sense (*culpa*). The term is preferred to ‘subjective element’ as referred by several authors due to the fact that it is also used to refer to the attribution of conduct to a State.

⁵⁹ Commentaries to Article 2, para 3. G Palmisano, ‘Fault’ (September 2007) in Wolfrum R (ed), *MPEPIL* (online edn) para 18. On the influence of the subjective theory on the ARSIWA, see A Gattini, ‘Smoking/no smoking: some remarks on the current place of fault in the ILC Draft Articles on State Responsibility’ (1999) 10 *EJIL* 397.

⁶⁰ In this case, the violation of a due diligence rule is determined by the level of negligence of the State. De La Pradelle, Politis and Salomon, *Recueil des Arbitrages Internationaux* (n 50) 967. In 1875 the *Institut de droit international* considered that ‘le seul fait matériel d’un acte hostile commis sur le territoire neutre ne suffit pas pour rendre responsable l’Etat neutre. Pour qu’on puisse admettre qu’il a violé son devoir, il faut la preuve soit d’une intention hostile (*dolus*), soit d’une négligence manifeste (*culpa*)’. Institut de Droit International, *Devoirs internationaux des Etats neutres: Règles de Washington* (Session of the Hague, 1875) para V. For Bluntschli, the conduct of the United Kingdom was ‘une inobservation fautive des devoirs d’un État neutre’ (Bluntschli (n 43) 479). According to Creasy, the question related to ‘a State’s duty not to neglect to provide itself with laws, and a system of process, by which it may control those within its territory from injuring other States’ (Creasy (n 44) 317 (para 339)). For Alphonse Rivier, the rule was derived from the notion of the principle *diligentia quam suis rebus adhibere solet*, establishing that a neutral State was responsible even for its ‘faute légère’ (A Rivier, *Principes du droit des gens*, Tome II (Rousseau 1896) 407). Such vision was influenced by Grotius, according to who ‘officials are liable for neglect if they do not employ the remedies which they can and ought to employ for the prevention of robbery and piracy’ (H Grotius, *De Jure Belli Ac Pacis Libri Tres* (Francis Kelsey tr, Clarendon Press 1925) Book II, Chapter XVII, XX, 436 (para I)).

diligence as established by the Treaty of Washington was the expression of the State's fault in preventing wrongful conduct.⁶¹ Anzilotti used the different conceptualizations of due diligence as articulated in the *Alabama* arbitration as a point of departure to demonstrate that even in cases in which there is an omission by the State regarding the action of private persons the concept of fault is not relevant. According to him:

[L]o stato è responsabile non per il concorso diretto o indiretto della sua volontà al fatto dell'individuo, non per un'intenzione dolosa o colposa che gli si possa rimproverare, ma per non avere tenuto il contegno che gli era imposto dal diritto internazionale, per aver violato il dovere suo verso gli altri stati, consistente nel non tollerare il fatto o nel punirlo se accaduto: non la colpa, ma il fatto contrario al diritto internazionale lo obbliga; solamente, il fatto contrario al diritto internazionale non sorge dell'azione dell'individuo, ma dal contegno dello stato riguardo all'atto compiuto dal privato.⁶²

Anzilotti observed that supporters of the subjective theory made an uncritical use of the theories of private and Roman law to explain the responsibility of the State in such cases, in particular by linking the duty of diligence in international law to the civil law notion of fault as the lack of diligence in foreseeing consequences that may be caused by certain conduct.⁶³ According to Anzilotti, the duty of due diligence referred to by the Treaty of Washington was not proof of the existence of the subjective element of the responsibility as argued by Triepel, but the content of a specific obligation of the State, i.e. that of 'exercer une certaine surveillance, à prendre certaines mesures destinées à empêcher qu'ils arrivent',⁶⁴ also reflected in other fields of international law such as the protection of foreigners.⁶⁵

Rules of the law of neutrality and the *jus ad bellum* were also chosen by Roberto Ago to illustrate the opposite theory, according to which it is possible to conceive that the psychological element is a constitutive element of the wrongful act, situated between the conduct which violates an international obligation and the organ which adopts such conduct.⁶⁶ In his Course to the Hague Academy of 1939 Ago discusses cases in which a State was excused from the commission of an unlawful act for the absence of fault caused by an error or fortuitous event.⁶⁷ Although not analysing in depth the question of due

⁶¹ H Triepel, 'Les rapports entre le droit interne et le droit international' (1923) 1 *RCADI* 73, 117.

⁶² Anzilotti, *Teoria generale della responsabilità dello Stato* (n 3) 172-173 (footnotes omitted). Such position is shared by La Pradelle and Politis: 'La surveillance à laquelle (l'Etat neutre) est tenu n'est pas un élément subjectif de sa responsabilité. Elle est l'objet même de son devoir dont la violation – comme celle de toute obligation internationale – le rend responsable sans qu'il y ait à parler de faute au sens propre du mot'. De La Pradelle, Politis and Salomon, *Recueil des Arbitrages Internationaux* (n 50) 974.

⁶³ Anzilotti, *Teoria generale della responsabilità dello Stato* (n 3) 154; D Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 *RGDIP* 5, 291. For the use of Roman law to explain the due diligence in international law, see Pisillo-Mazzeschi, 'Due diligence' e responsabilità internazionale degli Stati (n 54) Chapter 1; Ollino (n 42) Chapter 3.

⁶⁴ D Anzilotti, *Cours de droit international* (G Gidel tr, Sirey 1929) 503. See also Anzilotti, *Teoria generale della responsabilità dello Stato* (n 3) 174-175 (note 1).

⁶⁵ Anzilotti, *Cours de droit international* (n 64) 504.

⁶⁶ R Ago, 'Le délit international' (1939) 68 *RCADI* 415, 486.

⁶⁷ Ago, 'Le délit international' (n 66) 493-497. It was properly in the field of circumstances precluding wrongfulness that Ago left the influence of the subjective theory in the codification efforts of the Commission as Special Rapporteur. Articles 31 (force majeure) and 32 (fortuitous event) were proposed together by Ago in his Eight Report (1979) and establish cases in which the conduct of a State may be

diligence, Ago observed that while in cases of wrongful acts of its organs the *culpa levissima* seems to be sufficient to characterize the responsibility of the State, in case of acts of private persons against foreigners a ‘diligence en quelque sorte normale’ was necessary.⁶⁸

In conclusion, it is possible to establish a correlation between some aspects of the law of neutrality and the debates concerning the role of the psychological element in the law of State responsibility. In particular, the concept of due diligence highlighted in international law by the *Alabama* arbitration concerning the rules of the law of neutrality was used by supporters of objective and subjective theories to back their arguments.⁶⁹

5. Use of Force and Responsibility of a State in Connection with the Act of Another State

The influence of the rules regarding the use of force by States may also be verified in the notion of responsibility in connection with the act of another State, or ‘indirect responsibility’.⁷⁰ In the ARSIWA this aspect is dealt with by Articles 16 (Aid or assistance in the commission of an internationally wrongful act), 17 (Direction and control exercised over the commission of an internationally wrongful act), and 18 (Coercion of another State).

Article 16 is one of the most controversial aspects of the ARSIWA and reflects the principle of complicity in the law of State responsibility. According to it:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

The rule stipulates that a State is generally to be considered responsible for the complicity to the commission of a wrongful act when it voluntarily assists another State in carrying on its unlawful conduct, beyond the case of mere incitement. The main characteristic of such type of responsibility is that the aiding State is responsible for its own conduct, not

excused when there is the inexistence of choice in the conduct by the State organ, and therefore related to its intention (or the lack of it) in violating international law. See also A Gattini, ‘La notion de faute à la lumière du projet de convention de la Commission du Droit International sur la responsabilité internationale’ (1992) 3 *EJIL* 253, 269.

⁶⁸ Ago, ‘Le délit international’ (n 66) 497.

⁶⁹ Ollino (n 42) Chapter 1, Section 1.2.1.

⁷⁰ The term ‘indirect responsibility’ is adopted in the present chapter to refer to such a form of State responsibility in which a State answers for an internationally wrongful act committed by another State. The term may be criticized, among other reasons, for having also been used to refer to the responsibility of a State for acts of private individuals (as a synonymous of ‘vicarious responsibility’). The ILC adopts instead the term ‘derived responsibility’, which can also be criticized for giving the false idea that this kind of responsibility stems from the actions of others. The term ‘indirect responsibility’ is preferable because it is widely adopted by the doctrine. See for instance Anzilotti, *Teoria generale della responsabilità dello Stato* (n 3) 122; R Ago, *La responsabilità indiretta nel Diritto internazionale* (CEDAM 1936); J Crawford, *State Responsibility: The General Part* (Cambridge 2013) 397. For other authors adopting the term, see R Ago, Eight Report on State Responsibility, ILC Yearbook 1979, Vol II(1) 5 (para 3, footnote 8).

the wrongful act committed by the aided State.⁷¹ According to Article 16, to generate the responsibility of the aiding State, the purpose of the aid must be to facilitate the commission of the main wrongful conduct, which may also be a violation of an obligation that also bounds the aiding State. The awareness by the assisting State of the circumstances making the conduct wrongful is also added as a third requirement in the Commentaries to the Article.⁷²

Although the Commission presents examples of a State aiding another in the manufacture and use of chemical weapons,⁷³ the main example provided for by the Commentaries to Article 16 is the case in which a State breaches the prohibition of the use of force by ‘permitting the use of its territory by another State to carry out an armed attack against a third State’. The use by the United States of airfields in Germany and the United Kingdom to carry out armed interventions respectively in Lebanon in 1958 and Libya in 1986 are used as examples by the Commission.⁷⁴ It is clear, therefore, that the disposal of the territory of a State for the commission of wrongful conduct by another State makes a strong case in relation to the concept of complicity in State responsibility.⁷⁵

Nevertheless, the hypothesis may be also understood not as corresponding to a general notion of complicity but as a manifestation of the rule prohibiting aid or assistance in specific fields of international law. Some authors point out that the general concept of complicity is in reality the operation of specific primary rules, which were used by the Commission to try and identify elements to establish a general rule.⁷⁶ According to Corten, for instance, Article 16 in reality establishes a logic common to several specific primary rules and has only a ‘vocation didactique ou symbolique’, being ‘objectivement inutile’.⁷⁷ The Commission was always aware of such criticisms and this explains why the Commentaries to Article 16 states that:

Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts. Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule.⁷⁸

The Commission adopted as examples of such ‘specific substantive rules’ the concept of aggression presented by Article 3(f) of the Definition of Aggression adopted by UNGA Res 3314 (XXIX) (1974), which defines as aggression ‘the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other

⁷¹ Padelletti (n 51) 3.

⁷² Commentaries to Article 16, para 4.

⁷³ Ibid, para 7.

⁷⁴ Ibid, para 8. B Graefrath, ‘Complicity in the Law of International Responsibility’ (1996) 29 *Revue Belge de Droit International* 371, 372.

⁷⁵ According to Quingley, ‘the first sphere in which States began to make charges of complicity liability involved situations in which a State permitted use of its territory for the commencement by another State of an internationally wrongful act’. J Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’ (1986) 57 *BYIL* 77, 85.

⁷⁶ Graefrath, ‘Complicity in the Law of International Responsibility’ (n 74) 372.

⁷⁷ O Corten, ‘La ‘complicité’ dans le droit de la responsabilité internationale: un concept inutile?’ (2011) 57 *AFDI* 57, 60.

⁷⁸ Commentaries to Article 16, para 2.

State for perpetrating an act of aggression against a third State’ and the similar rule stated by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of UNGA Res 2625 (XXV) (1970).⁷⁹

By including an anticipated defence to criticisms, the Commission acknowledges the weakness of the general rule of complicity expressed by Article 16 and the difficulties arising from its qualification as a secondary rule.⁸⁰ It is difficult to trace the origins of the principle of complicity stated in Article 16, which was not recognized as part of the law of State responsibility before the Second World War.⁸¹ Despite having been confirmed as a customary rule by the ICJ,⁸² the rule may still be in the process of consolidation, or part of a ‘natural gap-filing process’ carried out by the Commission.⁸³ As observed by Lowe, Article 16 ‘heralds the extension of legal responsibility into areas where States have previously carried moral responsibility but the law has not clearly rendered them responsible for the acts that they facilitate’.⁸⁴ Its function may indeed have a ‘didactic or symbolic vocation’ as criticised by Corten, but this fact does not detract from its importance or usefulness as a ‘signpost against collaboration with wrongdoers’.⁸⁵

In any event, the importance of the rule prohibiting complicity for the unlawful use of armed force in the development of the principle of complicity is diminished by the fact that such rule is also present in primary rules related to violations of humanitarian law,⁸⁶ human rights law,⁸⁷ and the prohibition of genocide.⁸⁸ Arguably, the rule may also be

⁷⁹ The principles according to which ‘Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State’ and ‘Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present para-graph involve a threat or use of force’. UNGA Res 2625 (XXV) (1970) Article 1. See also UNGA Res 3314 (XXIX) (14 December 1974), Article 3(f); Commentaries to Article 16, para 2 (note 273).

⁸⁰ As admitted by Special Rapporteur Crawford, the rule of Article 16, along with Articles 17 and 18 of the ARSIWA, ‘do not sit comfortably within the dichotomy between primary and secondary rules’. Crawford, *State Responsibility* (n 10) 339.

⁸¹ In his course to the Hague Academy of 1939, Roberto Ago stated that ‘ce qui paraît (...) inconcevable en droit international, c’est toute forme de complicité, de participation, ou de provocation au délit’. Ago, ‘Le délit international’ (n 66) 523.

⁸² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 13) 217 (para 420).

⁸³ Quigley (n 75) 104.

⁸⁴ V Lowe, *International Law* (OUP 2007) 121.

⁸⁵ H P Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 268. See also Christian Dominicé, according to who the inclusion of the provision in the ARSIWA is ‘justified because they punish acts of the implicated State which are reprehensible’. C Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 281, 289.

⁸⁶ Article 1(1)(c) of the Ottawa Convention of 1997 establishes that ‘each State Party undertakes never under any circumstances (...) to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention’ (*Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211). See also Quigley (n 75) 106-107.

⁸⁷ Corten, ‘La “complicité” dans le droit de la responsabilité internationale’ (n 77) 63-66.

⁸⁸ Article III(e) of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 establishes as one of the acts that shall be punishable the ‘complicity in genocide’. On the other hand, Bufalini observes that the ICJ in its decision on the *Bosnian Genocide* (2007) interpreted the concept of

present in the responsibility of States regarding the obligation not to give assistance to States against which the United Nations is taking preventive or enforcement action, as stated in Article 2(5) of the UN Charter.⁸⁹

The possible influence of the law of the use of force is also verified concerning the responsibility of a State which directs and controls the conduct of another State over the commission of an internationally wrongful act, a hypothesis covered by Article 17. In this case, the State which directs and controls the conduct is responsible for the conduct itself, what is commonly known as ‘indirect responsibility’.⁹⁰ Indirect responsibility was accepted in international law mostly regarding the responsibility of a dominant State over another in a relationship of dependence or subordination, in special the existence of a protectorate.⁹¹ The maintenance of this principle even after the formal extinction of relations of suzerainty and protectorate is explained by the practical approach adopted to define this form of responsibility. While in the past some authors considered that the general representation of a State by another was sufficient to determine the transfer of responsibility,⁹² the level of control of the dependent State became the main reason for defining the indirect responsibility.⁹³

The criteria of the level of control to determine the indirect responsibility also explains the responsibility of an occupying Power in case of military occupation. Such a hypothesis was considered by Special Rapporteur Ago as the most important instance of indirect responsibility since it was ‘the most topical and the commonest’ of the cases, even if other cases of indirect responsibility were considered by the Commission in 1979.⁹⁴ Although military occupation is nowadays the main hypothesis of application of Article 17 of the ARSIWA, it was hardly regarded as an obvious example of indirect responsibility when it was proposed by Ago in an article published in 1946.⁹⁵ According to Ago, the indirect responsibility:

complicity of Article III(e) in a broader way than that adopted by Article 16. A Bufalini, ‘La responsabilità internazionale dello Stato per atti di genocidio: un regime in cerca di autonomia’ (2015-3) *Diritti umani e diritto internazionale* 571-588.

⁸⁹ Graefrath, ‘Complicity in the Law of International Responsibility’ (n 74) 377; Corten, ‘La “complicité” dans le droit de la responsabilité internationale’ (n 77) 63. Contra, see Quigley (n 75) 107. As observed by Aust, only the aid in circumventing specific obligations adopted by binding resolutions of the Security Council may be considered as aid in the sense of Article 16. Aust, *Complicity and the Law of State Responsibility* (n 85) 199.

⁹⁰ Ago, Eight Report (n 70) 4-5 (para 3). For critics to the concept, see Padelletti (n 51) 58-60.

⁹¹ Anzilotti, *Teoria generale della responsabilità dello Stato* (n 3) 122.

⁹² Among the adepts of the ‘theory of representation’ is Anzilotti. Anzilotti, *Cours de droit international* (n 64) 534. Other authors supporting this theory are Schüle and Schlochauer. Padelletti (n 51) 9-12.

⁹³ G Morelli, *Nozioni di Diritto Internazionale* (7th edn, CEDAM 1967) 364; Ago, Eight Report (n 70) 4-5 (para 3) 13-15 (paras 17-20); Padelletti (n 51) 46.

⁹⁴ 1536th meeting (22 May 1979), ILC Yearbook 1979, Vol I, 24 (para 7) and 1537th (23 May 1979), ILC Yearbook 1979, Vol I, 30 (para 15). The main cases of indirect responsibility considered by the Commission in 1979 were dependence relationships, the relations between a federal and a federated State and military occupations.

⁹⁵ R Ago, ‘Occupazione bellica dell’Italia e Trattato lateranense’ (1946) 2 *Comunicazioni e studi* 129-172. As acknowledged by the Ago, this particular example of indirect responsibility had been first proposed by Verdross in 1937, according to which ‘[I]n the event of belligerent or warlike occupation, the occupant is responsible for the conduct of the organs of the occupied State insofar as they are subjected to the command of the occupant’. A Verdross, *Völkerrecht* (Springer 1937) 177 (free translation).

[È] sempre e soltanto il corrispettivo necessario di certe forme internazionalmente lecite di un'ingerenza di un soggetto nell'attività di un altro soggetto: dovrà verificarsi quindi in tutti quei casi in cui uno stato sottoponga lecitamente alla propria direzione o controllo l'attività di un altro stato e limitatamente al campo dell'attività diretta o controllata, nell'ipotesi di un protettorato o di un vassallaggio o di un mandato come quella di un'occupazione bellica.⁹⁶

The situation of military or belligerent occupation is determined by the exercise of effective control of a territory by a State usually through the use of armed force, a question of fact independent from the existence of a state of war, or even the effective use of armed force.⁹⁷ As in the case of military occupation, there is no transfer of sovereignty from the State whose territory was occupied, no formal relationship of dependency is observed and the occupied territory continues to belong to the invaded State, which maintains its international personality. It is characteristic of belligerent occupation that some level of self-government of the territory is maintained, in general regarding activities that do not interfere with the interests of the occupying Power.⁹⁸ Since the existence of legal personality is the main difference between the hypothesis of Article 16 and the assimilation of the organs of the occupied State with those of the occupying State,⁹⁹ the example of belligerent occupation seems ideal.

Nevertheless, the responsibility of the occupying Power will depend on the level of control exercised over the occupied territory, which is not the same in all situations. As observed by Ago, in most cases the occupied territory is only supervised by the occupying State and the act committed by one of the organs of the occupied State under the control

⁹⁶ Ago, 'Occupazione bellica' (n 95) 165-166. The hypothesis of military occupation was mentioned by Ago in a work published in 1936 addressing the subject. Ago, *La responsabilità indiretta* (n 70).

⁹⁷ Since the administration of invaded territory is not an obligation for the occupying Power, the possibility of control exercised by it is a faculty granted by international law to safeguard its interests in the region (Morelli, *Nozioni di Diritto Internazionale* (n 93) 364). As established by Article 42 of the Regulations respecting the Laws and Customs of War on Land of 1907, a territory is considered to be occupied when it is 'actually placed under the authority of the hostile army', and the occupation extends 'only to the territory where such authority has been established and can be exercised' (*Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907* (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277). The current validity of the rule of 1907 was confirmed by the ICJ in the *Armed Activities* case of 2005, in which the Court established that the status of a State as occupying Power was determined by the establishment and actual exercise of an authority over a territory and not the mere stationing of its armed forces. In this sense, according to the Court, the status of occupied territory is determined by the substitution of the authority of the occupying State for that of the original sovereign. In the case in question the Court concluded that the Congolese region of Ituri was under Ugandan occupation due to factors such as the creation of a Ugandan province in the region by the commander of the Ugandan forces, the appointment of authorities and the provision of suggestion regarding the administration of the province. *Armed Activities on the Territory of the Congo* (n 14) 230 (para 173).

⁹⁸ Such decision is related more with the practical question of the reduction of costs than of a proper rule. Ago, 'Occupazione bellica' (n 95) 151; A Gerson, 'War, Conquered Territory, and Military Occupation in the Contemporary International Legal System' (1977) 18 *Harvard International Law Journal* 525, 529; Ago, Eight Report (n 70) 19-20 (para 31); Y Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 57. An example mentioned by Ago is the Agreement on Control Machinery in Austria of 1945, which determined areas of activity which were taken over by the Allied administration, leaving other areas of activity to the local Austrian administration under supervision of the Allied (1537th meeting (23 May 1979), ILC Yearbook 1979, Vol I, 31 (para 19)).

⁹⁹ Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (n 14) 76-77.

of the occupying State will be attributed to the intervener State,¹⁰⁰ although admitting that in some instances the conduct of an organ may be attributed to the occupied State itself.¹⁰¹

The European Court of Human Rights seems to consider that the effective control which characterizes the belligerent occupation of territory is sufficient to attribute the actions of local authorities to the occupying Power even without detailed control over their actions.¹⁰² In this case, a broader notion of control is adopted, since effective control may be exercised directly by the armed forces of the occupying Power or indirectly through a subordinate local administration influenced by the extent of military, economic, and political support for the local administration.¹⁰³ This broad notion is sometimes applied

¹⁰⁰ This is the case of Italy after the German invasion of September 1943, where much of the government, local administration and even the police were held by the occupying Power. For instance, some acts committed by the Italian police under German command, such as the invasion of the Basilica di San Paolo in 1944, were attributed to the occupying Power (Ago, 'Occupazione bellica' (n 95) 167-168; A Migliazza, *L'occupazione bellica* (Giuffrè 1949) 127; Ago, Eight Report (n 70) 21 (para 34)). This is also the case of the responsibility of Israel in relation to the massacres at Sabra and Chatila refugee camps in September 1982, in which Palestinians and Lebanese Shiites were killed by a Lebanese militia. The Report of the International Commission to enquire into reported violations of International Law by Israel during the invasion of Lebanon (MacBride Commission) concluded that 'the Israeli authorities bear a heavy legal responsibility, as the occupying power, for the massacres at Sabra and Chatila' ('Israel in Lebanon: Report of the International Commission to Enquire into Reported Violations of International Law by Israel during Its Invasion of the Lebanon' (1983) 12 *Journal of Palestine Studies* 117, 130-131 (Conclusion 8)).

¹⁰¹ This is observed in the *Héritiers du Duc de Guise* case of 1951, in which the Franco-Italian Conciliation Commission decided on the responsibility of Italy for the restitution of property requisitioned by a decree of the Italian authorities in Sicily during the Allied occupation of the island, considering that Italy was responsible by the fact that even if the Allied exercised administrative control over the territory, there was no proof of their involvement in the issue of the decrees (*Différend Héritiers de S A R Mgr le Duc de Guise (Décision n° 107 du 15 Septembre 1951)* (1951) 13 RIAA 154, 161 (para 7)). In a similar way, the Italian-United States Conciliation Commission established in cases such as *Treves* and *Levi* of 1956 the responsibility of Italy for legislative and administrative measures enacted by the local authorities of the Italian Social Republic in the territory occupied by Germany (*Treves Case (Decision 144 of 24 September 1956)* (1956) 14 RIAA 262, 265-266; *Levi Case (Decision 145 of 24 September 1956)* (1956) 14 RIAA 272, 279-280). The possibility of attribution of conduct by the occupied State seems to be recognized by the Security Council in Res 1483 (22 May 2003), in which it expressed the recognition of 'specific authorities, responsibilities, and obligations under applicable international law of (the United States of America and the United Kingdom of Great Britain and Northern Ireland) as occupying powers under unified command' and at the same time expressed its support regarding 'the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority' (preamble para 13 and operative para 9).

¹⁰² The principle was established first in the *Loizidou v Turkey* (1989) case in relation to actions of 'authorities of the Turkish Cypriot community' in northern Cyprus (*Loizidou v Turkey (Merits)* (App No 15318/89) ECHR 1996-VI, para 56). According to the Court, 'Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions' (*Al-Skeini and others v The United Kingdom* (Merits and Just Satisfaction) (App No 55721/07) ECHR 2011, para 138).

¹⁰³ According to the European Court of Human Rights, the primary reference for determining the existence of effective control is 'the strength of the State's military presence in the area', what seems to relate to the direct control over the territory. According to it secondary factors, such as 'the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region' are also important, what seems to be related to the subordinate local administration, or indirect control. *Al-Skeini* (n 102) para 139.

together with the responsibility of the occupying Power for the breach of the duty of prevention, which is intrinsically related but has different legal bases.¹⁰⁴

The third and last hypothesis of indirect responsibility contained in the ARSIWA refers to the responsibility of a State for an act committed by another one which was coerced by it, expressed by Article 18. In principle, such a rule seems to be one of the most evident examples of the contribution of the law of the use of force to the rules of State responsibility by stating the effect of coercion on State responsibility. Nevertheless, the type of coercion is not important for the configuration of the hypothesis of Article 18, which is focused ‘on the coerced state’s capacity to exercise its own free will, not on the methods by which a state might attain a sufficiently compromised outcome’.¹⁰⁵

6. Conclusion

The regulation of the use of force by States has a certain impact on the basic rules of State responsibility due to the importance of the interests involved. Such impact may be observed concerning three moments of the relation between the two fields of international law. In a first moment, it is to be expected that the development of theories of international responsibility would be based on examples of international rules having significant importance, such as the case of the law of war. This is especially observed concerning the qualification of the breach of international obligations and the elaboration of explanations for the role of the psychological element in the determination of the responsibility of a State. The law of neutrality, for instance, was useful in providing examples that could be used to illustrate a due diligence obligation and the notion of fault in international law.

Nevertheless, the influence of the regulation of the use of force did not limit itself to debates on the theory of State responsibility and also provided challenges to their well-established rules. This is the case of rules of attribution of conduct, which *a priori* proved insufficient to explain the attribution of the conduct of some armed groups to the States. The phenomenon intensified in the recent decades and led to the adaptation of the traditional rules of attribution, either by altering their field of application or establishing new rules. In the midway between the ancient influence and transformation by necessity, the law of the use of force confirms a rule which originally did not relate to it. This is the case of indirect responsibility for military occupation, which became the main example and the confirmation of the general rule.

¹⁰⁴ In the *Georgia v Russia (II)* case of 2021, for instance, the European Court of Human Rights considered that Russia was responsible for the conduct of members of the South Ossetian forces and also ‘an array of irregular militias’ against civilians, since the troops were ‘passively present’ during some violations and the country did not adopt sufficient measures to prevent such actions (*Georgia v Russia (II)* (Merits) (App No 38263/08) ECHR 2021, paras 212-222). The relation between military occupation and the duty of prevention by the occupying Power was observed by the ICJ in the *Armed Activities* case of 2005, in which the Court established that Uganda as an occupying Power in Ituri was responsible both for violations carried out by its military and ‘for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account’ (*Armed Activities on the Territory of the Congo* (n 14) 231 (para 179)). In this sense, the responsibility of the State is created not regarding the attribution of the conduct of the private entities or armed groups, but for the breach of an obligation of prevention by the State organs of the occupying Power.

¹⁰⁵ Crawford, *State Responsibility* (n 10) 421.

Part II – The Derogation of the Elements of an Internationally Wrongful Act by the Prohibition of the Use of Force

1. Introduction

Specificities of the international law regime of the use of force may generate special rules, determining the manner in which the responsibility of a State is determined and operates. The Draft Articles as adopted in First Reading in 1996 did not provide for the possibility of the existence of special rules for Part One since Draft Article 37 [1996] on *lex specialis* referred only to Part Two of the work. On the other hand, current Article 55 [2001] applies to the Articles as a whole, admitting such possibility.¹⁰⁶ It is possible to envisage four areas of the basic general rules of State responsibility in which special rules related to the regulation of the use of force by States may operate. The most affected area seems to be that concerning rules of attribution of conduct to States (section 2). The rules regarding the characterization of a breach are also affected by the violation of the prohibition of the use of force, in special to determine the possibility of the exercise of self-defence (section 3). Special rules regarding the element of intention may also be envisaged regarding the use of force, in particular for an act of aggression (section 4). A third area in which special rules may exist is the one related to the responsibility of a State for aiding or assisting another State, a specific hypothesis of indirect responsibility (section 5).

2. Special Rules of Attribution regarding the Prohibition of the Use of Force

Special secondary rules establishing hypothesis of attribution of conduct to a State are admitted by the ARSIWA beyond the hypothesis of the general rules established by Articles 4 to 11. The present section is dedicated to the analysis of the existence of special rules of attribution regarding situations involving the use of armed force, considering in special three possible candidates. The first candidate is the possibility of attribution to a State of acts of aggression committed by armed bands, groups, irregulars, or mercenaries in the hypothesis known as ‘indirect aggression’ (section 2.2). As a second candidate, international humanitarian law also provides for the attribution to a State of the conduct of entities or persons which are not attributable to a State under general rules of State responsibility, thus establishing a special threshold of attribution for the specific context of armed conflicts (section 2.3). The third candidate analysed refers to the attribution of the conduct of terrorist groups to a State to justify the use of force in self-defence against such State (section 2.4). Before the analysis of the possible candidates for special rules, it seems convenient to analyse whether a rule may be considered *lex specialis* regarding the general rules of attribution of State responsibility, considering the fact that some possible candidates for special rules involving the prohibition of the use of force are justified based on recent trends in international relations, including the increasing activity of armed groups or the war on terror (section 2.1).

¹⁰⁶ Commentaries to Article 55, para 6.

2.3. *The Character of the General Rules of Attribution of State Responsibility and Lex Specialis*

The existence of special rules of attribution of conduct to States is based on three simple assumptions: the existence of rules regarding attribution; the fact that those are secondary rules; and that they may be derogated from. Chapter II of Part One of the ARSIWA covers the circumstances in which a conduct may be attributed to a State, by establishing rules that are presented as secondary rules by the Commission, since attribution is a ‘normative operation (...) based on criteria determined by international law and not the mere recognition of a link of factual causality’, aiming to ‘establish that there is an act of the State for the purposes of responsibility’.¹⁰⁷ In this sense, the ARSIWA clearly adopt a normative approach to attribution of State responsibility, on the understanding that the operation is based on international rules and is therefore a legal one.

Nevertheless, it is also possible to conceive attribution of State responsibility as a question of fact rather than a legal question. This ‘factual approach’, advocated by Special Rapporteur Gaetano Arangio-Ruiz understands attribution as ‘the result of the intellectual operation carried out by the judge, arbitrator or whoever else needs to bridge the gap, on the basis of the factual (social, sociological and historical) causality’ between actions and omissions and the State.¹⁰⁸ The reasons for the difference between the normative and the factual approaches are linked with the understanding of the relationship between domestic and international laws and the notion of States as juridical persons or factual entities, which for the purposes of the present research cannot be analysed in depth as properly deserved.¹⁰⁹ A third group of authors understands attribution as an inextricable part of the primary rule, which explains more satisfactorily the attribution of the conduct of private individuals to States by considering it the breach of the obligation of prevention of the conduct of privates, which would be primary rules.¹¹⁰

Only the adoption of the normative approach admits the existence of special secondary rules of attribution of State responsibility, since ‘there is really no “derogation” from the common, merely factual attribution process’.¹¹¹ Thus, the present section adopts as an assumption the fact that there are general secondary rules of attribution of State responsibility which may be derogated by special rules, sharing the position adopted by the ARSIWA and the majority of doctrine.¹¹²

¹⁰⁷ Commentaries to Chapter II, para 4. The ARSIWA define as a general rule that the conduct attributed to a State is that of its organs of government or others acting under its direction or control (Articles 4, 5 and 6) and exceptionally admits the attribution to a State of the conducts of private persons or groups acting on the instructions or under the direction or control of the State or in the absence of it (Articles 8 and 9), the conduct of insurrectional movements (Article 10) and the conduct recognized and adopted by the State as its own (Article 11).

¹⁰⁸ Arangio-Ruiz, ‘State Responsibility Revisited’ (n 31) 79.

¹⁰⁹ Ibid. See also Palchetti, *L’organo di fatto dello Stato nell’illecito internazionale* (n 14) 25-27.

¹¹⁰ Kress, ‘L’organe de facto en droit international public’ (n 39) 123-124; Condorelli and Kress, ‘The Rules of Attribution’ (n 29) 225; Arangio-Ruiz, ‘State Responsibility Revisited’ (n 31) 127.

¹¹¹ Arangio-Ruiz, ‘State Responsibility Revisited’ (n 31) 126 and 140.

¹¹² Anzilotti, *Cours de droit international* (n 64) 254-255, 469; C T Eustathiades, ‘Les sujets du droit international et la responsabilité internationale. Nouvelles tendances’ (1953) 84 RCADI 397, 422; Ago, Third Report (n 13) 58 (para 218); L Condorelli, ‘L’imputation à l’État d’un fait internationalement illicite : solutions classiques et nouvelles tendances’ (1984) 189 RCADI 9, 26; Condorelli and Kress, ‘The Rules of Attribution’ (n 29) 225-228; Kolb, *The International Law of State Responsibility* (n 17) 70.

The ARSIWA provide little indication of what a special rule of attribution can be, but the Commission limits this possibility by asserting that the rules of Chapter II of Part One ‘are cumulative but they are also limitative’, and thus ‘in the absence of a specific undertaking or guarantee (which would be a *lex specialis*), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter’.¹¹³ From the observation of the Commission, it is possible to conclude that there is a strong presumption against the derogation from the rules of attribution and that the main case of derogation from the general rules is some special form of imputation to a State of the conduct of private persons.¹¹⁴

The *lex specialis* principle may operate regarding the general rules of attribution either by the creation by States of special rules of attribution applicable between themselves or according to a primary rule. In the first case, the special rule is established by a treaty and only regulates the relations between the parties, being *ratione personae*.¹¹⁵ In the second case, the special rule would be inherent to the primary rule and consequently *ratione materiae*,¹¹⁶ as in the case of certain rules of international humanitarian law analysed in section 2.3. It is also important to note that rules of attribution may be adopted by international law for different purposes and comprise different criteria, not being exclusively dedicated to the imputation of State responsibility.¹¹⁷ Examples of such rules are those relating to the expression of consent of a State in the law of treaties,¹¹⁸ the determination of the jurisdiction of an international court,¹¹⁹ or the definition of the existence of an armed conflict.¹²⁰

Despite agreeing with the customary character of most of the general rules of attribution present in the ARSIWA, several authors observe some modifications in those rules reflecting changes in the dynamics of international relations of States.¹²¹ The growth in

¹¹³ Commentaries to Chapter II, para 9.

¹¹⁴ Such position is supported by the ICJ, that in the *Bosnian Genocide* case (2007) considered that ‘rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*’ (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 13) 208-209 (para 401)). See also C Farhang, ‘Self-Defence as a Circumstance Precluding the Wrongfulness of the Use of Force’ (2015) 11 *Utrecht Law Review* 1, 8-9.

¹¹⁵ This would be the case of Article 139 of the UNCLOS, which establishes that a State may assume responsibility for acts of the private operator in seabed mining (Condorelli, ‘L’imputation’ (n 112) 141; Crawford, *State Responsibility* (n 10) 114). Another example of such rule is found in the Inter-American Convention on Forced Disappearance of Persons of 1994 and in the International Convention for the Protection of All Persons from Enforced Disappearance of 2010, which consider as ‘forced/enforced disappearance’ acts of limitation of freedom of persons or group of persons by agents of a State or ‘persons or groups of persons acting with the authorization, support, or acquiescence of the State’ (Articles II of the 1994 Convention and 2 of the 2010 Convention). Such provisions establish a criterion of attribution less rigid from those of Articles 4 and 8 of the ARSIWA.

¹¹⁶ This would be the case of some principles of space law related to the responsibility of States for certain activities carried out from their territories. Condorelli, ‘L’imputation’ (n 112) 121-126; Condorelli and Kress, ‘The Rules of Attribution’ (n 29) 227.

¹¹⁷ Kolb, *The International Law of State Responsibility* (n 17) 70-71; M Milanovic, ‘Special Rules of Attribution of Conduct in International Law’ (2020) 96 *International Law Studies Series* 295, 303-304.

¹¹⁸ *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331, Article 7.

¹¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 13) 209 (para 403).

¹²⁰ *Tadić Case* (Judgment) ICTY-94-1-A (15 July 1999) 36 (paras 90-91).

¹²¹ Condorelli, ‘L’imputation’ (n 112) 117-166.

the activities of armed paramilitary groups and international terrorist groups and the use of private security companies in armed conflicts are examples of changes that would increase uncertainty regarding the topic, illustrated by the contention between international jurisdictions over the criteria for the attribution of the rules of armed groups to States. Thus, the adaptation of the traditional rules of attribution may serve as an instrument by which international law seeks to deal with such trends. An important attempt of international law in this direction can be observed concerning the expansion of the concept of State organs and the hypotheses of attributing the conduct of private individuals to the State, as already observed in section 2 of part one of this chapter.¹²²

2.4. *Special Rules of Attribution regarding Aggression*

UNGA Res 3314 (XXIX) (1974), considered to reflect customary international law,¹²³ defines ‘aggression’ in its Article 1 generally as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition’. Article 3 establishes seven hypotheses that may also qualify as acts of aggression. Five of them comprise actions expressly carried out by the armed forces of the aggressor State,¹²⁴ which does not present any doubts since it is a well-established rule of international law expressed by Article 4(1) of the ARSIWA that a State is responsible for the conduct of its organs, which includes the actions of its regular armed forces. Unlike the previous hypothesis of Article 3 of UNGA Res 3314 (XXIX), subparagraphs (f) and (g) do not deal properly with conducts of the armed forces of the State binding by the obligation. Subparagraph (f) seems to deal not with a matter of attribution but with a case of indirect responsibility and is analysed in section 5. Subparagraph (g) defines an act of aggression as ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein’. This provision is often referred to as one of ‘indirect aggression’ and in principle encompasses the attribution to a State of the use of force that is not directly carried out by it. In this sense, it is possible to question whether such a hypothesis

¹²² The expansion of the concept of State organs tries to encompass new situations using the traditional rules of attribution, which are proved to be sufficiently adequate to deal with such changes. An example is the rule of Article 8 related to a conduct directed or controlled by a State. As demonstrated in part one of the present chapter, the introduction of the rule in the ARSIWA in its final years of work seems to be substantially influenced by the decision of the ICJ in the *Nicaragua* case of 1986, in special concerning a test for the attribution of the conduct of the contras to the United States. See for instance J Crawford, ‘Revising the Draft Articles on State Responsibility’ (1999) 10 *EJIL* 435, 439.

¹²³ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 103 (para 195).

¹²⁴ They are the hypothesis of subparagraphs (a) to (e): ‘(a) the invasion or attack *by the armed forces of a State* of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; ‘(b) Bombardment *by the armed forces of a State* against the territory of another State or the use of any weapons by a State against the territory of another State; ‘(c) The blockade of the ports or coasts of a State *by the armed forces of another State*; ‘(d) An attack *by the armed forces of a State* on the land, sea or air forces, or marine and air fleets of another State; ‘(e) The use of *armed forces of one State* which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement’. UNGA Res 3314 (XXIX) (14 December 1974), Article 3 (emphasis added).

presents a special rule of attribution for acts of aggression that derogates from the general rules of attribution of State responsibility.

The concept of indirect aggression of Article 3(g) of UNGA Res 3314 (XXIX) may be divided into two different types of actions which may be carried out by the organs of a State concerning armed bands, groups, irregulars, or mercenaries (thereafter ‘armed groups’): the sending *by* or *on behalf* of the State of such armed groups and the *substantial involvement* therein.

The sending *by* a State of armed groups seems to reflect a degree of ‘complete dependence’ that resembles the concept of *de facto* organ present in Article 4 of the ARSIWA as interpreted by the ICJ in the *Nicaragua* and the *Bosnian Genocide* cases, representing an enterprise carried out by the sending State. On the other hand, the sending *on behalf* of the State seems to characterize the hypothesis of Article 8 of the ARSIWA, in which the connection between the State and the armed group is less evident but there is a sort of direction and control of the conduct (although the term is also employed in the *Nicaragua* case to refer to *de facto* organs).¹²⁵ In principle, the possibilities of sending *by* or *on behalf* of a State or armed groups seem to be included in Articles 4 and 8 of the ARSIWA and do not represent a special derogation from the general rules of attribution.¹²⁶

The concept of *substantial involvement* presents a greater difficulty since apparently does not require the need for any control of the armed group by the State for the configuration of its responsibility for aggression, being sufficient the aid or assistance in carrying out the conduct. If this is the case, the ‘substantial involvement’ criteria for attributing acts of aggression to States seems to be less stringent than the criteria established by Articles 4 and 8 of ARSIWA for overall or effective control over the armed group. There is no clear definition for the concept of ‘substantial involvement’, but it is possible to exclude forms of support considered to be less serious, such as financial or organizational support, and mere tolerance.¹²⁷ In the *Nicaragua* case, the ICJ considered that the ‘provision of weapons or logistical or other support’ to armed groups may not qualify as an armed attack, being at most violations of the prohibition of the threat of use of force and non-

¹²⁵ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 62 (para 109). See also P L Zanardi, ‘Aggressione armata indiretta ed elemento soggettivo dell’illecito internazionale’ in *Le Droit international a l’heure de sa codification* (Giuffrè 1987) 153, 155-156.

¹²⁶ Pisillo-Mazzeschi, ‘*Due diligence*’ e *responsabilità internazionale degli Stati* (n 54) 297-306; Milanovic (n 117) 332-333.

¹²⁷ P L Zanardi, ‘Indirect Military Aggression’ in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff 1986) 111, 115; Pisillo-Mazzeschi, ‘*Due diligence*’ e *responsabilità internazionale degli Stati* (n 54) 345.

intervention,¹²⁸ what would not seem to be sufficient to characterize the concept of aggression of Article 3(g) of UNGA Res 3314 (XXIX).¹²⁹

Therefore, the responsibility of a State for indirect aggression by its substantial involvement in acts of armed force carried out by armed groups will depend on the degree of its involvement with the armed group. In the case of a stronger connection between the actions carried out by an armed group and the State supporting it, the armed group should be recognized as a *de facto* organ of it.¹³⁰ This hypothesis is similar to the one of the sending *by or on behalf* of a State or armed groups and the State may be considered both responsible for the commission of an act of aggression and the conduct carried out by the armed group.

In the case of an involvement that is substantial but not strong enough to establish the attribution of the conduct of the armed group to the State assisting it, the conduct of the latter is not attributed to the former. Nevertheless, the State remains responsible for an act of aggression for providing support to the armed group. As mentioned before, in principle such responsibility may be explained by the attribution of the conduct of the armed groups to the State, which would be a special rule of attribution of the conduct of privates less rigid than the general rules of State responsibility. On the other hand, it is also possible to understand the basis of the responsibility of the State as an autonomous violation from the one committed by the armed groups. This approach seems to be recognized by the ICJ in the *Armed Activities* case, in which the Court understood that the attribution of conduct of irregular forces to a State is independent of the existence of a violation regarding its support by the State.¹³¹

¹²⁸ The Court expressed that it ‘does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States’ (*Military and Paramilitary Activities in and against Nicaragua* (n 14) 103 (para 195) and 118-119 (para 228)). The Court did not address the issue of attribution of acts of aggression since Nicaragua did not invoke the responsibility of the United States for this specific conduct.

¹²⁹ Zanardi, ‘Aggressione armata indiretta ed elemento soggettivo’ (n 125) 153-165, 157; D Akande and A Tzanakopoulos, ‘The International Court of Justice and the Concept of Aggression’ in C Kreß and S Barriga (eds), *The Crime of Aggression* (CUP 2016) 214, 222.

¹³⁰ Zanardi, ‘Indirect Military Aggression’ (n 127) 115; Pisillo-Mazzeschi, ‘*Due diligence*’ e responsabilità internazionale degli Stati (n 54) 327-328; J C Martin, *Les règles internationales relatives à la lutte contre le terrorisme* (Bruylant 2006) 537; Palchetti, *L’organo di fatto dello Stato nell’illecito internazionale* (n 14) 110-114.

¹³¹ On the occasion, the DRC argued that massive support for irregular forces could be considered as an act of aggression in international law and invoked the responsibility of Uganda for aggression by actively supporting irregular forces operating in its territory by military, logistic, economic and financial means (*Armed Activities on the Territory of the Congo* (DRC v Uganda) (Memorial of the DRC of 6 July 2000) ICJ Written Proceedings 177-178 (4.45) and 273 (Claim 1)). In its decision of 2005, the Court did not analyse the claim of aggression but considered that despite the evidence that Uganda provided training and military support to irregular forces operating in the territory of the DRC, they could not be considered its *de facto* organs or acted on the instructions of, or under the direction or control of Uganda (*Armed Activities on the Territory of the Congo* (n 14) 226 (para 160)). Although not addressing expressly the existence of an act of aggression, the Court stated that even if the specific conduct of irregular forces could not be attributed to Uganda, the training and military support given to it violated ‘certain obligations of international law’, among which ‘a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the (UN) Charter’ (ibid, 226-227 (paras 161 and 165)).

In conclusion, the responsibility of a State for aggression under Article 3(g) of UNGA Res 3314 (XXIX) is based not on the attribution of the conduct of the armed groups to the State but on a specific violation of the duty to refrain from interfering in the internal affairs of other States, an autonomous commissive act by the State in the breach of a duty to abstain.¹³² This aspect is analysed further in section 3.1.

2.5. *Special Rules of Attribution of the International Humanitarian Law*

Due to particularities of the application of its rules, international humanitarian law is a field of international which provides for strong candidates for special rules of attribution. The basic rule of attribution in this field of international law is Article 3 of the Hague Convention IV respecting the Laws and Customs of War on Land of 1907, according to which:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.¹³³

The principle was reproduced with minor differences in Article 91 of the Additional Protocol I to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts and is frequently pointed out as a special rule regarding the general rules of attribution,¹³⁴ an assertion that may be analysed under both *ratione personae* and *ratione materiae* aspects.

Regarding the concept of persons or entities whose acts can be attributed to the State, Article 3 of the Hague Convention IV of 1907 expresses that a State is responsible for the conduct of ‘persons forming part of its armed forces’. It is clear that members of the regular armed forces of a State are to be considered to be an organ of it.¹³⁵ The problem, however, is whether the rule also extends to other entities or persons whose conduct is usually not attributed to a State under the general rules of State responsibility. The Regulations annexed to the Hague Convention IV of 1907 establish that ‘the armed forces of the belligerent parties may consist of combatants and non-combatants’ (Article 3),¹³⁶ which includes in the concept not only military staff but also medical and religious

¹³² Pisillo-Mazzeschi, *‘Due diligence’ e responsabilità internazionale degli Stati* (n 54) 323-328. The author argues that in the case of indirect aggression by the ‘sending by or on behalf of armed groups’ the responsibility of the State is based on the attribution of the conduct of the armed groups.

¹³³ *Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907* (n 97).

¹³⁴ Condorelli, ‘L’imputation’ (n 112) 145-149; F Kalshoven, ‘State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond’ (1991) 40 *International and Comparative Law Quarterly* 827, 837; C J Tams, ‘Unity and Diversity in the Law of State Responsibility’ in A Zimmermann and R Hofmann (eds), *Unity and Diversity in International Law* (Duncker & Humblot 2006) 435, 441.

¹³⁵ In the *Armed Activities* case the ICJ considered that ‘the conduct of individual soldiers and officers of the (Uganda Peoples’ Defence Forces) is to be considered as the conduct of a State organ. In the Court’s view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda’ (*Armed Activities on the Territory of the Congo* (n 14) 242 (para 213)). This passage is referred to by Condorelli and Kress as the acknowledgment by the ICJ of the existence of a special rule of attribution in international humanitarian law (Condorelli and Kress, ‘The Rules of Attribution’ (n 29) 228). The Court, however, affirms that the rule is an application of a ‘well-established rule of international law, which is of customary character’ according to which ‘the conduct of any organ of a State must be regarded as an act of that State’.

¹³⁶ *Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907* (n 97) Article 3 of the Annex to the Convention (Regulations Respecting the Laws and Customs of War on Land).

personnel and is consonant with the rule expressed by Article 4 of the ARSIWA. On the other hand, Article 43 of the Additional Protocol I to the Geneva Conventions of 1949 disregards any difference from the conduct of regulars and irregulars and considers as armed forces ‘all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates’.¹³⁷ The concept requires a reasonable degree of organization and hierarchy and in principle may also encompass private groups, although the degree of relation between them and the Party is not determined by the treaty,¹³⁸ leaving room for the application of the general rules of State responsibility.

It is asserted that the existence of a special rule of attribution in the field of international humanitarian law was recognized by the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case, in particular after the rejection by the Appeals Chamber of the same criterion of attribution adopted by the ICJ in the *Nicaragua* case, based on the general rules of State responsibility.¹³⁹ According to the Appeals Chamber:

Admittedly, the legal solution to the question under discussion might be found in the body of law that is more directly relevant to the question, namely, international humanitarian law. This corpus of rules and principles may indeed contain legal criteria for determining when armed forces fighting in an armed conflict which is *prima facie* internal may be regarded as acting on behalf of a foreign Power even if they do not formally possess the status of its organs. These criteria may differ from the standards laid down in general international law, that is in the law of State responsibility, for evaluating acts of individuals not having the status of State officials, but which are performed on behalf of a certain State.¹⁴⁰

The Appeals Chamber first analysed under which conditions armed groups may be deemed to act on behalf of another State or assimilated to its organs by making recourse to the concept of ‘prisoners of war’ presented by the Third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War. The Convention conceptualizes prisoners of war not only members of the armed forces of a Party but also ‘members of militias or

¹³⁷ *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I to the Geneva Conventions of 1949) Article 43(1).

¹³⁸ According to the Commentaries of the ICRC to the Protocol, ‘the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training’ and ‘all armed forces, groups and units are necessarily structured and have a hierarchy, as they are subordinate to a command which is responsible to one of the Parties to the conflict for their operations’. Zimmermann and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 512.

¹³⁹ In order to determine whether the Republika Srpska may be considered as a *de facto* organ of the Federal Republic of Yugoslavia, the Trial Chamber of the Tribunal applied in its judgment of 7 May 1997 the same criterion of attribution adopted by the ICJ in the *Nicaragua* case. The Trial Chamber traced a parallel between the cases facing the ‘particular problem’ of applying rules of State responsibility for *de facto* organs ‘to the specific circumstance of rebel forces fighting a seemingly internal conflict against the recognized government of a State, but dependent on the support of a foreign Power in the continuation of that conflict’ (*Tadić Case* (Opinion and Judgment) ICTY-94-1-T (7 May 1997) 205 (para 585) and 210 (para 595)). See also Condorelli and Kress, ‘The Rules of Attribution’ (n 29) 227.

¹⁴⁰ *Tadić* (15 July 1999) (n 120) 36 (para 90).

volunteer corps forming part of such armed forces'.¹⁴¹ The judges then considered that 'international rules and State practice' require control over the irregulars and a 'relationship of dependence and allegiance' to the Party of the conflict to qualify them as lawful combatants. Against its initial hypothesis, the Appeals Chamber concluded that 'international humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials'.¹⁴²

The second aspect which may also demonstrate the speciality of a rule of attribution in the field of international humanitarian law relates to the types of conduct that may be attributed to the State. Since Article 4(1) of the ARSIWA establishes that the conduct of organs of a State is attributed in the exercise of functions of a public character or apparent official capacity, 'purely private conduct' by a State organ is not attributed to a State.¹⁴³ As Article 3 of the Hague Convention IV of 1907 attributes to a State *all acts* committed by persons forming part of its armed forces, including acts committed by officials or soldiers in contexts not related to the function would be attributed to it, the rule seems to expand the rule of Article 4(1) of the ARSIWA.¹⁴⁴

Article 3 of the Hague Convention IV becomes contradictory if the expression 'all acts' is interpreted to include even conducts that are not unlawful. The two sentences of the article seem to be incompatible between them for referring both to the responsibility of the State specifically for violations of rules of international humanitarian law and for all acts committed to the members of its armed forces, which are not identical. From the joint reading of both sentences and the intention of the drafters of the Hague Conference of 1907,¹⁴⁵ the most suitable interpretation is to consider that the responsibility referred by the second sentence of Article 3 is limited to *all acts* of the members of armed forces *which violates the provisions of the said Regulations*.¹⁴⁶ The term 'all acts' seems also to be adopted by Article 3 to emphasize the responsibility of the State for *ultra vires* acts of soldiers.¹⁴⁷

¹⁴¹ According to the Convention, 'members of militias or volunteer corps forming part of such armed forces' can be considered as such if they are under the command by a person responsible for his subordinates, have distinctive signs, carry arms openly and conduct their operations according to the laws and customs of war. *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Articles 4A(1) and 4A(2).

¹⁴² *Tadić* (15 July 1999) (n 120) 37-40 (paras 92-98).

¹⁴³ Commentaries to Article 4, para 13.

¹⁴⁴ According to Condorelli, such rule would be derogatory from the general rules of international law (Condorelli, 'L'imputation' (n 112) 145-149). For Kalshoven, the rules would be supplementary (Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (n 134) 837).

¹⁴⁵ J B Scott (ed), *The Proceedings of the Hague Peace Conferences (The Conference of 1907 - Vol III)* (OUP 1921) 139-143; A Freeman, 'Responsibility of States for Unlawful Acts of Their Armed Forces' (1955) 88 *RCADI* 263, 335-338; Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (n 134) 837.

¹⁴⁶ This seems also to be the opinion of the ICRC, according to which Article 91 of the Additional Protocol I (which incorporates Article 3 of the Hague Convention IV) does not establish the duty of a State to pay compensation even when there is no violation of the rules of the Conventions or the Protocol (Zimmermann (n 138) 1058). The Commentary, on the other rule, did not discard the existence of such liability regime. See also E David, *Principes de droit des conflits armés* (5th edn, Bruylant 2012) 704.

¹⁴⁷ According to Major General von Gündell, German representative which proposed the article, 'we cannot hold here to the theory of the subjective fault by which the State would be responsible only if a lack of care

In conclusion, Article 3 of the Hague Convention IV of 1907 is not a special rule of attribution since it does not derogate from the general rules of the ARSIWA. The rule simply reaffirms the attribution to a State of conduct by organs of a State in violation of international obligations.¹⁴⁸ As will be observed in section 3, the attribution to States of conduct of members of armed forces and private persons, which sometimes is considered to be a special rule of international humanitarian law, may be related to the duty of vigilance of the State over the members of its armed forces.

2.6. *Special Rules of Attribution regarding the Use of Force against Terrorism*

Another field that may be regarded as having special rules of attribution is the fight against terrorism, in particular as regards the possibility to attribute the conduct of a terrorist group to a State beyond the general rule codified in Article 8 of the ARSIWA. Some authors envisaged the possibility of attribution of terrorist actions to States supporting or providing shelter to terrorist groups to a substantial degree as a case of *lex specialis* related to the specific character of the criminal conduct.¹⁴⁹ Such a rule may have a clear impact on the *jus ad bellum* by allowing the use of force in self-defence against a State which supports or harbours a terrorist group and therefore becomes responsible for their terrorist acts.¹⁵⁰

There are three main possibilities to attribute the conduct of terrorist groups to a State: firstly, the existence of an organic link between the terrorist group and the State which justifies the attribution of the conduct of the former to the latter; secondly, when the terrorist group is considered to be a private group but nonetheless the State directs and controls its conduct and becomes responsible for it; and thirdly, when the State harbours or provides shelter to the terrorist group. While the first two hypotheses are nothing but an application of the general principles of State responsibility, the last possibility may integrate a special rule of attribution not related to any other general principle.

or surveillance were established against it' (see the citation in Scott, *The Proceedings of the Hague Peace Conferences* (n 145) 140; see also Anzilotti, *Cours de droit international* (n 64) 499). Although such rule is well established today and incorporated in Article 7 of the ARSIWA, the vision according to which a State would be responsible for unlawful acts of soldiers only when carried out under orders of officials or due to their negligence was still followed by the doctrine at the beginning of the twentieth century (Freeman (n 145) 329-330). Article 91 of the Additional Protocol I to the Geneva Conventions of 1949 is used to reassert the rule by the ILC in the Commentaries of Article 7 of the ARSIWA (para 4) and by the ICJ in the *Armed Activities* case of 2005 (*Armed Activities on the Territory of the Congo* (n 14) 242 (para 214)).

¹⁴⁸ As analysed in chapter 3, damages caused by the conduct of organs of a State that do not violate rules of international humanitarian law may give rise to the State's obligation of reparation in the case of serious violations of *jus ad bellum*. But in this case, too, there is no derogation from the general rules of attribution.

¹⁴⁹ T Becker, *Terrorism and the State Rethinking the Rules of State Responsibility* (Hart 2006) 257 and 359; Condorelli and Kress, 'The Rules of Attribution' (n 29) 228.

¹⁵⁰ As international law admits self-defence only against an armed attack carried out by a State, the attribution of an armed attack carried out by a terrorist group allows for the use of force in self-defence against the harbouring State. It could be argued that the exercise of self-defence may justify the violation of some rights of third States accidentally affected by the action, as observed in chapter 2. In this case, however, only some minor violations seem to be justified. An armed attack directly specifically against the territory of a State hardly may be considered to be incidental. See for instance F Paddeu, 'Use of Force against Non-state Actors and the Circumstance Precluding Wrongfulness of Self-Defence' (2017) 30 *Leiden Journal of International Law* 93.

In the first case, the terrorist group may be considered to be an organ of the State, a hypothesis in which the attribution of the terrorist conduct to the State is clear.¹⁵¹ In this sense, according to Condorelli:

The fundamental idea underlying the entire regime of imputability is well known and appears perfectly suitable to deal with State terrorism: all acts of omission or commission of all organs *lato sensu* of a State – including those entities entitled by the domestic law of that State to exercise public powers, despite their separation from the State *apparatus* – are acts of State from the point of view of international law. It follows that the imputability to a State of a terrorist act is unquestionable if evidence is provided that the author of such act was a State organ acting in that capacity.¹⁵²

A terrorist group may be considered to be part of the official *apparatus* of a State, a case in which the criterion of attribution is determined by the internal law of the State, and the principle of Article 4 of the ARSIWA applies.¹⁵³ However, it is more probable that terrorist groups are considered as *de facto* State organs or a private group directed or controlled by a State, depending on the level of relationship between them.¹⁵⁴ In the case of participation of actual State officials in the acts of terrorism carried out by terrorist groups or employment by the State of mercenaries or armed bands organized, commanded and controlled by the State, it seems possible to consider the terrorist group as a *de facto* organ of the State due to the existence of an organic link between them, as established by Article 4(2) of the ARSIWA.¹⁵⁵ As in the case of *de jure* organs of State, such hypothesis is determined by the organic link between the group and the State and is not related properly with the activity carried out by the group. In the case of the supply of financial aid or weapons, logistic support or provision of refuge to the terrorist group, the group is understood as a private group and nonetheless, its conduct may be attributed to a State which directs or controls it, according to the hypothesis encompassed by Article 8 of the ARSIWA. This is not always the case, since as mentioned in the previous section only exceptionally the assistance provided by a State leads to the attribution of the conduct of an armed or terrorist group to it. In this sense, under the rules of State responsibility, the supply of weapons, provision of logistical support, or financial aid does not seem to be

¹⁵¹ Martin (n 130) 535-537.

¹⁵² L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *Israel Yearbook on Human Rights* 233-246, 234 (footnotes omitted).

¹⁵³ Such as the in the *Rainbow Warrior* case of 1985, in which agents of the French Directorate General of External Security (DGSE) were prosecuted for the explosion and sinking of the civilian vessel in the port of Auckland. In 2003 the Libyan government expressed that it 'accepts responsibility for the actions of its officials' for the Lockerbie incident of 1988 and the attribution to the Iraqi Intelligence Service by the United States of the attempt of assassination of President George Bush in 1993. For the characterization in general, see Martin (n 130) 461, 467-469; Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (n 14) 130-133.

¹⁵⁴ A Cassese, 'The International Community's "Legal" Response to Terrorism' (1989) 38 *International and Comparative Law Quarterly* 589, 598.

¹⁵⁵ Such possibility was pointed out by some authors to be the case of the relationship between the Taleban as *de facto* government of Afghanistan and Al Qaeda in 2001 or Lebanon and the Hezbollah in 2006, for instance (A Tancredi, 'Il problema della legittima difesa nei confronti di milizie non statali alla luce dell'ultima crisi tra Israele e Libano' (2007) 90 *RDI* 969, 972-977). See in general Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (n 14) 138-146.

enough to characterize the direction or control of the State over the group, either according to the effective or the overall control tests.¹⁵⁶

The third main possibility concerns the emergence, after 2001, of a special rule attributing the conduct of terrorist groups to States that harbour or tolerate them, also called the ‘harbouring test’.¹⁵⁷ The attribution is based on the omission or passivity of the State towards the terrorist group and may also be seen as an aspect of the ‘unwilling or unable’ doctrine.¹⁵⁸ The harbouring test is frequently applied in State practice, in special regarding the context of the ‘war on terror’.¹⁵⁹

As the hypothesis of indirect aggression analysed in section 2.2, the responsibility of the harbouring State is not due to the direct attribution to it of the conduct of the group but to the direct violation of obligations related to the control over its territory, in particular, the general duty to prevent activities of privates which may affect other States.¹⁶⁰ As explained by Martin, the State harbouring terrorist groups also breaches a specific obligation of international law prohibiting the assistance to terrorist groups, a duty which

¹⁵⁶ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 65-65 (para 115); *Tadić* (15 July 1999) (n 120) 59 (para 137).

¹⁵⁷ M G Kohen, ‘Les controverses sur la question du “terrorisme d’Etat”’ in K Bannelier and others (eds), *Le droit international face au terrorisme* (Pedone 2002) 83, 88-89; L Condorelli, ‘Conclusion générale’ in *Les Nations Unies et l’Afghanistan* (Pedone 2003) 197, 206-207; G Travalio and J Altenburg, ‘Terrorism, State Responsibility, and the Use of Military Force’ (2003) 4 *Chicago Journal of International Law* 97, 111; A Nollkaemper, ‘Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility’ in Blokker N M and Schrijver N (eds), *The Security Council and the Use of Force: Theory and Reality, a Need for a Change?* (Martinus Nijhoff 2005) 133, 158; Condorelli and Kress, ‘The Rules of Attribution’ (n 29) 228.

¹⁵⁸ Some authors understand the ‘unwilling or unable’ test as a form of attribution or involvement of the territorial State in the conduct of the non-State actors. See for instance the analysis of T Ruys and S Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence’ (2005) 10 *JCSL* 289-320; C J Tams, ‘The Use of Force against Terrorists’ (2009) 20 *EJIL* 359; P Starski, ‘Right to Self-Defense, Attribution and the Non-State Actor: Birth of the “Unable or Unwilling” Standard?’ (2015) 75 *ZaöRV* 455. On the other hand, others argue that in this case the issue is not one of attribution of conduct but of justification for the violation of the territorial integrity of the State, since the conduct of the group generally cannot be attributed to the territorial State. See for instance N Tsagourias, ‘Self-Defence against Non-State Actors: Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule’ (2016) 29 *LJIL* 801; Paddeu, ‘Use of Force against Non-state Actors’ (n 150) 93; E de Wet, ‘The invocation of the right to self-defence in response to armed attacks conducted by armed groups: Implications for attribution’ (2019) 32 *LJIL* 91. In any event, the doctrine is not applied in a uniform and coherent way by States that directly or indirectly adopt it. O Corten, ‘The Unwilling or Unable Test: Has It Been, and Could It Be, Accepted’ (2016) 29 *LJIL* 777-800.

¹⁵⁹ The United States adopted the test to justify the use of force in Afghanistan after the terrorist attacks of September 11 carried out by Al Qaeda, as the US Congress authorized the President to use force in Afghanistan against ‘nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons’ (Authorization for Use of Military Force Pub L 107-40, Sept 18, 2001, 115 Stat 224, Section 2(a)). The United States (as well as some members of the coalition) also adopted the concept to justify the use of force against ISIL (Da’esh) in Syria in 2014 and 2021, claiming that ‘the Syrian regime has shown that it cannot and will not confront these safe havens effectively itself’ (UN Doc S/2014/695; S/2015/221; S/2015/693; S/2021/202). In 2006 Israel stated that the responsibility for acts carried out by the Hezbollah ‘lies with the Government of Lebanon, from whose territory these acts have been launched into Israel’ (UN Doc A/60/937 - S/2006/515). See in general S Ratner, ‘Jus Ad Bellum and Jus in Bello after September 11’ (2002) 96 *AJIL* 905, 908; Y Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge 2011) 261.

¹⁶⁰ Pisillo-Mazzeschi, ‘*Due diligence*’ e responsabilità internazionale degli Stati (n 54) 329-331.

encompasses not only by the prohibition to provide active support¹⁶¹ but also the prohibition of passive support to the terrorist group, and includes the obligation to prevent terrorist activities in its territory. In this sense:

Tout État doit faire preuve d'une vigilance suffisante pour empêcher un acte terroriste sur son territoire ou le faire cesser et pourra donc voir sa responsabilité engagée pour son manque de diligence ou de volonté à lutter effectivement contre le terrorisme sous sa juridiction. La carence de l'État constitutive du soutien passif au terrorisme peut ainsi prendre diverses formes dont le fait de laisser sciemment des terroristes entrer sur ou transiter par leur territoire, ou de tolérer en connaissance de cause la présence de terroristes.¹⁶²

In conclusion, also in the case of terrorism the supposed special rule of attribution is better explained by the breach of a duty of the territorial State to prevent acts of private individuals which may affect other States, which is confirmed by State practice.¹⁶³ This rule is better explained in the following section.

3. The Breach of the Prohibition of the Use of Force

A wrongful conduct is qualified by the contrast between the conduct of the wrongdoer State and the conduct required by the international obligation breached. Through the analysis of the objective element of an internationally wrongful act is possible to

¹⁶¹ This obligation is established by UNGA Res 2625 (XXV) (24 October 1970), according to which: 'every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts (...) involve a threat or use of force' (Article 1). The obligation was reaffirmed by UNSC Res 1373 (28 September 2001), adopted in response to the armed attacks of the 11 September 2001 (para 2). See also L N C Brant, 'Terrorismo Internacional: A Guerra Preventiva e a Desconstrução do Direito Internacional' (2004) 90 *Revista Brasileira De Estudos Políticos* 199-238.

¹⁶² Martin (n 130) 459. As observed by Monnheimer, since 2001 the general obligation of due diligence in preventing terrorist activities by States in their territories is being concretized by several specific duties established by conventions or by the Security Council, such as the strengthening of border controls and measures to prevent the acquisition of weapons by armed groups, among others. Monnheimer, *Due diligence obligations in international human rights law* (n 46) 169-170.

¹⁶³ The United States justified airstrikes against Al-Qaeda training camps and Taliban installations in Afghanistan in 2001 based on the exercise of self-defence. Nevertheless, Washington did not attribute the actions of the Al-Qaeda directly to the Taliban, arguing that there was 'clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks', and that 'the attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation' (UN Doc S/2001/946). Israel justified the adoption of measures in Lebanon in 2006 as the exercise of self-defence in response to attacks carried out by the Hezbollah. Although claiming that the 'responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel', also the 'ineptitude and inaction' of the Lebanese government are mentioned. In this sense, the referred responsibility seems to be 'moral' since the acts are not attributed directed to Lebanon (UN Doc A/60/937 - S/2006/515). Likewise, in 2003 Israel claimed that Syria provided 'safe harbour, training areas, financial and logistical support' for groups such as Hezbollah, Hamas and Fatah but did not attribute the responsibility of the terrorist acts to Damascus (UN Doc A/57/706 - S/2003/46). In 1996 the Security Council adopted Res 1044 (31 January 1996) requesting to Sudan the extradition to Ethiopia of suspects of participation in the assassination attempt of the Egyptian President Hosni Mubarak in Addis Ababa 'sheltering in the Sudan' and to 'desist from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements and act in its relations with its neighbours and with others', although not attributing the conduct of the group to the country (para 4). See also Martin (n 130) 539-541.

determine how the responsibility of a State for events involving the use of armed force may arise even if such events cannot be attributed to it, such as armed attacks by non-State actors operating from its territory (section 3.1). From this perspective it is also possible to analyse whether the use of force may be considered as a wrongful act of continuing character for the exercise of self-defence, particularly to recover occupied territory (section 3.2).

3.1. The Prohibition of the Use of Force and the Breach of the Duties of Protection and Prevention

In some situations, it is possible to identify a relationship of causality between the conduct of a State and an episode of the use of armed force which may be explained as an operation of rules of attribution of conduct. For instance, armed attacks originating from the territory of a State may be attributed to that State, as well as the use of force by an armed group may be attributed to the State financing or assisting it. Although in several cases the use of force is indeed attributable to the State, the link of causality between the State conduct and the situation in which armed force is used is determined by the breach of obligations other than the prohibition of the use of force. The breach of two main different primary obligations may be involved in this situation: the duty to abstain and the duty of prevention.

The first type of primary rule which may be violated in connection with the prohibition of the use of force is the duty of States to abstain from interfering in other States. As observed in section 2.2, some authors claim that Article 3(g) of the Definition of Aggression of UNGA Res 3314 (XXIX) (1974) establishes a special rule of attribution by characterizing an act of aggression as ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein’. The purpose of the Resolution is primarily to define an act of aggression,¹⁶⁴ not to establish secondary rules attributing the conduct of armed groups to the sending State. The provision is better understood as a primary obligation establishing the concept of aggression, which is related to the determination of the existence of a breach.¹⁶⁵

¹⁶⁴ With the exception of subparagraph (f), analysed in section 5.

¹⁶⁵ This is also the case of other rules which conceptualize a violation, such as the concept of torture established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to Article 1(1) of the Convention, ‘torture’ is defined as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. The concept of torture was used by the ILC in the Commentaries to Article 55 to exemplify a situation in which ‘a particular treaty might impose obligations on a State but define the “State” for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II’ (para 3). Since torture is defined by the Convention as an act committed ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’, according to the Commission it would be ‘probably narrower than the bases for attribution of conduct to the State in Part One, chapter II’ of the ARSIWA (para 3, note 820). On the other

In this way, the rules of attribution of State responsibility apply regularly to the hypothesis of ‘indirect aggression’. The main obligation is breached not by the armed groups but by the State organs sending the armed groups by or on behalf of the State or through the substantial involvement of the State in their activities. In this case, it is even possible to consider that the act is not properly a case of ‘indirect aggression’ but of *direct* aggression.¹⁶⁶ Depending on the degree of involvement between the State and the armed group also the conduct of the latter is attributed to the former, which can include both the use of armed force and violations of international humanitarian law.¹⁶⁷

The primary rule established by Article 3(g) of the Definition of Aggression is an expression of the principle of non-intervention, expressed by UNGA Res 2625 (XXV) (1970) as ‘the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State’.¹⁶⁸ The relationship between the prohibition of the use of force and the principle of non-intervention was analysed in the *Nicaragua* case by the ICJ, which considered that the assistance to rebels may be an autonomous commissive act by the assisting State in breach of a duty to abstain.¹⁶⁹

The prohibition of the use of force is also related to the violation of the duty of a State to prevent harmful activities carried out within its sphere of control,¹⁷⁰ which is the source of two different obligations related to the use of force: the obligation of States not to allow its territory to be used for acts contrary to the rights of other States and the obligation of vigilance. In a first case, the general duty of prevention establishes the obligation of States not to tolerate the use of its territory as a base for hostile operations against other States (*sic utere non laedas*), a rule which was first observed in the law of neutrality¹⁷¹ and is

hand, as observed by Milanovic, Article 1 only defines the concept of torture for the purpose of the Convention and the fact that torture not committed with the involvement of a public official or other person acting in an official capacity is simply not considered to be torture according to the Convention. Milanovic (n 117) 311-312.

¹⁶⁶ Zanardi, ‘Indirect Military Aggression’ (n 127) 112. In the *Armed Activities* case, the DRC excluded expressly the existence of ‘indirect’ aggression in the case, considering that the question of attribution of acts carried out by irregular groups supported by Uganda was not relevant since ‘le simple soutien et encouragement à ces forces suffit à engager la responsabilité de l’Ouganda, pour le comportement de ses propres agents’ (*Armed Activities on the Territory of the Congo (DRC v Uganda)*) (Memorial of the DRC of 6 July 2000) ICJ Written Proceedings 175 (4.38)).

¹⁶⁷ It should be noted that not all forms of aggression constitute armed attacks for the purpose of self-defence. The use of force by armed actors will only be considered an armed attack for this purpose if attributed to the State. Therefore, some forms of indirect aggression can justify the use of force in self-defence.

¹⁶⁸ UNGA Res 2625 (XXV) (24 October 1970) Article 1.

¹⁶⁹ In the decision on the merits of the case of 1986, the Court considered that the assistance to rebels in the form of the provision of weapons or logistical or other support could be regarded both as a violation of the prohibition of the threat or use of force and as a violation of the principle of non-intervention since both breaches have in common the element of coercion (ICJ Rep 103-104 (para 195) and 108 (para 205)).

¹⁷⁰ The duty of prevention is a manifestation of the general duty of protection by a State of foreign individuals or other States (*sic utere tuo ut alienum non laedas* obligation). This general duty of prevention is conditioned by due diligence. Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (n 54) 35.

¹⁷¹ This rule was first observed as an obligation for a neutral States not to tolerate the use of their territories for operations carried out by belligerent State during armed conflicts, one of the main expressions of the principle of impartiality of the law of neutrality. Fauchille, *Traité de droit international public* (n 51) 659 (para 1450).

currently applied also concerning the prevention of armed actions carried out against other States by armed bands, groups, irregulars, mercenaries, or terrorist groups.¹⁷²

There are three different bases for the responsibility of a State for extraterritorial armed activities of non-State actors operating from its territory: the responsibility for the breach of the duty of prevention of conducts carried out by armed groups; the responsibility for the assistance to armed groups in the commission of such conducts (a breach of the duty to abstain referred above); and the direct responsibility for the conducts of armed groups if such conducts are attributed to the State. The confusion between those three bases of responsibility is verified in the doctrinal debate regarding the possibility of the exercise of self-defence against the conduct of terrorist groups.

State practice shows that usually the conduct of terrorist groups are not attributed to a State outside the criteria established under the law of State responsibility. As analysed in section 2.4, it is sometimes claimed that the ‘harbouring’ test and the ‘unwilling or unable’ doctrine are the recognition of the existence of special rules attributing the conduct of terrorist groups to the territorial State where they operate.¹⁷³ In particular, part of the doctrine claims that the practice of self-defence against non-State actors may be explained by the existence of less rigid criteria established by special rules of attribution of the armed attack carried out by such actor to the State in whose territory they operate.¹⁷⁴ In this way, the armed attack carried out by non-State actors may be attributed to the State that tolerates or does not prevent their action and the use of force in self-defence would be justified against it. As observed by Palchetti, such claims, in reality, seems rather expand the hypothesis of the exercise of self-defence than establish a special rule of attribution for terrorist acts.¹⁷⁵

The analysis of recent practice confirms that States generally do not exercise ‘self-defence against non-State actors’ by attributing the conduct of the armed group to the territorial State. For instance, the external intervention in the Syrian Civil War points out the fact that States justifying the use of force against ISIL (Da’esh) as measures of self-defence seek to emphasize that the measure is not directed against Syria, therefore it is not based on the attribution of the wrongful conduct (i.e., the armed attack or aggression) of the group to Damascus.¹⁷⁶ This may be explained by the fact that the use of force, in this case,

¹⁷² According to Special Rapporteur Ago, in the case of harbouring of armed groups, the State violates obligations of vigilance, protection and control, which are commonly applied in relation to the protection of foreigners. R Ago, Fourth Report (n 27) 120 (para 136).

¹⁷³ See n 157.

¹⁷⁴ Part of the doctrine considers sufficient to support this position evidence of State practice in which the State exercising self-defence establishes a connection between the armed attacks by non-State actors and the territorial States. Although such connection is really present, the armed attacks are not actually attributed to the territorial State, as its own acts. See, for instance, Ruys and Verhoeven (n 158) 289-320; Tams, ‘The Use of Force against Terrorists’ (n 158) 359; De Wet, ‘The invocation of the right to self-defence in response to armed attacks conducted by armed groups’ (n 158) 91.

¹⁷⁵ Palchetti, *L’organo di fatto dello Stato nell’illecito internazionale* (n 14) 140-141.

¹⁷⁶ No country that invoked self-defence to justify the use of force against ISIL (Da’esh) has directly attributed the conduct of the terrorist group to Syria. On the contrary, several countries claimed that self-defence was not directed against the country. See for instance the letters sent to the Security Council by Canada (which claims that ‘these military actions are not aimed at Syria or the Syrian people’, UN Doc S/2015/221), Australia (according to which ‘these operations are not directed against Syria or the Syrian people’, UN Doc S/2015/693), Germany (claiming that that the measures were ‘directed against ISIL, not

is aimed at targeting installations or training camps of armed groups and not the territorial State *per se*, which is not held accountable and would not suffer a direct attack. In addition, the use of force in response to conduct attributed to a State is an inter-State use of force and poses greater political costs for the intervening State. In this sense, if the conduct is attributed to the State, the hypothesis would be no longer of self-defence ‘against non-State actors’.

At this point, it is possible to question whether the use of force can be justified by the violation of the territorial State’s duty not to tolerate the use of its territory as a base for hostile operations by non-State actors against other States. One possibility would be to consider self-defence as a special consequence of the breach of the duty of protection by the territorial State. Another possibility, observed by Tancredi, is to consider that the armed measures are adopted against non-State actors by the victim State or by the international community in ‘substitution’ of the territorial State in the fulfilment of the former’s obligation of law enforcement in its territory.¹⁷⁷ Nevertheless, such possibilities are not accepted by doctrine and State practice or seem to override the prohibition of the use of force.¹⁷⁸

The second type of obligation related to the duty of a State to prevent harmful activities carried out within its sphere of control is the duty of vigilance, which is reflected in the special obligation of States to prevent violations of international humanitarian law. Article 1 common to the Geneva Conventions of 1949 establishes that the Parties ‘undertake to respect and to *ensure respect* for the present Convention in all circumstances’.¹⁷⁹ The vague terms of the Article were initially interpreted as referring to the State’s duty of vigilance over its own organs.¹⁸⁰ On the other hand, the 2016 Commentaries of the ICRC to Article 1 explain that:

The duty to ensure respect covers not only the armed forces and other persons or groups acting on behalf of the High Contracting Parties but extends to the whole of the population over which they exercise authority, i.e. *also to private persons whose conduct is not attributable to the State*. This constitutes a general duty of due

against the Syrian Arab Republic’, UN Doc S/2015/946), Belgium (observing that the military measures ‘are directed against the so-called “Islamic State in Iraq and the Levant” and not against the Syrian Arab Republic’, UN Doc S/2016/523) and Norway (observing that ‘the measures are directed against ISIL, not against the Arab Republic of Syria’, UN Doc S/2016/513).

¹⁷⁷ A Tancredi, ‘Doctrinal Alternatives to Self-Defence Against Non-State Actors’ (2017) 77 *ZaöRV* 69.

¹⁷⁸ In the *Corfu Channel* case (1949), for instance, the ICJ considered that Albania had violated the ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ and even so considered the use of force by the United Kingdom in Operation Retail to be illegal. *Corfu Channel Case* (UK v Albania) (Merits) [1949] ICJ Rep 4, 22.

¹⁷⁹ *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (emphasis added).

¹⁸⁰ Pictet, for instance, considered that the phrase of Article 1 ‘may seem redundant’, explaining that the engagement of a State ‘extends *eo ipso* to all those over whom it has authority’, not referring to private individuals. J Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary. Vol I, Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field* (ICRC 1952) 25.

diligence to prevent and repress breaches of the Conventions by private persons over which a State exercises authority, including persons in occupied territory.¹⁸¹

In this case, the responsibility of the State does not arise from the attribution of private conduct but from the violation of the duty of vigilance, which may be understood as a corollary of territorial control.¹⁸² This is the reason why the duty of vigilance is particularly relevant regarding violations of human rights and international humanitarian law in occupied territory,¹⁸³ as confirmed by State practice.¹⁸⁴

It is possible to conclude that some candidates for special rules of attribution related to the use of force by States analysed in section 2 do not have such character. As observed by Arangio-Ruiz, some possible ‘derogations’ from the law of State responsibility may be better understood as primary rules establishing for the State the obligation of vigilance or due diligence.¹⁸⁵

3.2. *Illegal Use of Force as an Act of Continuing Character*

As observed in part one, the qualification of the breach of an international obligation is important for determining the *tempus commissi delicti*, what is necessary to determine the legal consequences of the wrongful conduct such as the obligation of cessation and reparation imposed upon the wrongdoer State and the possibility of countermeasures. This aspect is also important concerning the prohibition of the use of force, in particular to determine the possibility of the exercise of self-defence, which is a faculty granted by international law to a State to employ armed force to repel an armed attack.¹⁸⁶

¹⁸¹ ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016) 45-46 (para 150) (emphasis added). See also the ICRC Commentaries of 1987 to Article 91 of the Additional Protocol I, according to which a State is responsible for damages caused by private individuals ‘if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances’ or ‘has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place’. Zimmermann (n 138) 1057-1058 (footnotes omitted).

¹⁸² Ollino (n 42) Chapter 3, Section 3.1.1. See also Dupuy, ‘Le fait générateur de la responsabilité internationale des États’ (n 3) 48.

¹⁸³ Article 43 of the Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 establishes the obligation of the occupying Power to ‘take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’ (*Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907* (n 97) Article 43 of the Regulations Respecting the Laws and Customs of War on Land). See also A Berkes, ‘The Standard of Due Diligence as a Result of Interchange between the Law of Armed Conflict and General International Law’ (2018) 23 *JCSL* 433.

¹⁸⁴ In the *Armed Activities* case of 2005 the ICJ considered Uganda responsible for ‘acts of looting, plundering and exploitation of the DRC’s natural resources’ committed by its armed forces and for ‘failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory’ (*Armed Activities on the Territory of the Congo* (n 14) 253 (para 250)). The Eritrea-Ethiopia Claims Commission considered that Ethiopia was ‘liable for permitting the unlawful looting and stripping of buildings in the town (of Tserona) during the period of its occupation’, ‘whether or not Ethiopian military personnel were directly involved in the looting and stripping of buildings’ (EECC, *Central Front – Eritrea’s Claims 2, 4, 6, 7, 8 and 22*, 2004, 16 (para 67)). Similar findings were reached regarding the responsibility of Ethiopia as occupying Power for damages in several other locations (EECC, *Partial Award - Western Front, Aerial Bombardment and Related Claims – Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 and 26*, 2004).

¹⁸⁵ Arangio-Ruiz, ‘State Responsibility Revisited’ (n 31) 126.

¹⁸⁶ This aspect is better analysed in chapter 2, part one.

Since one of the typical effects of aggression is the unlawful occupation of part of the territory of another State and since the unlawful occupation is considered as one of the most classic examples of a continuing wrongful act,¹⁸⁷ it is possible to question whether self-defence may be justified to recover the territory occupied. A special rule of State responsibility could be identified in this case, as the determination of the occurrence of the breach as well as its duration would depend not only on the armed intervention that made the occupation possible but also on the maintenance of the occupation.

There are three different approaches concerning the bearing of military occupation on the violation of the prohibition of the use of force and the exercise of self-defence. The first approach considers that military occupation is a continuing wrongful act in violation of the prohibition of the use of force, as expressed by Article 2(4) of the UN Charter, and therefore the occupied State may use armed force in self-defence to recover the territory. A military occupation would be considered as a ‘continuing armed attack’ regardless of its duration and the continuation of the hostilities since the situation is generated by an armed attack. Part of the doctrine support this possibility,¹⁸⁸ which may also be confirmed by State practice regarding the exercise of collective self-defence against Iraq five months after the invasion of Kuwait in August 1990, and by the United Kingdom against Argentina some weeks after the occupation of the Falkland Islands (Malvinas) in 1982.¹⁸⁹

It should be observed that a military occupation is usually considered to be an ‘act of aggression’ rather than an ‘armed attack’.¹⁹⁰ Article 3(a) of UNGA Res 3314 (XXIX) (1974) defines among an act of aggression the ‘invasion or attack by the armed forces of a State of the territory of another State, or *any military occupation, however temporary, resulting from such invasion or attack*, or any annexation by the use of force of the territory of another State or part thereof’.¹⁹¹ It can be argued that the concept of ‘aggression’ may be used to determine the existence of an armed attack, as done by the ICJ,¹⁹² and that the classification of the action is irrelevant for the purposes of the exercise

¹⁸⁷ Commentaries to Article 14, para 3; Ago, Seventh Report (n 46) 42 (para 27); J Salmon, ‘Duration of the Breach’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 383, 386.

¹⁸⁸ O Corten, *The Law Against War* (Hart Publishing 2010) 486-487; M Longobardo, *The Use of Force in Occupied Territory* (CUP 2018) 120; D Akande and A Tzanakopoulos, ‘Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?’ (2021) *EJIL* (forthcoming).

¹⁸⁹ The invasion of Kuwait was done between 2 and 3 August 1990 but military action to force the withdrawal of Iraqi troops only began in January 1991. Only on 6 August 1990, the Security Council adopted Res 661 ‘affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait’ (preambular para 6). For the meaning of the ‘authorization’ to the use of force in self-defence by the Security Council, see G Gaja, ‘Il Consiglio di sicurezza di fronte all’occupazione del Kuwait: il significato di una autorizzazione’ (1990) 73 *RDI* 696-697. In the case of the Falkland Islands (Malvinas) War, the United Kingdom started the use of armed force against Argentina 23 days after the invasion of the Islands (E Henry, ‘The Falklands/Malvinas War – 1982’ in T Ruys, O Corten and A Hofer (eds), *The Use of Force in International Law* (OUP 2018) 361-378).

¹⁹⁰ For instance, Laos considered that the occupation by regular forces of Thailand of Laotian territories near the border between both countries in 1984 ‘clearly constitutes aggression’ (UN Doc S/16765). Kuwait considered the invasion of its territory by Iraq in 1990 as an act of aggression (UN Doc S/21439). In 1999 Ethiopia considered that the occupation of Badme by Eritrea was ‘the symbol of Eritrean aggression’ (UN Doc S/1999/249). The occupation and annexation of Crimea by Russia in 2014 was also characterized as an act of aggression by Ukraine (UN Doc S/2014/895).

¹⁹¹ UNGA Res 3314 (XXIX) (14 December 1974) Article 3(a) (emphasis added).

¹⁹² *Military and Paramilitary Activities in and against Nicaragua* (n 14) 103-104 (para 195); *Armed Activities on the Territory of the Congo* (n 14) 222-223 (para 146).

of self-defence. Nevertheless, the choice of words may reveal a subtle different perception of States regarding the character of military occupation. One of the purposes of the definition of the concept by UNGA Res 3314 (XXIX) was not the determination of the concept of armed attack but to provide to the UN Security Council guidance in the determination of the existence of an act of aggression.¹⁹³ In this sense, the characterization of military occupation as an act of aggression by States may be a way of mobilizing and encouraging the Security Council to make recommendations or adopt measures to maintain or restore international peace and security, as determined by Article 39 of the UN Charter.¹⁹⁴ Before being a measure that requires an emergency action by the State itself, military occupation as an act of aggression may be considered a threat to international peace and security that would require not the exercise of self-defence by the affected State but the activation of the collective security system established by the UN Charter.¹⁹⁵

The second approach to the question considers that a State may use armed force to recover occupied territory not based on self-defence (which is a response to an *external* unlawful armed attack) but on a domestic use of force. Since Article 2(4) of the UN Charter prohibits the threat or use of force by States ‘in their *international* relations’, the use of force by a State to recover control over a part of its own territory may be considered as a measure of law enforcement.¹⁹⁶ On the other hand, the use of force by a State in its own territory does not mean that the action does not have international repercussions or does not affect the interests of other States, since there is an ‘unequivocal *inter-State* component behind occupation and the military response to it’.¹⁹⁷ State practice also shows that the use of force to retake occupied territory is usually justified by States based on the exercise of self-defence.¹⁹⁸

¹⁹³ UNGA Res 3314 (XXIX) (14 December 1974) para 4.

¹⁹⁴ O Corten and A Lagerwall, ‘La violation d’un cessez-le-feu constitue-t-elle nécessairement une violation de l’article 2 § 4 de la Charte des Nations Unies ?’ (2008) 61 *Revue Hellénique de Droit International* 87, 95.

¹⁹⁵ In this sense, the consideration of a situation as an ‘act of aggression’ and not an ‘armed attack’ could indicate that the exercise of individual or collective self-defence is not considered necessary by the State that had its territory occupied. This aspect is reinforced by the function of ‘safety valve’ attributed to self-defence by the UN Charter in case of the failure of the Security Council in adopting the necessary measures to deal with an armed attack on a State (M Arcari, ‘Il mantenimento della pace e l’uso della forza’ in T Scovazzi (ed), *Corso di Diritto Internazionale* (1st part, 3rd edn, Giuffrè 2018) 195, 291). In the case of Crimea, for instance, Ukraine considered the occupation and annexation of Crimea by Russia in 2014 as an act of aggression and ‘urge[d] the Member States to take further consolidated steps to stop the aggression’ (UN Doc S/2014/895). According to Bowett, the concept of aggression is ‘essentially a problem connected with the development of a system of collective security’ and not a synonym of armed attack (D W Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 251). See in general Akande and Tzanakopoulos, ‘The International Court of Justice and the Concept of Aggression’ (n 129) 214-232.

¹⁹⁶ O Schachter, ‘The Right of States to Use Armed Force’ (1984) 82 *Michigan Law Review* 1620, 1626; Corten, *The Law Against War* (n 188) 91.

¹⁹⁷ T Ruys and F R Silvestre, ‘Military Action to Recover Occupied Land: Lawful Self-defence or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited’ (2021) 97 *International Law Studies* 665, 681. See also Bowett, *Self-Defence in International Law* (n 195) 22.

¹⁹⁸ As demonstrated by the invocation of self-defence as a justification for military actions by Ukraine since 2014 in the Donbas region. See for instance manifestations of the representative of Ukraine in the Security Council (7365th meeting (21 January 2015) S/PV.7365, 20-21; 7457th meeting (5 June 2015) S/PV.7457, 19). See also M Arcari, ‘Violazione del divieto di uso della forza, aggressione o attacco armato in relazione all’intervento militare della Russia in Crimea?’ (2014) 8 *Diritti Umani e Diritto Internazionale* 473, 476.

The third approach considers that the exercise of self-defence does not justify the use of force to recover occupied territory due to three main limitations. The use of force in self-defence is first limited by the requirement of immediacy, according to which a reasonable time-lag must exist between the armed attack and the armed reaction undertaken to repel it. It is widely accepted in doctrine and State practice that although certain elasticity is allowed regarding the requirement of immediacy, long intervals do not seem to meet the requirement.¹⁹⁹ If one considers that a military occupation does not amount to a continuing armed attack, the requirement of immediacy would impair the possibility of the use of force in self-defence in this case.²⁰⁰ The example of the Nagorno-Karabakh conflict of 2020 is useful to illustrate such limitation, since Azerbaijan claimed the exercise of self-defence to justify the military operations to retake the enclave *de facto* controlled by Armenia on its territory twenty-six years after the signing of the ceasefire between the two countries. Although the exercise of self-defence was used to justify the military operation, Azerbaijan claimed that it reacted against ‘intensive fire’ from the armed forces of Armenia on 27 September 2020, therefore to a specific event and not the military occupation itself.²⁰¹ In other words, the military occupation of Nagorno-Karabakh itself was not considered by Azerbaijan as an armed attack giving rise to the possibility of use of force in self-defence.

A second limitation to the use of force is the duty of States to ‘refrain from the threat or use of force to violate the existing international boundaries of another State or *as a means of solving international disputes*, including territorial disputes’, as expressed by UNGA Res 2625 (XXV) (1970).²⁰² According to some authors, this rule would prohibit the recovery of occupied territory through the use of armed force even if the State which acts in self-defence holds the legal title over the territory.²⁰³ It is nevertheless doubtful whether a military occupation can be considered as a ‘territorial dispute’.²⁰⁴ In any event, this limitation does not preclude the hypothesis of considering a territorial occupation as a continuing armed attack.

A third limitation refers to the requirement of necessity, in particular, the assertion according to which ‘force should not be considered necessary until peaceful measures

¹⁹⁹ For instance, the interval of days as in the case of the reaction of the United Kingdom in the Falkland Islands (Malvinas) War of 1982 and months of the international community regarding the invasion of Kuwait by Iraq in 1990 were considered as tolerable (Corten, *The Law Against War* (n 188) 487; Arcari, ‘Il mantenimento della pace e l’uso della forza’ (n 195) 295; Dinstein, *War, Aggression and Self-Defence* (n 159) 233).

²⁰⁰ Ruys and Silvestre (n 197) 682-686. A possible counter-argument to this limitation is that it should be interpreted also according to the principle of necessity, as the passage of time may indicate the absence of other reasonable means of recovering the territory (Akande and Tzanakopoulos, ‘Use of Force in Self-Defence to Recover Occupied Territory’ (n 188)).

²⁰¹ Baku claimed that it adopted ‘countermeasures, in the exercise of the right of self-defence’ in order to ‘repulse the aggression (from Armenia) and ensure the safety of the civilian population’ of the country, also mentioning previous attacks since 2016 attributed to Armenia (UN Doc S/2020/956). The reaction of the international community regarding the legal basis of the action was very limited. Turkey observed that Azerbaijan exercised self-defence and that the outbreak of hostilities was ‘the direct consequence of Armenia’s consistent provocations’ (UN Doc S/2020/1024). For an account of the conflict, see Ruys and Silvestre (n 197) 665.

²⁰² UNGA Res 2625 (XXV) (24 October 1970) para 1 (emphasis added).

²⁰³ Ruys and Silvestre (n 197) 692.

²⁰⁴ Akande and Tzanakopoulos, ‘Use of Force in Self-Defence to Recover Occupied Territory’ (n 188).

have been found wanting or when they clearly would be futile'.²⁰⁵ In this sense, when the invaded State has alternatives to the use of force to halt an armed attack, self-defence would not be justified.²⁰⁶ This reasoning is in line with the aforementioned hypothesis of considering military occupation as an act of aggression that gives rise to the activation of the collective security system, an alternative to the use of force in self-defence. On the other hand, this limitation must be interpreted with flexibility and having in mind the efficacy of the measures available and the principle of proportionality, since it is not reasonable to condition the exercise of self-defence to the fulfilment of available peaceful means.²⁰⁷

Two concluding remarks may be done considering the observations made above. First, it does not seem that long-term military occupation can be considered as an armed attack of continuing character, although it may be considered as an act of aggression and a violation of the prohibition of the use of force. The invasion of a territory and the maintenance of its occupation seem to be two different wrongful conducts which are both a violation of the prohibition of the use of force but have different degrees of intensity concerning the use of armed force and its consequences.²⁰⁸

Second, the concept of armed attack is specific to the law of the use of force for the purposes of determining the legality of the exercise of self-defence and although used as a synonym of aggression and serious violations of the prohibition of the use of force, it does not denote a specific or autonomous wrongful act. Also, self-defence may not be considered properly as a 'consequence' of a wrongful act, as examined in chapter 3. In this sense, to consider that a military occupation is a continuing wrongful act does not mean that the use of force to recover territory is justified based on self-defence. This evaluation is flexible and made not based only on the rules of State responsibility but also considering the rights of the affected State and the interest of the international community in the maintenance of international peace and security. In this way, State practice demonstrates that self-defence may be adopted as a justification for the recovering of short-term military occupations, but usually not for long-term occupations.²⁰⁹

4. Special Intent as a Component of the Act of Aggression

As analysed in part one of the present chapter, the ARSIWA consider only the breach of an international obligation and the attribution of the conduct to a State as necessary elements of an internationally wrongful act. Beyond both elements, it is possible to

²⁰⁵ Schachter, 'The Right of States to Use Armed Force' (n 196) 1635.

²⁰⁶ In the *Armed Activities* case of 2005, the ICJ considered that Article 51 of the UN Charter 'does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council' (*Armed Activities on the Territory of the Congo* (n 14) 223-224 (para 148)). See also Longobardo (n 188) 121.

²⁰⁷ Schachter, 'The Right of States to Use Armed Force' (n 196) 1637. According to Corten, in this case 'on pourra être guidé par le critère général des moyens alternatifs: moins l'État concerné avait le choix des moyens, plus son action apparaîtra nécessaire au sens de la légitime défense'. O Corten, 'La nécessité et le *ius ad bellum*' in *La nécessité en droit international* (Colloque de Grenoble de la SFDI) (Pedone 2007) 127, 139-140.

²⁰⁸ Ruys and Silvestre (n 197) 719.

²⁰⁹ This may be seen in the cases of Kuwait in 1990 and the Falkland Islands (Malvinas) in 1982. On the other hand, it is not reasonable to consider that self-defence may be used to justify the use of force in Northern Cyprus, as observed by Ruys and Silvestre.

consider whether the intention or psychological element may be an additional component to characterize specific wrongful conducts, such as aggression. This element is already recognized concerning some wrongful acts committed by States such as genocide, which requires proof of the intention of the State to destroy, in whole or in part, a protected group.²¹⁰ In this sense, it is possible to question whether the element of special intent or *animus aggressionis* is necessary to characterize an act of aggression or armed attack.

Some authors argue that the intention is an essential element to differentiate acts of aggression from other unlawful uses of armed force.²¹¹ On the other hand, opposing authors consider the risk of abuse and the predominance of the objective theory of responsibility in international law.²¹² The element of intent was also discussed during the several attempts to define aggression. The Temporary Mixed Commission of the League of Nations discussed whether the ‘test of the violation of a frontier’ would be enough to characterize an act of aggression or whether also ‘signs of the intention of aggression’ would be necessary, with no success.²¹³ During the discussions at the United Nations on the drafting of the definition of aggression, two different proposals were analysed. One proposal was presented by the Soviet Union and established that the requirement of specific intent could be replaced by the objectivity of the principle of priority, according to which the status of a State as the aggressor is based on the first use of force.²¹⁴ Another proposal was presented by a group of Western States and defined aggression based on a list of possible intentions of the aggressor State, including the use of force for diminishing the territory or altering the boundaries of another State or for disrupting or interfering

²¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 13) 121 (paras 186-187); B Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff 2009) 122.

²¹¹ Such possibility was considered by Fitzmaurice, according to who the motives or apparent motives and the circumstances of armed actions are essential to differentiate an act of aggression from the exercise of self-defence or the execution of treaty rights or obligations (G Fitzmaurice, ‘The Definition of Aggression’ (1952) 1 *International and Comparative Law Quarterly* 137, 141). This was also the position of Jean Spiropoulos, Special Rapporteur of the ILC for Crimes against the Peace and Security of Mankind, which understood the notion of aggression as composed of an objective element, that is the act of aggression, and a subjective element, which would be the aggressive intention. The subjective element would differentiate a State launching a defensive attack against an aggression being prepared by another State against it (Jean Spiropoulos, Second Report on a Draft Code of Offences Against the Peace and Security of Mankind, ILC Yearbook 1951, Vol II, 67-68 (para 153)).

²¹² For Žourek, the notion of intention in the concept of aggression is useless since for its gravity a State may not be excused for an act of aggression (J Žourek, ‘La définition de l’agression et le droit international. Développements récents de la question’ (1957) 92 *RCADI* 755, 843). Eustathiades added that it would give rise to abuse and would create an absurd burden of proof for the victim State (C T Eustathiades, ‘La définition de l’agression adoptée aux Nations Unies et la légitime défense’ (1975) 28 *Revue Hellenique de Droit International* 5, 52-53). This may also be seen in the fact that the ILC did not accept Spiropoulos’ proposal of recognition of the subjective element as part of the notion of aggression. See the manifestations of the members of the Commission in the 93rd and 95th meetings of the organ (31 May and 4 June 1951), ILC Yearbook 1951, Vol I, 91 and 114-115.

²¹³ Those include industrial and military mobilisations and the collection of stocks of raw materials. Possible ‘impressions’ of the intention of aggression include the aggressor’s political attitude, propaganda, attitude of the press and population and even its policy regarding the international market (‘Commentary on the Definition of a Case of Aggression’ (1923) League of Nations Official Journal Spec Supp 16, 183-185).

²¹⁴ The proposal was based on the Litvinov proposal of 1933 (UN Doc A/9019, 8 (para 2)). For an overview of the efforts for the definition of aggression, see Eustathiades, ‘La définition de l’agression’ (n 212) 13-36.

with the conduct of the affairs of another State.²¹⁵ The Western proposal faced considerable opposition, but an agreement led to the acceptance of the definition of aggression adopted in 1974 by UNGA Res 3314 (XXIX). As established by Article 2:

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.²¹⁶

The provision establishes the principle of priority suggested by the Soviet proposal in considering the first use of force as *prima facie* evidence of an act of aggression and at the same time allows the analysis of the intent of the aggressor by establishing that the Security Council may disregard a conduct as such having in mind ‘other relevant circumstances’, what may include the *animus aggressionis* of the State.²¹⁷ The requirement of special intent is also important in determining the gravity which differentiates international crimes of States, among which aggression is the main example, from other delicts, as considered by the ILC until 1996.²¹⁸ Under international criminal law, the concept of the crime of aggression still requires the psychological element of *mens rea*.²¹⁹

In principle, State practice does not seem to require the element of intention for the invocation of the responsibility for aggression.²²⁰ Nevertheless, the element of intention

²¹⁵ Other intentions were the alteration of internationally agreed lines of demarcation, changes in the government of another State and the intention to inflict harm or obtain concessions (UN Doc A/9019, 12 (Article IV)).

²¹⁶ UNGA Res 3314 (XXIX) (14 December 1974) Article 2.

²¹⁷ UN Doc A/9619, 30; B Broms, ‘The Definition of Aggression’ (1977) 154 *RCADI* 299, 344-346; T Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (CUP 2010) 160. Contra, see J Žourek, ‘Enfin une définition de l’agression’ (1974) 20 *AFDI* 9, 25-26.

²¹⁸ Gattini, ‘Smoking/no smoking’ (n 59) 399-401. According to Special Rapporteur Arangio-Ruiz, even if the Commission did not consider fault as an element of the wrongful act, ‘it would have to acknowledge that fault played a major role with regard to the substantive and procedural consequences of internationally wrongful acts’, what ‘would be particularly important because the Commission was called upon to deal not only with delicts, but also with crimes’ (2168th meeting (5 June 1990), ILC Yearbook 1990, Vol I, 142-143 (para 34)).

²¹⁹ For Bonafè, the psychological element may not be considered as a requirement of the State responsibility for aggression and such absence is the main point of contrast between the concepts of aggression under international criminal law and State responsibility. Despite this fact, the author notes that ‘aggression is characterized by a complete overlap between aggravated state responsibility and individual criminal liability’ regarding both the material and subjective elements. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (n 210) 138-143.

²²⁰ In the *Nicaragua* case, neither State specified the existence of a specific intent to invoke State responsibility for an act of aggression, especially regarding the commission of indirect aggression, although Nicaragua mentioned in its Memorial of 1985 the existence of a ‘consistent pattern of intentions, purposes and acts over a long period of time’ of the United States as a form of indirect evidence to consider different events as part of a deliberate policy of Washington (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Memorial of Nicaragua of 30 April 1985) ICJ Written Proceedings 56 (para 209)). In the *Armed Activities* case, the DRC did not mention the psychological element to invoke the responsibility of Uganda for acts of aggression. Likewise, the invasion of Kuwait by Iraq in 1990 was not defined by the Security Council as an act of aggression and few mentions were initially made regarding the purposes of Iraq or characterizing the armed attack as such. It was just four days after

appears to be relevant regarding small-scale uses of force, with claims over the existence of an ‘aggressive intent’ present in State practice concerning border or armed incidents,²²¹ movement of troops near borders,²²² overflights,²²³ and other small-scale uses of force. The absence of such requirement in cases involving larger uses of armed force may be explained by the fact that the element of intention is presumed, being implicit in such cases.²²⁴ As observed by Palmisano, in the case of acts of aggression:

La dinamica estrinseca degli avvenimenti testimonia infatti con tale evidenza l’intenzione dello Stato di fare uso della forza contro la sovranità, l’integrità territoriale o l’indipendenza politica di un altro Stato, che sarebbe assurdo anche solo immaginare che dietro tale dinamica non vi sia una precisa volontà aggressiva. In questi casi dunque *l’intenzione si presume*. (...) Ciò non significa peraltro che l’aspetto soggettivo dell’antigiuridicità sia irrilevante nella disciplina dell’aggressione, ma solo che esso è posto in ombra dalla presenza di inequivocabili attività esteriori, oggettivamente considerate. Attività che non possono prodursi se non in presenza di un’intenzione aggressiva.²²⁵

Notwithstanding the presumption of the element of intention, it is possible to verify its appreciation in some cases of large uses of force, such as in the decisions of the ICJ on

the invasion that the Representative of Kuwait to the Security Council claimed that ‘the invading Power’s premeditated aim of the aggression was the overthrow of the legitimate Government of the State of Kuwait’ and ‘to install a new Government in Kuwait’ (2933rd meeting (6 August 1990) S/PV.2933, 6).

²²¹ In 1973 the United States affirmed that neither the alleged entry of a Lockheed C-130 into Libyan airspace and the presence of the Sixth Fleet in the Mediterranean ‘constitute aggression or reflect an aggressive intent on the part of the United States’ as claimed by Libya (UN Doc S/10956). Iran claimed that the ‘aggressive intent’ of US warships in the Gulf might be demonstrated by confronts with Iranian patrol boats and the shot down of Iran Air Flight 655 by USS Vincennes in 1988 (S/PV.2818, 28-30).

²²² India claimed in 1951 that military movements in Kashmir ‘have not been inspired by any aggressive intent or design’ regarding Pakistan (UN Doc S/2260). In 1994 Kuwait denounced the ‘aggressive intention’ of Iraq in deploying troops to the border between both countries (UN Doc S/1994/1165). In 2021 Sudan claimed that the movement of troops in its borders ‘have no aggressive intent’ regarding its neighbours (UN Doc S/2021/832).

²²³ President Eisenhower rejected complaint of aggression by flights over the URSS territory after the U2 incident of 1 May 1960 by claiming that ‘these activities had no aggressive intent but rather were to assure the safety of the United States and the free world against surprise attack’ (UN Doc S/PV.857, 19 (para 102)). In 2011 Georgia claimed that the entry of Russian helicopters in its airspace was a ‘clear evidence of the aggressive intentions of Russia towards Georgia’ (UN Doc A/65/941 – S/2011/564).

²²⁴ Corten, *The Law Against War* (n 188) 78; Ruys, ‘*Armed Attack*’ (n 217) 167.

²²⁵ G Palmisano, ‘Colpa dell’organo e colpa dello Stato nella responsabilità internazionale: spunti critici di teoria e prassi’ (1992) 19-20 *Comunicazioni e Studi* 623, 747-748 (emphasis from the original).

the *Nicaragua*²²⁶ and the *Oil Platforms* cases,²²⁷ and the Eritrea-Ethiopia Claims Commission.²²⁸

A possible question that may follow from the above analysis is whether fault in a strict sense may also be considered a psychological element of aggression. The special intent or *animus aggressionis* may be defined as a sort of *dolus*, in which the State has the intention to bring about the consequences of the act prohibited,²²⁹ while the concept of fault in a strict sense or *culpa* is used to qualify the fact that the State fails to take the necessary measure to avoid wrongful conduct.²³⁰ This possibility is more relevant considering the hypothesis of ‘indirect aggression’ provided for by Article 3(g) of UNGA Res 3314 (XXIX) (1974), since fault in a strict sense may be considered in determining the State responsibility for the breach of the duty of vigilance in some situations (*culpa in vigilando*) such as the obligation of not allowing the use of its territory by armed bands,

²²⁶ In its decision of 1986, the Court analysed whether transborder military incursions attributed to Nicaragua into the territory of Honduras and Costa Rica might be considered as an ‘armed attack’. According to the Court, ‘very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an “armed attack” by Nicaragua on either or both States’ (*Military and Paramilitary Activities in and against Nicaragua* (n 14) 119-120 (para 231) (emphasis added)). The passage seems to confirm that the motivation for the use of force on small scale can determine its character as an armed attack or as an act of aggression. See also Ruys, ‘*Armed Attack*’ (n 217) 161-162; C Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 154-155.

²²⁷ In deciding whether the use of force against the MV Sea Isle City was an armed attack perpetrated by Iran, as alleged by the United States, the Court argued that even if the launching of the missile that hit the oil tanker was attributed to Iran (what has not been proven), it was sent from a long distance and ‘could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters’ (*Oil Platforms* (Islamic Republic of Iran v United States of America) (Merits) [2003] ICJ Rep 161, 191-192 (para 64) (emphasis added)). In this sense, the intention of the use of force directed against the United States seems to be considered relevant in order to characterize an armed attack. The Court also considered relevant the fact that the mines launched by Iran were aimed specifically at the United States.

²²⁸ In *Jus Ad Bellum* decision (2005), the EECC analysed Ethiopia’s claim of premeditation of the military operations by Eritrea in its territory in 1998 and concluded that the evidence that the Eritrean armed forces were fully mobilized in the first months of war would not prove that the invasion of Ethiopia was predetermined or determined by military demands (EECC, *Jus Ad Bellum Ethiopia’s Claims* 1-8, 2005 (para 19)). On the other hand, in the assessment of the amount of compensation in the *Final Award on Ethiopia’s Damages Claim* of 2009, the Commission considered that the determination of compensation must take into account the fact that ‘Eritrea’s violation of the jus ad bellum in May 1998 (...) was different in magnitude and character from the aggressive uses of force marking the onset of the Second World War, the invasion of South Korea in 1950, or Iraq’s 1990 invasion and occupation of Kuwait’ (EECC, *Final Award – Ethiopia’s Damages Claims*, 2009 (para 312)). The fact that the Commission analysed Ethiopia’s claim of premeditation by Eritrea and considered the seriousness and *character* of the use of force seems to point out to the fact that the intention was considered by it at least regarding the determination of the amount of compensation. See also C Ponti, ‘The Eritrea-Ethiopia Claims Commission’s Controversial Ruling on Self-defence’ in A De Guttry, H H G Post and G Venturini (eds), *The 1998-2000 Eritrea-Ethiopia War and its aftermath in international legal perspective: from the 2000 Algiers Agreements to the 2018 Peace Agreement* (2nd edn, Springer 2021) 327, 337-338.

²²⁹ The concept seems similar to the one of *animus belligerendi*, or the intention of a State to wage war. Part of the doctrine considered the *animus belligerendi* of at least one of the belligerent States as an essential element of the concept of war, verified by indicia such as the formal declaration of war. Nevertheless, the *animus belligerendi* is associated with the determination of the existence of armed conflict and the regime applied to it, not with the consequences of the use of force or other questions of State responsibility. Brownlie, *International Law and the Use of Force by States* (n 20) 406; Dinstein, *War, Aggression and Self-Defence* (n 159) 14.

²³⁰ Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (n 54) 9.

groups, irregulars or mercenaries to carry out acts of armed force.²³¹ Nevertheless, it is clear from the definition of Article 3(g) that the act of aggression is considered to be either a volitive action of sending such entities or the ‘substantial involvement therein’, which surpasses a mere lack of vigilance.²³²

It is possible to conclude that the specific intent is a requirement for the characterization of the use of armed force as aggression, determining the seriousness of the act and differentiating it from less serious uses of force. This explains why the requirement is especially considered regarding small-scale uses of force in which the character of the act as an aggression is not clearly established. Nevertheless, the requirement of *animus aggressionis* is not a special rule derogating from the general rules of State responsibility, since the ARSIWA do not establish *a priori* the exclusion of such element for the determination of a wrongful conduct. As recognized by the Commission, the psychological element ‘depends on the circumstances, including the content of the primary obligation in question’.²³³ In this sense, the *animus aggressionis* is better seen as an element required by the primary rule prohibiting aggression in international law.

5. Special Rule regarding Complicity to Aggression

According to Article 16 of the ARSIWA, a State may be responsible for aiding or assisting another State in the commission of an internationally wrongful act if it does so with knowledge of the circumstances of wrongfulness and the act would be considered as wrongful if committed individually by the aiding State. As warned by the Commission in the Commentaries to Article 16, the situation of aid or assistance ‘is not to be confused with the responsibility of the acting State’, since the aiding State is responsible for a wrongful act autonomous to the main wrongful conduct committed by the assisted State.²³⁴

The concept of aid or assistance is absorbed by Article 3(f) of the Definition of Aggression adopted by UNGA Res 3314 (XXIX) (1974), which defines aggression as ‘the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State’.²³⁵ As a specific form of aid or assistance would be sufficient to characterize an act of aggression, in principle the rule of Article 16 of the ARSIWA could not be applied for this specific wrongful conduct. Therefore, it may be concluded that at least in a specific form of assistance involving the territory of the assisting State, complicity in aggression may be considered as equal to the main wrongful conduct, being an exception to the general rule of Article 16.

²³¹ Zanardi, ‘Aggressione armata indiretta ed elemento soggettivo’ (n 125) 157 (footnote 9); Palmisano, ‘Fault’ (n 59) para 46.

²³² The breach of the duty of vigilance in allowing the use of its territory as a base of operation for armed groups may engage the responsibility of the State, although not by an act of aggression. See Becker (n 149) 136-140.

²³³ Commentaries to Article 2, para 3. Palmisano, ‘Fault’ (n 59) para 18. On the influence of the subjective theory on the ARSIWA, see Gattini, ‘Smoking/no smoking’ (n 59) 397.

²³⁴ Commentaries to Article 16, para 1.

²³⁵ UNGA Res 3314 (XXIX) (14 December 1974), Article 3(f).

The hypothesis of Article 3(f) of UNGA Res 3314 (XXIX) probably is not an independent act of aggression, expressing at most the prohibition of complicity.²³⁶ This assertion is also coherent with the ‘derivative character’ of the responsibility for aid or assistance, in which the conduct of the aiding State is not an independently wrongful act.²³⁷ In the case of the hypothesis of Article 3(f), the assisting State would only be responsible for aggression if the aided State actually commits aggression, as confirmed by the few examples of State practice concerning this situation.²³⁸

In any event, the hypothesis raises the question of why such a particular form of assistance is considered to be more serious than others to the point of being equated to the main wrongful conduct established by UNGA Res 3314 (XXIX), in particular if one considers that the hypothesis is very specific and occasional. The reason for such distinctiveness may be related to the gravity of the assistance and the element of intention. There are several forms of complicity in an act of aggression with different levels of State participation and influence on the success in the commission of the wrongful conduct. The gravity of the participation of a State in an act of aggression may be considered to define the responsibility of the aiding State. Thus, the disposal of a territory by a State is more serious than other forms of participation (such as the provision of means of transport by it, for instance) and this level of gravity of the assistance may be a differentiating factor of the hypothesis provided by under Article 3(f).²³⁹

²³⁶ Quigley (n 75) 86. According to Special Rapporteur Ago, even in cases such as Article 3(f) of the Definition of Aggression in which a provision specifically creates the idea of equivalence between complicity and the main wrongful conduct, ‘it seems impossible to conclude that the treatment by international law of complicity of any kind in a given act is necessarily the same as its treatment of the act itself’ (Ago, Seventh Report (n 46) 60 (para 75)). In this sense, according to Ago, the wording of Article 3(f) ‘should not be taken too literally’ (1516th meeting (12 July 1978), ILC Yearbook 1978, Vol I, 226 (para 22)). The hypothesis of Article 3(f) was proposed by insistence of Romania in 1969 and adopted by the Special Committee on the question of Defining Aggression without extensive discussion (UN Doc A/AC.134/SR.25-51; A/AC.134/SR.52-66). The provision was not present in any previous definition of aggression and was the hypothesis of article 3 that generated the most opposition. Some States observed that Article 3(f) is not properly an act of aggression, such as Bulgaria, Syria and the Soviet Union (UN Doc A/AC.134/SR.110-113; A/AC.134/SR.100-109). Other commentaries seem to point out that the intention of Article 3(f) was indeed to prohibit the collusion of the territorial State with the aggressor State, not to autonomously attribute an act of aggression to it (UN Doc A/C.6/SR.1474; A/C.6/SR.1479; A/C.6/SR.1079; A/AC.134/SR.100-109; A/C.6/SR.1472). See also Zanardi, ‘Aggressione armata indiretta ed elemento soggettivo’ (n 125) 159-161.

²³⁷ M Jackson, *Complicity in International Law* (OUP 2015) 139.

²³⁸ The URSS invoked the responsibility of Germany and Italy in the Security Council for allowing the use of airfields in their territories by the United States in order to carry out an armed intervention in Lebanon in 1958, claiming that ‘the entire responsibility for the consequences falls upon the organizers of an participators in the armed intervention against the peoples of the Arab East, first and foremost, of the Government of the United States of America’, although not equating both status (UN Doc S/PV.827, 22 (para 119)). The governments denied responsibility. Likewise, the URSS accused Israel of being a direct accomplice in the British and American intervention in Jordan in the same year for allowing the passage of planes over its territory (W Rosenberger and H C Tobin (eds), *Keesing’s Contemporary Archives*, vol 11 (1957-1958) 16334). Libya and several countries claimed the responsibility of the United Kingdom for allowing the use of airbases in its territory for the raid made by the United States in Libya in 1986. According to Libya, the United Kingdom was ‘an active partner in the aggression’ and must ‘shoulder its responsibility for that’. (UN Doc S/PV.2680, see also the manifestation of other States in the 2675th to 2683rd meetings of the Security Council (15 April to 24 April 1986)).

²³⁹ It is possible to imagine a grade of possible levels of participation of a State in the act of aggression carried out by other State according to the gravity of such participation. In the lower level of the grade is

Another factor that may explain the peculiar form of complicity of Article 3(f) of UNGA Res 3314 (XXIX) is the psychological element, which is determinant in characterizing the participation of a State. According to Article 16(a) of the ARSIWA, the aid or assistance in the commission of an internationally wrongful act only occurs when the aiding State ‘does so with knowledge of the circumstances of the internationally wrongful act’.²⁴⁰ A clear example of the necessity of such an element in the case of aggression is the fact that the mere supply of weapons to a State by another without the latter’s knowledge of its use to commit aggression would not constitute complicity. As observed in the precedent section, the *animus aggressionis* may be considered as a requirement for the commission of an act of aggression, but one can also question whether it is also a necessary requirement for triggering State responsibility for aid or assistance to another State in the commission of such wrongful conduct.²⁴¹ As the hypothesis of Article 3(f) is considered by UNGA Res 3314 (XXIX) as an act of aggression *per se*, in principle the requirement of specific intent (*animus aggressionis*) will apply to it.²⁴² On the other hand, there does not seem to be an explanation for applying such stringent criteria to complicity

the case of mere incitement, which is not an unlawful act and not sufficient to engage the responsibility of the State instigator. In the middle of the grade, there is the hypothesis of aid or assistance of Article 16, in which the aiding State is not responsible for the act of aggression but bears responsibility for its complicity. In the highest level of the grade, there is the hypothesis of joint responsibility, in which the participating State is engaged in the aggression in such a way that it is also responsible for the conduct. Although the hypothesis of Article 3(f) of the Definition of Aggression is better situated in the middle of the grade, it is possible to consider that its particular gravity may influence the degree of responsibility of the aiding State, what may reflect, for instance, in its obligation of reparation or other consequences of the wrongful conduct. See Ago, Seventh Report (n 46) 54-55 (para 62); Quigley (n 75) 106.

²⁴⁰ Padelletti (n 51) 79.

²⁴¹ It is not clear what may be the character of the psychological element required by Article 16(a). In principle, the provision seems to exclude the necessity of specific intent by specifying that only the ‘knowledge of the circumstances’ is sufficient as a psychological element. On the other hand, it may be possible that the *dolus specialis* is considered to be a specific requirement for aid or assistance in the case of an act of aggression, which may constitute a specific secondary rule. A special intention may also be considered necessary for the responsibility for complicity in particular wrongful conduct. In the *Bosnian Genocide* case of 2007, the ICJ considered that in the case of genocide the aid or assistance would not be attributable to a State unless ‘at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator’ (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 13) 218 (para 421)). For the analysis of this point, see Bufalini (n 88) 576-577.

²⁴² A possible confirmation of this interpretation may be seen in the *Corfu Channel* case of 1949. In dealing with the claim made by the United Kingdom that the minefield in the Corfu Strait which caused damage to two British warships was laid by the Yugoslav Navy ‘with the connivance or knowledge of the Albanian Government’, the ICJ concluded that the minelaying operations could not have been made without the knowledge of Albania but did not make a conclusion regarding its complicity (*Corfu Channel Case* (n 178) 22). This decision could be interpreted as meaning that mere knowledge would not be sufficient to characterize Albania’s complicity, therefore requiring proof of specific intent in this particular case. However, the Court’s decision not to express itself on the issue of complicity may be related to the impossibility of determining the author of the main unlawful act due to the absence of direct evidence, which hampered any conclusion regarding the unlawful act. According to the Court, ‘a charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here’ (ibid 17). See also Padelletti (n 51) 185; G Puma, *Complicità di Stati nell’illecito internazionale* (Giappichelli 2018) 33.

for aggression in general and the limited international practice on the subject also points to the fact that the *dolus specialis* is not required in this case.²⁴³

The question of the specific purpose of Article 3(f) of UNGA Res 3314 (XXIX) remains, nevertheless. An explanation for the specificity of such type of violation may be the fact that it refers not only to the State responsibility for complicity to aggression but also to the violation of the duty not to allow the use of one's territory for the commission of wrongful conducts against other States, a violation analysed in section 3.2 that is independent of the main wrongful conduct and is confirmed by State practice.²⁴⁴ In conclusion, a special intent is not a requirement for State responsibility for the use of force or act of aggression.

6. Conclusion

From the nature of the use of force by States is possible to envisage situations in which some rules aimed at its regulation replace the general rules of State responsibility, in particular considering that in situations involving the use of force several rights of States are at stake. Nevertheless, a special rule must be well consolidated to derogate from the general rules of State responsibility. The present chapter demonstrates that this does not occur with the rules of the law of the use of force and the basic rules on the determination of State responsibility.

The possible candidates for special rules analysed are better explained as resulting from primary rules rather than secondary ones. In some situations, the existence of a logical link between the conduct of private entities and the responsibility of a State appears to be explained as special rules of attribution. However, in most cases, the responsibility is originated from the breach of the duty of protection by the State, which is deemed responsible for not exercising the diligent conduct required by it for its control over a territory or certain individuals. Similarly, the complicity for acts of aggression, which in some situations is assimilated to an act of aggression itself, is better understood as a rule prohibiting a State from assisting other States in the commission of aggression. This rule is also related to the duty of protection which stipulates the obligation for a State not to allow the use of its territory for the commission of wrongful conducts against other States.

Another explanation provided by primary rule may be observed in the case of the requirement of specific intent as a necessary element of an act of aggression. In this case, the requirement of the psychological element is determined by the rule prohibiting

²⁴³ According to Salmon, the complicity to aggression is characterized by the material aid and the knowledge of the fact that such aid will be used to acts of aggression ('intention-connaissance'), while in the case of aggression the aggressor should have the purpose to conduct in such a manner ('intention-motif'). J Salmon, 'L'intention en matière de responsabilité internationale' in *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (Pedone 1991) 413, 416.

²⁴⁴ For instance, in the case of the invocation of the responsibility of Italy and Germany by the URSS in the intervention carried out by the United States in Lebanon (n 238), the Soviet government also requested to such governments to take effective measures to prevent the use of their territories 'for purposes of aggression against Arab States which are defending their freedom and national independence' (W Rosenberger and H C Tobin (eds), *Keesing's Contemporary Archives*, vol 11 (1957-1958) 16333-16334). This was also evidenced by the *Corfu Channel* case, in which the Court stated that the responsibility of Albania was based on the breach of 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel Case* (n 178) 22). See also Padelletti (n 51) 109-110.

aggression, which does not contradict the general rules of State responsibility. In this sense, the element of intention may be understood, at most, as an additional element of State responsibility.

CHAPTER 2 – CIRCUMSTANCES PRECLUDING WRONGFULNESS

The law of State responsibility provides for circumstances in which the wrongful character of State conduct contrary to an international obligation is excluded. Such circumstances act as justifications for the wrongful conduct of a State and because of them, its responsibility does not arise. In the ARSIWA the circumstances precluding wrongfulness are found in Chapter V of Part One. The purpose of the present chapter is to analyse the relationship between primary rules related to the prohibition of the use of force and the general circumstance of self-defence (part one) and special rules that may justify the violation of the prohibition of the use of force derogating from the general rules (part two).

Part I – Contribution of the Prohibition of the Use of Force to Self-Defence as a Circumstance Precluding Wrongfulness

1. Introduction

Self-defence is one of the most important tenets of international law and plays a central role in the regulation of the use of force as it is near-universally considered the main exception to the prohibition of the use of force by States. It has an evident impact on the law of international responsibility for being a legal justification for the use of force, therefore being able to justify a conduct otherwise contrary to international law. This fact is reflected in the inclusion without major opposition of Article 21 of the ARSIWA, which states that ‘the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations’.

Despite the comprehensive existing bibliography on self-defence in general, the works dedicated to the analysis of its function as a circumstance precluding the wrongfulness of a conduct are scarce.²⁴⁵ Part one of the present chapter intends to investigate how self-defence is incorporated by the law of international responsibility as a circumstance precluding wrongfulness and to demonstrate its role in adapting the classic *jus ad bellum* to the current framework of international law. The right to self-defence has been accommodated in the international legal system in different ways since the beginning of the process of limitation of the freedom of States to use force in international law and gradually became a justification for the use of force outside a state of war with the consolidation of the general prohibition of the use of force in international law by UN Charter.²⁴⁶ From this point, it was natural for the law of State responsibility to assimilate the justification of self-defence as a secondary rule.

²⁴⁵ See for instance G M Badr, ‘The Exculpatory Effect of Self-Defense in State Responsibility’ (1980) 10 *Georgia Journal of International and Comparative Law* 1-28; J M Thouvenin, ‘Circumstances precluding wrongfulness in the ILC Articles on State Responsibility: Self-Defence’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 455-467; Farhang, ‘Self-Defence’ (n 114) 1-18; F Paddeu, ‘Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility’ (2015) 85 *BYIL* 90; Paddeu, ‘Use of Force against Non-state Actors’ (n 150) 93; F Paddeu, *Justification and Excuse in International Law* (CUP 2018).

²⁴⁶ P L Zanardi, *La legittima difesa nel diritto internazionale* (Giuffrè 1972) 12.

Part one is divided into three sections that gradually present stages of the analysis of the function of self-defence as a circumstance precluding wrongfulness. Section 2 deals with the main theories regarding its function in the international legal system. Section 3 explains how the concept of self-defence has been incorporated into the law of State responsibility, examining different hypotheses of the content of the secondary rule on self-defence divided according to the extent of its exculpatory effect on violations of international law. The hypothesis adopted by ILC in the ARSIWA regarding self-defence is further analysed in section 4, which identifies flaws in the explanation offered by the Commission to justify the effect of self-defence on third States and confirms that self-defence as a rule of State responsibility plays a role in the coherence of the international legal system and corresponds to an adaptation of the legal effects of the use of force after the UN Charter. Section 5 draws some conclusive remarks from the above findings.

2. Self-defence as a ‘Primary Rule’

As a ‘primary rule’ of international law, self-defence could be conceptualized one that authorizes a State to react to an armed attack with forcible means, an equivalent to the rule stated by Article 51 of the UN Charter. Although there is a broad agreement regarding the basic concept of self-defence, its effects and nature as a rule are a source of discordance and can be summed up in two distinct conceptions that try to explain its function regarding the prohibition of the use of force, presented in this section.²⁴⁷

2.1. Self-defence as an ‘Inherent Right’

The first conception considers self-defence as a proper *right* of States and therefore an autonomous entitlement for the use of force, independent from its prohibition. Before the establishment of the UN Charter, the content of self-defence was generally associated with concepts such as self-preservation and necessity.²⁴⁸ Self-preservation was seen as a fundamental right of a State which justified the adoption of measures against the rights of other States, including the use of force, as a way to guarantee the survival of the State adopting them.²⁴⁹ From the second half of the nineteenth century, self-defence was recognized as an exceptional measure of self-help aimed at the preservation of a State in periods of peace, followed by other similar institutes such as armed reprisals and the use of force in state of necessity.²⁵⁰

Continued restrictions on the use of force by States limited the recourse to forms of armed self-help and after the UN Charter self-defence was recognized as the only form of armed

²⁴⁷ The substantive character of self-defence is not clear and is one of the most studied topics in international law, reason why this section does not intend to analyse in detail the origin of the rule, its limits or applications, but to present in a broad way the two basic trends of interpretation of the function of self-defence.

²⁴⁸ C H M Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’ (1953) 81 *RCADI* 451, 462; Brownlie, *International Law and the Use of Force by States* (n 20) 231; Zanardi, *La legittima difesa nel diritto internazionale* (n 246) 124; B Cheng, *General Principles of Law as applied by International Courts and Tribunals* (CUP 1987), 77.

²⁴⁹ According to Grotius, the right of self-defence ‘has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor’. Grotius (n 60) 172. For other conceptions of the period, see Zanardi, *La legittima difesa nel diritto internazionale* (n 246) 9.

²⁵⁰ Brownlie, *International Law and the Use of Force by States* (n 20) 26; Zanardi, *La legittima difesa nel diritto internazionale* (n 246) 27.

self-help allowed in international law.²⁵¹ In this sense, the capacity of a State to adopt unilateral action to protect its territory or sovereignty was recognized as a legal ‘right’ of a State and the term was reproduced in Article 51 of the UN Charter along with the (also) questionable adjective of ‘inherent’.²⁵² Self-defence then acquires a positive meaning as a rule of international law authorizing the use of force by the State for the protection of certain rights. Its relationship with the prohibition of the use of force is represented as a confrontation between two subjective rights: the basic right of the aggressor State to territorial integrity and sovereignty and the fundamental right of the victim State to use force to repel an armed attack from the aggressor.²⁵³

This position was common among several authors in the years between-wars²⁵⁴ and following the adoption of the UN Charter.²⁵⁵ The advantage of the conception of self-defence as a right is its intuitive logic universally present in domestic law, according to which every subject should have the right to take the necessary measures to protect its vital interests.²⁵⁶ One of the problems of this conception is that it fails to identify the duty corresponding to it. The right of a State to have its political independence and territorial integrity respected corresponds to the duty of another State to refrain from attacking or intervening in the territory of another, but the ‘right’ to self-defence has no corresponding ‘duty’.²⁵⁷ Furthermore, the recognition of self-defence as a right completely excluded it from the law of State responsibility, since it would be characterized as a primary rule.²⁵⁸ For this and other reasons, a more adequate characterization of self-defence was theorized, considering it as a justification, and not as a right.

2.2. *Self-defence as Liberty of Resistance Against an Armed Attack*

As an exception to the prohibition of the use of force, self-defence can also be characterized as freedom of action to repel an attack. In this sense, self-defence would be

²⁵¹ H Kelsen, ‘Collective Security and Collective Self-Defense under the Charter of the United Nations’ (1948) 42 *AJIL* 783, 784. Self-help in this case is understood as an action to guarantee the exercise of a right, generally taken by the holder of the right. See also the judgment on the *Corfu Channel* case of 1949, in which the Court rejected the defence of the agent of the United Kingdom that the Operation Retail could be considered as a measure of ‘self-protection or self-help’ (*Corfu Channel Case* (n 178) 35).

²⁵² A Randelzhofer and G Nolte, ‘Article 51’ in B Simma and others (eds), *The Charter of the United Nations* (3rd edn, OUP 2012) 1397, 1403.

²⁵³ Farhang, ‘Self-Defence’ (n 114) 11.

²⁵⁴ See for instance A Verdross, ‘Règles générales du droit international de la paix’ (1929) 30 *RCADI* 271, 481; L Le Fur, *Précis de Droit International Public* (3rd edn, Dalloz 1937) 387-388.

²⁵⁵ According to Bowett, author of a reference work on the subject, self-defence is ‘necessary to protect certain essential rights of the State against violation by other States’, which includes the right of territorial integrity, the right of political independence, the right of protection over nationals and certain economic rights (Bowett, *Self-Defence in International Law* (n 195) 270). For Kelsen, self-defence would be a subjective right of a State victim to an armed attack to react against the attacker, an authorisation to use force to defend interests (H Kelsen, *The Law of the United Nations* (Stevens & Sons 1951) 791). Schwarzenberger goes further, stating that the function of self-defence is to ‘preserve or restore the legal *status quo*’ (G Schwarzenberger, ‘The Fundamental Principles of International Law’ (1955) 87 *RCADI* 191, 343). For other conceptions, see also N Q Dinh, ‘La légitime défense d’après la Charte des Nations Unies’ (1948) 52 *RGDIP* 223, 227; Corten, *The Law Against War* (n 188) 401; Dinstein, *War, Aggression and Self-Defence* (n 159) 190.

²⁵⁶ Verdross, ‘Règles générales du droit international de la paix’ (n 254) 485.

²⁵⁷ The only possible solution would be to consider the existence of an absurd duty for the attacker State to remain passive to the use of force in self-defence against it. L A Sicilianos, *Les réactions décentralisées à l’illicite* (LGDJ 1990) 46-49; Paddeu, *Justification and Excuse in International Law* (n 245) 213.

²⁵⁸ Thouvenin (n 245) 459.

not considered as a right but a *faculty* granted by international law to a State to employ armed force in the exceptional circumstance of the occurrence of an armed attack.²⁵⁹ In other words, the victim State is discharged from the duty to refrain from the use of force by the specific occurrence of an armed attack. Being the exception to a negative rule that imposes a prohibition, or a negative rule-element of it, self-defence is not a positive obligation but a liberty or faculty to do a conduct otherwise prohibited by a rule.²⁶⁰ As explained by Quadri (although referring to the *genus* of self-help):

[L]a doctrine positiviste s'est représentée d'une manière erronée l'institution de l'autotutelle, quand elle a cru identifier cette institution avec la *réaction de la victime contre l'agresseur*. (...) [L]'autotutelle (...) est une sanction normative qui ne consiste nullement en une réaction concrète à la violation d'un droit subjectif international, mais dans la *liberté juridique de réagir*, c'est-à-dire dans la *suspension de la protection que l'ordre international assurait à l'offenseur avant la commission du délit*.²⁶¹

Self-defence not only suspends the prohibition of the use of force but also the protection granted by international law to certain rights of the attacking State, such as sovereignty and territorial integrity. In this sense, there is a 'forfeiture of legal protection' of the State and the suspension of some rights of the attacking State.²⁶² The suspension is not unlimited and must obey the principles of necessity and proportionality and other rules protecting the values of the international community.

Both ways to interpret the function of self-defence are not exclusive between themselves. It is possible to understand self-defence either having characteristics of a right and at the same time being a justification. In any case, the purpose of the present section is not to deepen the discussion of the controversy but to understand the impact of the two conceptions in the development of the law of State responsibility, especially on the codification efforts carried out by the ILC analysed in the following section.

3. Self-defence as a Circumstance Precluding Wrongfulness

To consider self-defence as a temporary faculty to adopt a conduct that is prohibited by international law under normal circumstances is essentially to state that self-defence acts as a circumstance precluding wrongfulness, or as a justification or excuse to the non-performance of an obligation while the circumstance subsists.²⁶³ In the case of self-defence, the conduct carried out using force to counter an armed attack could preclude the wrongfulness of the use of force. This character of self-defence is perhaps the most evident contribution of the law of the use of force to the general law of State

²⁵⁹ Morelli, *Nozioni di Diritto Internazionale* (n 93) 353-354; G P Fletcher and J D Ohlin, *Defending Humanity* (OUP 2008) 45; A Tanzi, *Introduzione al diritto internazionale contemporaneo* (4th edn, CEDAM 2013) 409.

²⁶⁰ J Basdevant, 'Règles générales du droit de la paix' (1936) 58 *RCADI* 471, 546; Ago, 'Le délit international' (n 66) 538; Paddeu, *Justification and Excuse in International Law* (n 245) 194.

²⁶¹ R Quadri, 'Cours général de droit international public' (1964) 113 *RCADI* 239, 270 (emphasis from the original).

²⁶² Paddeu, *Justification and Excuse in International Law* (n 245) 220. See also Ago, 'Le délit international' (n 66) 539; P Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal* 1, 22; P Daillier, M Forteau, A Pellet, D Müller, QD Nguyen, *Droit International Public* (8th edn, LGDJ 2009) 875.

²⁶³ Commentaries to Article 21, para 2. Badr (n 245) 3.

responsibility. Although this characterization is rejected by several authors,²⁶⁴ self-defence was included in the ARSIWA without any major opposition. There are, however, some controversies related to the kind of illegal conduct that may be precluded by self-defence.

Among those authors who understand self-defence as a circumstance precluding wrongfulness, three trends can be identified. According to the first trend, self-defence can preclude only the violation of the prohibition of the use of force, as it is aimed specifically at this norm (section 3.1). The second trend regards self-defence as a circumstance that could justify the breach not only of the prohibition of the use of force but also of other obligations eventually breached in the exercise of self-defence. This was the initial position adopted by the ILC under the influence of Special Rapporteur Ago (section 3.2). The third trend considers self-defence as a circumstance that precludes only collateral breaches which eventually could occur due to the exercise of self-defence, and not the prohibition of the use of force since the use of force in self-defence is not considered by international law as an internationally wrongful act (section 3.3). This was the view adopted by the final version of the ARSIWA under influence of its fifth and last Special Rapporteur, James Crawford.

3.1. Preclusion of the Violation of the Prohibition of the Use of Force

According to some authors, self-defence can preclude exclusively the wrongfulness of the violation of the prohibition of the use of force.²⁶⁵ For this minority view, self-defence would be a circumstance precluding wrongfulness exclusively regarding a specific rule of international law, which could turn it into a special secondary rule. The emphasis on this specific violation may be related to concerns about the use of self-defence against acts that are not armed attacks, such as economic aggression,²⁶⁶ despite this possibility being rejected by the very notion of action to repel an armed attack.

3.2. Preclusion of the Wrongfulness of the Violation of the Prohibition of the Use of Force and Other Related Violations

Other authors realized that although the main function of self-defence is to justify the violation of the prohibition of the use of force, it can also justify the violation of other obligations carried out peripherally when the force is used to repel an armed attack. Being a circumstance applicable to several possible violations, self-defence could be regarded as a general rule of State responsibility, not limited to a specific obligation. This was the original position of Special Rapporteur Ago, which suggested the inclusion of self-defence among the general circumstances precluding wrongfulness in the following terms:

The wrongfulness of an act of a State not in conformity with *an international obligation to another State* is precluded if the State committed the act in order to

²⁶⁴ For instance, A Pellet, 'Les articles de la CDI sur la responsabilité de l'État pour fait internationalement illicite. Suite - et fin?' (2002) 48 *AFDI* 1, 6; Corten, *The Law Against War* (n 188) 401.

²⁶⁵ Kelsen, 'Collective Security and Collective Self-Defense' (n 251) 784; Badr (n 245) 8.

²⁶⁶ Bowett, *Self-Defence in International Law* (n 195) 106.

defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations.²⁶⁷

According to Special Rapporteur Ago, self-defence is the ‘circumstance *par excellence* which precluded wrongfulness’ by exonerating the victim State of the obligation not to use force against the aggressor in order to respond to ‘the most serious and unmistakable international offence’.²⁶⁸ Despite the emphasis on the prohibition of the use of force, the Special Rapporteur did not exclude the possibility that the self-defence would be used to justify other violations and Draft Article 34 [1980] adopted a generic reference to violations of international obligations.

The greatest difficulty concerning this concept is its relationship with the notion of peremptory norms of international law, in particular, the rule according to which a wrongful act cannot be precluded under any circumstances if it is not in accordance with a peremptory norm of international law, expressed in Article 26 [2001].²⁶⁹ Since the prohibition of the use of force is widely recognized as an example of a peremptory rule of international law,²⁷⁰ in principle self-defence could not preclude serious violations of the prohibition of the use of force, even to repel an armed attack.

The solution to this antinomy is either to consider the right to self-defence as part of the primary rule, to consider the content of the peremptory rule limited to serious violations of the prohibition of the use of force or to consider self-defence as having the character of a peremptory rule itself.²⁷¹ In the first case, self-defence is an exception provided for by the very same prohibition of the use of force, which is a peremptory rule. No conflict between different norms exists since self-defence is comprised in the general prohibition of the use of force and therefore it is as a primary rule itself.²⁷² In the second case, only serious violations of the prohibition of the use of force have a peremptory character and the defensive use of force in response to an armed attack is not included among such

²⁶⁷ R Ago, Addendum - Eight Report on State Responsibility, ILC Yearbook 1980, Vol II(1), 70 (para 124) (emphasis added).

²⁶⁸ The inclusion of the provision in the ARSIWA was justified by Ago not by its general application as a circumstance precluding wrongfulness but by the seriousness of the violation of the prohibition of the use of force and its customary character, recognized before the UN Charter. None of the several efforts of codification of the rules of state responsibility in the interwar period provided for self-defence as a justification for the exclusion of responsibility, which is explained by their focus on rules regarding responsibility for damages caused to foreigners. The Draft Convention prepared by the German International Law Association in 1930 allowed in its Draft Article 16 the use of measures of self-defence as understood as sanctions against States that refused to settle disputes resulting from the interpretation and application of the Convention. Ago, Addendum – Eight Report (n 267) 53-54 (paras 87-88) and 62 (para 107); 1629th meeting (9 June 1980), ILC Yearbook 1980, Vol I, 239 (para 31).

²⁶⁹ In this case, there is an antinomy between the rule in Article 26 of the ARSIWA and the preclusive effect of self-defence regarding the violation of the prohibition of the use of force. A similar antinomy is analysed in part two, section 2 of the present chapter concerning consent as a circumstance precluding the wrongfulness of the violation of the prohibition of the use of force. For the concept of antinomy, see J Salmon, ‘Les antinomies en droit international public’ in C Perelman (ed), *Les antinomies en droit* (Émile Bruylant, 1965) 285.

²⁷⁰ Ago, Addendum – Eight Report (n 267) 61 (para 104); Corten, *The Law Against War* (n 188) 200.

²⁷¹ Kelsen defends that self-defence might be considered as a rule of *jus cogens* (Kelsen, *The Law of the United Nations* (n 255) 791). This possibility was also considered by Special Rapporteur Ago (1619th meeting (25 June 1980), ILC Yearbook 1980, Vol I, 186 (para 11)). See also Schwarzenberger (n 255) 346.

²⁷² S Helmersen, ‘The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations’ (2014) 61 *Netherlands International Law Review* 167, 176-177.

violations.²⁷³ In the third case, self-defence is considered an independent rule of preemptory character, which is not repelled by the prohibition of the use of force because it has the same normative value. This hypothesis, implicitly adopted by Ago,²⁷⁴ does not explain why according to Article 51 of the UN Charter the Security Council can restrict the possibility of exercising self-defence after having taken measures necessary to maintain international peace and security.²⁷⁵

This antinomy had not been raised in 1980 and most of the criticism in the Commission at the time focused on problems in the relationship between the Draft Articles and Article 51 of the UN Charter.²⁷⁶ Draft Article 34 [1980] proposed by Ago was approved in the First Reading of the ARSIWA in 1980 with some modifications, although a different interpretation of the article from that espoused by the Special Rapporteur was adopted by the Commission.²⁷⁷ In the Commentaries to Draft Article 34 [1980], the Commission stated that the sole purpose of the provision was to indicate that ‘recourse by a State to the use of armed force with the specific aim of halting or repelling aggression by another State cannot constitute an internationally wrongful act’ despite the prohibition of the use of force.²⁷⁸

3.3. *Preclusion of the Wrongfulness of Collateral Violations of the Use of Force*

A third perspective establishes that self-defence may preclude all breaches of obligations that occurred in its exercise, *except* the violation of the prohibition of the use of force. This understanding is based on the assertion that self-defence is lawful *per se* and that is precisely why it need not have its wrongfulness precluded and was adopted by the Commission following the criticism made by the Soviet member of the Commission to Draft Article 34 [1980] proposed by Special Rapporteur Ago.²⁷⁹ According to this

²⁷³ This hypothesis originated the ‘principle of priority’ in the definition of aggression, which excludes from such classification the defensive use of force. S M Schwebel, ‘Aggression, Intervention and Self-Defence in Modern International Law’ (1972) 136 *RCADI* 411, 463-464. See also n 240 above and section 2 of part two of the present chapter.

²⁷⁴ Ago, Addendum – Eight Report (n 267) 59 (para 101).

²⁷⁵ Thouvenin (n 245) 465.

²⁷⁶ The interpretation of the Charter by the Commission was considered to be ‘undesirable’ by some of its members since the organ would not be competent to interpret the provisions of the Charter, a task reserved to ‘other organs’ of the Organization (See for instance the observations made by several members in the 1620th and 1621st meetings of the Commission (26 and 27 June 1980), ILC Yearbook 1980, Vol I; ILC, Report of the ILC on the work of its thirty-second session’ (5 May-25 July 1980) UN Doc A/35/10, 60 (paras 24-25)). The reluctance of the Commission to interpret the UN Charter was criticized by Special Rapporteur Arangio-Ruiz, who argued that some members may be ‘simply using a very poor pretext to thwart the discussion of important issues’ and that the organ may interpret the Charter ‘in the context of the consideration of the institutional aspects’ (2436th meeting (5 June 1996), ILC Yearbook 1996, Vol I, 22 (para 2)). See also P Palchetti, ‘Customary Rules on the Use of Force in the Work of Codification of the International Law Commission’ in E Cannizzaro and P Palchetti (eds), *Customary International Law on The Use of Force* (Brill 2005) 233, 238.

²⁷⁷ The Commission rejected Ago’s conception that both Draft Article 34 [1980] and Article 51 of the UN Charter have the same content. The solution agreed was to replace the reference to Article 51 with the more general formula ‘taken in conformity with the Charter of the United Nations’. ILC, Report of the ILC on the work of its thirty-second session’ (5 May-25 July 1980) UN Doc A/35/10, 25.

²⁷⁸ ILC, Report of the ILC on the work of its thirty-second session’ (5 May-25 July 1980) UN Doc A/35/10, 25 (para 1).

²⁷⁹ According to Ushakov, self-defence was ‘the inalienable right of a State that suffered armed attack’ and a ‘perfectly legitimate action’, the reason why it would not make sense to consider self-defence as a

reasoning, a circumstance precluding wrongfulness cannot operate if there is no breach of the prohibition of the use of force. Special Rapporteur James Crawford observed that although the consideration of self-defence as a circumstance precluding wrongfulness ‘appears uncontroversial’:

So far as that obligation (under Article 2(4) of the UN Charter) is concerned, the exclusion of action in self-defence is part of the definition of the obligation itself. A State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4, and if the only effect of self-defence as a circumstance precluding wrongfulness is so to provide, then it should be deleted (...).²⁸⁰

Crawford based his position on a commentary made by Mongolia in the Sixth Committee of the General Assembly in 1981 and on Ushakov’s characterization of self-defence as a proper right and not a justification for the use of force, as originally proposed by Ago and adopted by the Commission in 1980.²⁸¹ His position also appears to have been greatly influenced by the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 1996, which according to Crawford emphasized the lawfulness of the use of force in self-defence when referring to ‘the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake’, an expression that evokes wheatonian concepts of self-preservation.²⁸² Nevertheless, Crawford observed that a State may violate other obligations towards the aggressor by the exercise of self-defence:

[I]t seems clear that there are cases where self-defence may preclude the wrongfulness of conduct which would otherwise be in breach of treaty or other obligations of the State concerned, even though no question can possibly arise, for a

circumstance precluding the wrongfulness of an action which by definition could not be considered as wrongful conduct (1620th meeting (26 June 1980), ILC Yearbook 1980, Vol I, 190 (paras 16-17)). Ago explained this contradiction by asserting that the existence of a ‘situation or *de facto* conditions’ of self-defence would lead to the exoneration of the duty to respect the general obligation to refrain from the use of force (Ago, Addendum – Eight Report (n 267) 53 (para 87)). That could mean that self-defence can be considered as a *de facto* situation expressed by secondary rules of international law that suspends the application of the rule of Article 2(4) of the UN Charter in relation to the aggressor State (see for instance Farhang, ‘Self-Defence’ (n 114) 13). The Commentaries to Draft Article 34 [1980] expressed this contradiction by stating that ‘where there is a situation of self-defence, the objective element of the internationally wrongful act, namely the breach of the obligation not to use force, is absent and, consequently no wrongful act can have taken place’ (ILC, Report of the ILC on the work of its thirty-second session’ (5 May-25 July 1980) UN Doc A/35/10, 60 (para 24)). See also the position of R Monaco, *Manuale di Diritto Internazionale Pubblico* (UTET 1960) 378.

²⁸⁰ J Crawford, Second Report on State Responsibility, ILC Yearbook 1999, Vol II(1) 74 (para 298).

²⁸¹ The position of Crawford is less clear in his book of 2013. According to him, self-defence ‘does not belong among circumstances precluding wrongfulness’, but ‘can be seen as both a right and a circumstance precluding wrongfulness’. Crawford, *State Responsibility* (n 10) 290.

²⁸² *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 263; Crawford, Second Report (n 280) 74 (para 298, note 590). It can be argued that the Court wanted to emphasize the exceptionality of the use of force in the exercise of self-defence and the application of the requirements of necessity and proportionality, which in practice prevents the legality of the use of nuclear weapons in self-defence. The phrase is unfortunate not only for adopting an old-fashioned view of self-defence but also for being technically inaccurate: self-defence should not be used only when the very existence of the state is at risk or would be impractical.

State acting in self-defence, of action contrary to the basic obligation under Article 2, paragraph 4, of the Charter of the United Nations.²⁸³

Despite maintaining the substance of Draft Article 34 [1980], Article 21 [2001] was interpreted by the Commission as proposed by Special Rapporteur Crawford. Reproducing Crawford's words, the Commentaries to the provision considered that 'a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4'.²⁸⁴ According to the Commission, the purpose of Article 21 is to justify actions otherwise considered as wrongful that do not consist of the use of force but resulted from the exercise of self-defence, therefore, the rule could only be a justification for the 'collateral impairment' created by the use of force in the exercise of self-defence.²⁸⁵

The change in the position of the Commission led by Crawford seems to indicate the preference for a clear division between the law of State responsibility and the law of the use of force.²⁸⁶ This conclusion raises the discussion about differences or even contradictions between the text of the ARSIWA and the commentaries by the Commission.²⁸⁷ In any event, this interpretation has the advantage of making the self-defence as a circumstance precluding wrongfulness compatible with the recognition of the prohibition of the use of force as a peremptory rule,²⁸⁸ but as will be presented in the next section, it also presents inconsistencies.

4. The Range of Violations Precluded by Self-Defence in Practice

According to the interpretation of Article 21 of the ARSIWA adopted by the Commission, self-defence may only preclude the wrongfulness of violations that are connected to the exercise of the use of force, although not the use of force itself. Therefore, self-defence

²⁸³ Crawford, Second Report (n 280) 75 (para 300). Crawford proposed to add a paragraph to Draft Article 34 [1980] limiting self-defence to 'obligations of total restraint' referred to by the ICJ in the then-recent Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (Crawford, Second Report (n 280) 75 (para 301) and 87 (para 358, Article 29ter(2)). The additions made by Crawford were rejected by the majority of the Commission and the text of Draft Article 34 [1980] was maintained almost unchanged in what would be Article 21 [2001]. See the discussions of the 2589th meeting of the Commission (17 June 1999), ILC Yearbook 1999, Vol I.

²⁸⁴ Commentaries to Article 21, para 1.

²⁸⁵ Crawford claimed that the ILC has accepted that the right of self-defence does not belong among circumstances precluding wrongfulness (Crawford, *State Responsibility* (n 10) 290). On the other hand, the provision was replicated in the Commission's 2011 Draft Articles on the Responsibility of International Organizations without the same restriction related to the prohibition of the use of force in its Commentaries (ILC, Draft Articles on the Responsibility of International Organizations, Report of the ILC on its sixty-third session, UN Doc A/66/10, ILC Yearbook 2011, Vol II(2), 113). See also Thouvenin (n 245) 464; Paddeu, 'Use of Force against Non-state Actors' (n 150) 98.

²⁸⁶ For the Commission's position in relation to the UN Charter, see section 4.3, part two of chapter 4. See also M Arcari, 'Responsabilità dello Stato per violazioni gravi di norme fondamentali e sistema di sicurezza collettiva delle Nazioni Unite' in M Spinedi, A Gianelli and M L Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (Giuffrè 2006) 291-340; Farhang, 'Self-Defence' (n 114) 2-3;

²⁸⁷ For instance, a discrepancy between Article and interpretation by the Commission was observed by Arangio-Ruiz in relation to Article 8. Arangio-Ruiz, 'State Responsibility Revisited' (n 31) 83-85. See Chapter 1, Part One, Section 2. For the importance of the commentaries of the Commission to the interpretation of the Articles, see Gaja, 'Interpreting Articles Adopted by the International Law Commission' (n 11).

²⁸⁸ Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness' (n 245) 104.

only precludes the wrongfulness of violations that are ‘collateral’ to the exercise of the use of force in self-defence. The position taken by the Commission is consistent with the statement that the use of force in self-defence is not illegal *per se* but presents problems in its application, in particular regarding its separation from the prohibition of the use of force and the effects concerning third States. This section focuses on analysing these problems.

4.1. Other Obligations Affected by Self-Defence as a Circumstance Precluding Wrongfulness

According to the Commentaries of the ILC on the ARSIWA, ‘self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision’.²⁸⁹ The Commentaries do not present examples of such a violation, which may be justified by the fact that it is not possible to formulate a settled list of violations since the obligations affected may vary according to the measures taken in self-defence to halt an armed attack.

The type of obligation violated by the use of force in self-defence will depend on the nature of the prior attack and may vary from specific uses of force against military targets to large-scale attacks and invasion of territory.²⁹⁰ According to Special Rapporteur Crawford, the exercise of the use of force in self-defence may preclude the wrongfulness of the violation of territorial integrity, interference in internal State affairs, disruption of trade in violation of trade treaties, blockading of a port in the breach of a treaty guaranteeing the freedom of navigation and freezing of the assets of the aggressor in its territory.²⁹¹ Among the examples cited by Crawford, the first two seem to be the most relevant.

The principles of sovereignty and territorial integrity are generally connected with the control of a State over its territory and the right not to be subject to coercion and may be violated by the invasion of the territory or through a counteroffensive to suppress the armed attack.²⁹² However, such rights may not be affected when acts in self-defence occur in the territory of the attacked State itself, in the territory of a third State, or the high seas. The *Nicaragua* case provides an example of how the principles of sovereignty and territorial integrity can be violated by the use of force. The applicant claimed that the United States had violated the prohibition of the use of force and the principles of territorial sovereignty and non-intervention through armed attacks against its territory by land, sea, and air, as well as incursions into its territory and trespass of its airspace by military aircraft.²⁹³ In its decision on the merits of 1986, the ICJ implied that measures taken by the United States could be justified as measures of self-defence, although

²⁸⁹ Commentaries to Article 21, para 2.

²⁹⁰ T Gill, ‘Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law’ in T Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd edn, OUP 2015) 213, 223.

²⁹¹ Crawford, Second Report (n 280) 74-75 (para 298); 2704th meeting (7 August 2001), ILC Yearbook 2001, Vol I, 258 (paras 27 and 33).

²⁹² Corten, *The Law Against War* (n 188) 169.

²⁹³ The acts that would have caused such violations are almost identical. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Memorial of Nicaragua of 30 April 1985) ICJ Written Proceedings 115-220.

concluding that at the specific case the respondent had no right to claim such circumstance.²⁹⁴ According to the Court, the effects of the principles of territorial sovereignty, prohibition of the use of force, and non-intervention overlap, in the sense that the violation of one of them may imply the violation of others.²⁹⁵

Given the interruption caused by an armed attack and the consequent use of force in self-defence, it is plausible that also commercial relations between the States involved are deeply affected. In the *Nicaragua* case, the applicant claimed that the United States had violated obligations stipulating the freedom of commerce and navigation and freedom of transit of the 1956 Treaty of Friendship, Commerce and Navigation between the parties by the mining of several Nicaraguan ports which caused damage to vessels.²⁹⁶ The Court implicitly accepted the possibility of preclusion also of such violations by the exercise of self-defence, although it denied the existence of such a right on the part of the United States.²⁹⁷ Similarly, in the *Oil Platforms* case of 2003, Iran argued that the attacks made by the United States against oil installations violated provisions stipulating freedom of commerce and navigation of the 1955 Treaty of Amity, Economic Relations and Consular Rights, among others.²⁹⁸ The Court rejected the claim of self-defence raised by the United States by considering that the attacks were not necessary but concluded that the actions against the oil installations did not violate the provisions on the freedom of commerce as established by the Treaty of Amity.²⁹⁹ Despite this, both parties admitted that self-defence could justify the violation of freedom of commerce established by the treaty.

4.2. *Effect on Third States*

Classically, it is admitted that the use of force in self-defence justifies the violation of obligations only concerning the aggressor State when adopted in compliance with the requirements of necessity, proportionality, and immediacy.³⁰⁰ The use of force outside these limits is considered excessive self-defence and consequently an illegal use of force. Although such an exonerating effect exists concerning the prohibition of the use of force, as seen in the previous section this effect can also be observed concerning other violations.

In its Commentaries to Draft Article 34 [1980], the ILC expressed that the provision ‘not intended to preclude any wrongfulness of, so to speak, indirect injury that might be

²⁹⁴ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 128 (para 252). Judge Schwebel referred to Draft Article 34 [1980] in his Dissenting Opinion, asserting that ‘where a State is charged with an unlawful use of force, but actually has employed force in self-defence, that State is absolved of any breach of its international responsibility. In my view, that is the situation of the current case’ (ibid 377 (para 231)). See also Paddeu, *Justification and Excuse in International Law* (n 245) 200.

²⁹⁵ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 128 (para 251).

²⁹⁶ According to Nicaragua, this also resulted in the cancellation of deliveries and pickups. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Memorial of Nicaragua of 30 April 1985) ICJ Written Proceedings 110.

²⁹⁷ Paddeu, *Justification and Excuse in International Law* (n 245) 203.

²⁹⁸ According to Iran, freedom of commerce would also be affected by preventing the other Party from producing goods for export. *Oil Platforms* (Memorial of the Islamic Republic of Iran of 8 June 1993) ICJ Written Proceedings 88. See also Thouvenin (n 245) 455-467, 461; Paddeu, *Justification and Excuse in International Law* (n 245) 203.

²⁹⁹ ICJ Rep 198 (paras 76 and 83).

³⁰⁰ Corten, *The Law Against War* (n 188) 126; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 194 (para 139).

suffered by a third State in connection with a measure of self-defence taken against a State which has committed an armed attack'.³⁰¹ Special Rapporteur Crawford considered that the commentary was not necessary since 'a State acting in self-defence might be entitled to take action against third States', but the question was adequately covered by the relevant primary rules.³⁰² According to Crawford, those matters are dealt with by the rules of the law of neutrality, which admits that third States may be affected by the existence of a state of war and gives certain belligerent rights to a State exercising self-defence.³⁰³ This position is reflected by the Commentaries to the ARSIWA, which stated that 'Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States'.³⁰⁴

The assertion that the effect of self-defence in third States is adequately dealt with by the law of neutrality cannot be sustained for several reasons. It is not clear whether third States would be considered as 'neutrals' concerning the use of force in self-defence since the possibility of application of the law of neutrality in the exercise of self-defence is debatable. The rules of the law of neutrality apply to armed conflicts and an isolated act of self-defence may not have the intensity and duration sufficient to trigger their application.³⁰⁵ Disregarding this fact, it can be argued that in contemporary international law the application of the law of neutrality is possible as long as the Security Council does not take actions regarding a conflict, admittedly allowing the existence of neutral States in the context of the exercise of the use of force in self-defence after an armed attack has occurred.³⁰⁶

As affirmed by Special Rapporteur Crawford, the law of neutrality allows for certain rights for belligerents, such as the right to stop, visit and search merchant ships of neutral States in high seas, the capture of goods deemed to be used in the war effort of the enemy, the right of transit through international straits and archipelagic shipping lanes by belligerent warships in times of peace and even the destruction of neutral property incidentally or to prevent its use by the enemy.³⁰⁷ This regime, in Crawford's view, would justify the effect of the exercise of self-defence on third States as it is composed of rights belonging to primary rules.

³⁰¹ ILC, Report of the ILC on the work of its thirty-second session' (5 May-25 July 1980) UN Doc A/35/10, 61 (para 28).

³⁰² 2587th meeting (15 June 1999), ILC Yearbook 1999, Vol I, 141 (para 33).

³⁰³ Crawford, Second Report (n 280) 76 (para 302).

³⁰⁴ Commentaries to Article 21, para 5.

³⁰⁵ The limits of application of the law of neutrality are not clear and depend on the analysis of each case. Monaco (n 279) 434. The ICJ implicitly recognized in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) that the rules of armed conflict, which have a similar application to the rules of neutrality, apply to acts in self-defence (*Legality of the Threat or Use of Nuclear Weapons* (n 282) 261 (paras 89-90). Contra, see Sicilianos, *Les réactions décentralisées à l'illicite* (n 257) 8-9.

³⁰⁶ R Kolb and R Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 277; M Gavouneli, 'Neutrality – A Survivor?' (2012) 23 *EJIL* 267-273, 272-273; P Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1224, 1229; M Bothe, 'Neutrality, Concept and General Rules' (October 2015) in R Wolfrum (ed), *MPEPIL* (online edn), para 9. This is also the position of countries that adopt permanent neutrality and are members of the United Nations, such as Austria, Switzerland and Turkmenistan. Morelli, *Nozioni di Diritto Internazionale* (n 93) 166-174; B Conforti and C Focarelli, *Le Nazioni Unite* (10th edn, Wolters Kluwer/CEDAM 2015) 39-45.

³⁰⁷ Bothe (n 306) para 63.

The law of neutrality, if applicable, could in fact constitute a special regime of primary rules that explain the legality of the effects of the use of force in self-defence against third States. However, some obligations imposed by the law of neutrality such as the inviolability of neutral territory by armed forces and the overflight of military aircraft or missiles into neutral airspace³⁰⁸ could be violated by the exercise of self-defence and justified on this basis. Even more important is the fact that the practice of States shows that the law of neutrality is not applied by States to justify the effects on third States of the exercise of self-defence. Some actions that would be lawful under the law of neutrality are *still considered illegal* by States applying them and are justified based on self-defence, not on the rules of the law of neutrality.

An example is the limitation of freedom of navigation, which can be affected by the interception of vessels³⁰⁹ and was adopted by Egypt against vessels carrying goods to Israeli ports through the Suez Canal in 1951. Visits and the retention of vessels in the Canal were justified by Egypt as measures taken in self-defence against Israel, although the measures were not limited to Israeli vessels. The Security Council denied the existence of any circumstance allowing the exercise of self-defence, but implicitly admitted the legality of those measures in similar circumstances asserting that ‘that practice cannot *in the prevailing circumstances* be justified on the ground that it is necessary for self-defence’.³¹⁰ In the aftermath of the military interception in the high seas by Israel of a flotilla attempting to deliver humanitarian aid to Gaza in May 2010, several members of the Security Council criticized not only Israel’s invocation of self-defence to justify the operation but also the violation of international law principles related to freedom of navigation.³¹¹ Under normal circumstances, a State does not have the right to stop, visit and search foreign vessels and these measures can be considered as a violation of non-interference, but such actions are recognized as a right of belligerents under the law of neutrality.³¹² In both cases, self-defence was used as the primary justification for the measures adopted, even though States recognized the existence of a state of war that could justify also measures in the regular exercise of rights provided for by the law of neutrality.³¹³

³⁰⁸ Bothe (n 306) paras 47 and 92.

³⁰⁹ This measure can be applied to contraband control. G B Pallieri, *Diritto bellico* (2nd edn, CEDAM 1954) 448.

³¹⁰ UNSC Res 95 (1 September 1951) preambular para 8 (emphasis added). The term ‘in the prevailing circumstances’ implies that in principle the measures applied by Egypt could be justified by the exercise of self-defence, but not at the case in question. The meaning is confirmed by the French version of the Resolution. See also Zanardi, *La legittima difesa nel diritto internazionale* (n 246) 220; S D Bailey, *How Wars End*, Vol I (Clarendon Press 1982) 107-108; M Arcari, ‘Legittima difesa e (in)azione del Consiglio di Sicurezza delle Nazioni Unite’ in A Lanciotti and A Tanzi (eds), *Usò della forza e legittima difesa nel diritto internazionale contemporaneo* (Jovene 2012) 37, 53. For a contrary position, see Badr (n 245) 24.

³¹¹ This is the case of Turkey, Mexico, Brazil, Russia, Lebanon, and Bosnia and Herzegovina. 6325th meeting (31 May 2010) S/PV.6325.

³¹² As established by Article 110 of the UNCLOS. The Suez Canal regime stipulated by the 1888 Constantinople Convention allows the passage of warships of belligerents, somewhat similar to the regime of the high seas. M Arcari, ‘Suez Canal’ (October 2007) in R Wolfrum (ed), *MPEPIL* (online edn) para 7. For the rule of the law of neutrality, see Bothe (n 306) paras 67-76.

³¹³ The state of war with Israel was recognized was recognized by Egypt despite the Armistice Agreement of 1949 (UNSC 553rd meeting (16 August 1951), 22-23 (para 95)). Israel recognized the existence of a ‘state of armed conflict’ with the Hamas (UNSC 6325th meeting (31 May 2010), 14). On the claims made

The disturbance of the freedom of navigation by the establishment of blockades is another example of how self-defence may justify effects on third States. Maritime blockages to prevent vessels from entering enemy ports is a method of warfare admitted by the law of neutrality.³¹⁴ The United Kingdom justified the establishment of a Total Exclusion Zone of 200 nautical miles around the Falkland Islands (Malvinas) in 1982 based on its right of self-defence.³¹⁵ After Iraq invaded Kuwait in 1990, the United States justified the interception of vessels seeking to engage in trade with Iraq or Kuwait by the exercise of self-defence and in conformity with the sanctions imposed by the Security Council. The implementation of the maritime blockade, which was not expressly authorized by the Security Council at that occasion, did not receive great opposition and was subsequently authorized by the organ.³¹⁶ In 2008 Russia announced the creation of a 'security zone' in the Black Sea along the coast of Abkhazia to protect its nationals, provide support for its troops and provide humanitarian assistance to the conflict in South Ossetia, and argued that armed force could be used in self-defence.³¹⁷ Apart from concerns about the delivery of humanitarian aid to the zone of conflict, there was little opposition to the Russian measure.³¹⁸

Although the violation of several obligations of third States appears to be justified by the use of force in self-defence, its exculpatory effect does not extend to all obligations. Violations of territorial integrity and sovereignty of third States, which are intrinsically linked to the main effects of the use of force, in practice appear not to be justified by the use of force in self-defence. There is virtually no occasion in State practice in which self-defence was accepted as a justification for the violation of the territorial integrity and sovereignty of a third State.³¹⁹

by Israel, see D Guilfoyle, 'The Mavi Marmara Incident and Blockade in Armed Conflict' (2011) 81 *BYIL* 177-223.

³¹⁴ W H von Heinegg, 'Blockade' (October 2015) in R Wolfrum (ed), *MPEPIL* (online edn) para 1. The difference between blockades and exclusion zones refers to the objective. Blockades are predominantly aimed at affecting trade relations, while exclusion zones have a defensive character. M Schmitt, 'Air Law and Military Operations' in T D Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd edn, OUP 2015) 354, 414-415. See also Giorgio Balladore Pallieri (n 309) 428.

³¹⁵ UN Doc S/15006. This measure, which was applied to any vessel or aircraft, was contested in the Security Council by Latin American countries and the Organization of American States as a violation of principles of international law and the freedom of the seas. See for instance the manifestations of Argentina, Venezuela e Panama in the 2360th meeting of the Council (21 May 1982, S/PV.2360) and the resolution adopted on 29 May 1982 by the Meeting of Consultation of Ministers of Foreign Affairs of the Rio Treaty (OEA/Ser.F/II.20 Doc. 77/82 rev. 2). See also Corten, *The Law Against War* (n 188) 120; Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness' (n 245) 122.

³¹⁶ UN Doc S/21537. In the Security Council, the measure applied by the United States was opposed by Yemen, Cuba and Iraq in the 2937th meeting (18 August 1990). The measure was later adopted by UNSC Res 665 (25 August 1990).

³¹⁷ 5953rd meeting (10 August 2008) S/PV.5953, 9. This should not be confused with the terrestrial Security Zone established by the Moscow Agreement on Cease-Fire of 1994 and referred to by Security Council resolutions.

³¹⁸ The only clear complaint was made by the Representative of Georgia. 5953rd meeting (10 August 2008) S/PV.5953, 5.

³¹⁹ In 1969 Cambodia complained of the bombing of its positions on the border with Vietnam by United States forces, which resulted in several deaths and injuries of Cambodian military personnel (UN Doc S/9526). Even claiming that the attack was in self-defence against attacks from North Vietnamese bases operating in Cambodia, the United States recognized the violation of Cambodian territory and offered voluntary compensation for damages caused to the families affected (UN Doc S/9692). Likewise, the

In conclusion, it can be said that there is a tendency to consider self-defence as a circumstance able to preclude the wrongfulness of the violation of *some* rights of third States. Rights whose violation is not justified by self-defence are precisely those that cannot be violated by the law of neutrality, the reason why this regime is used by the ILC to explain the possibility of preclusion of certain violations against third States in the exercise of self-defence. It must be remembered, however, that it is not the law of neutrality that determines these exceptions. As seen above, State practice demonstrates that some lawful actions according to the law of neutrality are considered illegal by States that commit them and tend to be justified based on self-defence. Indubitably, one must take into account the fact that States tend to use self-defence to justify all their actions involving the use of force,³²⁰ but in this case, self-defence is used to justify non-armed actions that could be considered perfectly lawful under the law of neutrality.

Before concluding, an important observation must be made. The tendency to accept self-defence as a circumstance precluding wrongfulness also of violations against third States has been explored by some authors to support the growing tendency to use force in self-defence against the armed attack by non-State actors. As analysed in chapter 1, usually efforts to justify the use of force against non-State actors relate to the attribution of their acts to States by the concept of indirect aggression or to the failure of States to suppress such conduct. Nevertheless, some authors argue that the State in which the non-State actor operates may be considered as a ‘third State’ and the violation of its territorial integrity and sovereignty by the use of force against the non-State actor may be justified by self-defence as a circumstance precluding wrongfulness.³²¹ This reasoning would allow the law of State responsibility to ‘overcome’ an authorization that does not currently exist in Article 51 of the UN Charter by considering that the relationship would not be considered as a violation of the use of force but of the territorial integrity of the State covered by Article 21 of ARSIWA.³²² Even if Article 51 of the UN Charter were interpreted in such a way as to allow the use of force against non-State actors, it is difficult to imagine how an attack carried out in the territory of a State might not affect its sovereignty or territorial integrity. As determined by the ICJ in the *Nicaragua* case, ‘the effects of the principle of respect for territorial sovereignty *inevitably* overlap with those of the principles of the prohibition of the use of force and of non-intervention’.³²³

This finding shows that it is not possible to separate the violation of some obligations from the violation of the prohibition of the use of force. The claim that Article 21 precludes only the wrongfulness of ‘collateral violations’ connected with the exercise of armed force is artificial and cannot be maintained due to the dependence between the violation of the prohibition of the use of force and the violation of other obligations

destruction of the nuclear reactor under construction in Osiraq in 1981 by the Israeli air force was not only criticized for the attacks made in Iraq’s territory, but also for the violation of the airspace of Jordan and Saudi Arabia. Specific mentions to the violation of the airspaces of Jordan and Saudi Arabia were made in the Security Council by several States between 12 and 19 June 1981 (UN Doc S/PV.2280; S/PV.2281; S/PV.2282; S/PV.2284; S/PV.2285; S/PV.2288).

³²⁰ Gray, *International Law and the Use of Force* (n 226) 124.

³²¹ Martin (n 130) 300-302; Paddeu, ‘Use of Force against Non-state Actors’ (n 150) 114.

³²² Tsagourias, ‘Self-Defence against Non-State Actors’ (n 158) 822.

³²³ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 128 (para 251) (emphasis added).

connected with it, such as territorial integrity and sovereignty.³²⁴ This evidently does not mean that there are no limits to the application of self-defence, which only precludes the wrongfulness of some violations. As noted by the Commentaries on the ARSIWA, rules for the protection of human rights or international humanitarian law cannot be precluded by self-defence.³²⁵ In addition to these, one can add also other limitations related to third States, such as the prohibition on the use of force and the violation of territorial integrity and sovereignty.

5. Conclusion

As shown in section 1, the general prohibition of the use of force expressed in the UN Charter consolidated the nature of self-defence as a true juridical *defence*, therefore as an excuse for the exceptional use of force and a circumstance precluding wrongfulness of the law of State responsibility. As a result of this, the exculpatory effects of the self-defence were codified in the law of State responsibility by the ILC, as seen in section 2. Self-defence is perhaps one of the most evident examples of justification in international law, reason which justifies its inclusion in the list of general circumstances precluding the wrongfulness of the ARSIWA. Its general character is based mostly on the importance of the violation to which the justification applies, even if questions related to the maintenance of international peace and security were usually avoided by the ILC.³²⁶

Partly due to the Commission's reluctance to address the politically sensitive field of the maintenance of international peace and security, the approach chosen by it to deal with self-defence in the final version of the ARSIWA has not proved to be adequate. The argument that the use of force in self-defence would not be wrongful because it is lawful *per se* and therefore would not need to have its wrongfulness precluded is not satisfactory, which is evidenced by the possibility of preclusion of violation suffered by third States. The ILC argues that such effects would be regulated by the law of neutrality, but the application of its rules in specific uses of force in self-defence is doubtful and would still not be sufficient to explain violations such as territorial integrity and sovereignty. In addition, as seen in section 3, States rarely justify violations of the rights of third States arising from the use of force in self-defence based on the law of neutrality. On the contrary, they normally justify such violations based on self-defence alone, which points out the indissoluble nature of the rule in justifying both the use of force against the aggressor State and collateral violations suffered by third States.

The rules of the law of neutrality partly explain the repercussions on third States of self-defence by regulating the effects of the use of force in States that do not engage directly in military activities. The general prohibition on the use of force, however, has altered legal relations between States. Violations against third States are no longer considered to

³²⁴ This reason may explain the fact that self-defence is the only circumstance precluding wrongfulness of the ARSIWA that has never been mentioned in the reports of the UN Secretary-General on the practice of international courts, tribunals and other bodies regarding State responsibility despite the increasing number of invocations of self-defence by States. Five reports in total have been published, in the years of 2007 (UN Doc A/62/62), 2010 (A/65/76), 2013 (A/68/72), 2016 (A/71/80) and 2019 (A/74/83). See Arcari, 'Forma o sostanza' (n 10).

³²⁵ Commentaries to Article 21, para 3.

³²⁶ Palchetti, 'Customary Rules on the Use of Force in the Work of Codification of the International Law Commission' (n 276) 233-241.

be rights of belligerent States, although may be justified in the specific circumstance of the action taken to repel an armed attack. Thus, just as the use of force is wrongful if it is not justified by self-defence or by the authorization of the Security Council, violations against third States are also wrongful if not justified by the exercise of self-defence. In other words, the incorporation of self-defence as a rule by the law of State responsibility is the result of the abolition of the pre-Charter *jus ad bellum*. Its purpose is to justify the lawfulness of the use of force by a State to repel an armed attack in a legal system in which the use of force no longer affects completely the legal relationship between States.

Part II – The Derogation of the General Rules regarding Circumstances Precluding Wrongfulness

1. Introduction

Since international law partly reflects the dynamics of State relations and the rules embodied by the UN Charter were created almost eight decades ago, special rules or exceptions not envisaged in the Charter may arguably have been created by the practice of States.³²⁷ Given the absence of formal alterations of the UN Charter, such changes may be explained by developments that occurred in the customary rules of the law of State responsibility. In particular, it could be argued that the development of specific secondary rules would provide new or different justifications for the use of force that at first sight would be considered contrary to international law. In this sense, secondary rules providing for circumstances precluding the wrongfulness of a non-general character could certainly be the legal solution to justify some specificities of the law of the use of force already observed in State practice.

The general law of State responsibility did not provide expressly for new exceptions to the prohibition on the use of force nor expressly reject the possibility of the existence of special rules to that effect. The list of circumstances precluding wrongfulness adopted by the ARSIWA encompasses rules generally applicable in international law and it was not meant to be exhaustive, as expressed by the Commission:

The Commission is sufficiently aware of the evolving nature of international law to believe that a circumstance which is not today held to have the effect of precluding the wrongfulness of an act of a State not in conformity with an international obligation, may have that effect in the future. At all events, the Commission wishes to point out that chapter V is *not to be construed as closing the door* on that possibility.³²⁸

The Commission acknowledged the possibility of the development of other circumstances precluding wrongfulness and new suggestions have been made by its members and by Special Rapporteur Crawford.³²⁹ In addition, also changes in the operation of the existing

³²⁷ International law (as law in general) does not accurately reflect the existing social dynamics of its subjects, being always ‘one step behind’ changes in these dynamics. International law is both normative and concrete in the sense that it seeks political objectives of States, but at the same time tries not to deviate too much from their actual behaviour under the risk of becoming a ‘natural morality’. International law, therefore, represents a certain degree of idealized behaviour. M Koskenniemi, *From Apology to Utopia* (CUP 2005) 17-18; L Henkin, *International Law* (Martinus Nijhoff 1995) 37-38.

³²⁸ ILC, Report of the ILC on the work of its thirty-second session’ (5 May-25 July 1980) UN Doc A/35/10, 61 (para 29) (emphasis added). The list was originally presented by Special Rapporteur Ago in its Eight Report of 1979 and the Addendum to the Eight Report of 1980.

³²⁹ Crawford proposed the inclusion of the circumstances of ‘performance in conflict with a peremptory norm’, the ‘*exceptio inadimplenti non est adimplendum*’ principle and the ‘clean hands doctrine’, all of them rejected by the Commission (Crawford, Second Report (n 280) 76-83 (paras 306-336)). See also S Szurek, ‘The Notion of Circumstances Precluding Wrongfulness’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 427, 431.

circumstances or even special rules excluding their application were envisaged by the Commission.³³⁰

Part two of the present chapter aims to analyse whether special rules under the current regime of the use of force limiting or altering the general rules of State responsibility have been consolidated.³³¹ For this purpose, four excuses frequently invoked by States to justify the use of force in recent times and which in principle are incompatible with or derogate from the general rules on circumstances precluding wrongfulness present in the ARSIWA were selected.³³² In this way, section 2 analyses whether consent may justify the violation of the prohibition of the use of force considering recent cases in which armed interventions were authorized by the territorial State. Section 3 scrutinises the legality of armed or forcible countermeasures under the law of State responsibility and its application by State practice. Section 4 analyses the hypothesis of humanitarian intervention being an autonomous justification for the violation of the prohibition of the use of force or a special type of a traditional circumstance precluding wrongfulness, such as necessity. The last hypothesis analysed in section 5 is the doctrine of the protection of nationals abroad, whose assimilation into traditional circumstances precluding wrongfulness is subject to debate. Section 6 draws some conclusive remarks from the above findings.

2. Consent to the Use of Force

Article 20 of the ARSIWA determines that ‘valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent’. The provision reflects the legal principle *volenti non fit injuria* and raised considerable opposition in the Commission.

Consent was maintained in the final version of the ARSIWA as a circumstance precluding wrongfulness even presenting a logical inconsistency. On one hand, it is widely recognized that valid consent can preclude the wrongfulness of the violation of the prohibition of the use of force and the sending of troops to the territory of a State with its

³³⁰ According to the Commission, Article 55 (*Lex specialis*) of the ARSIWA does not apply ‘to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law’. This is the case of treaty provisions excluding the possibility of invocation of force majeure or necessity. Commentaries to Article 55, paras 2 and 3.

³³¹ The circumstance of self-defence is not analysed in part two for its character of a general rule of State responsibility (as analysed in part one). Nevertheless, a brief commentary must be made regarding the character of self-defence as a circumstance precluding wrongfulness and possible developments on the law of the use of force. It should be noted that as expressed by Article 21 only a ‘lawful measure’ of self-defence precludes the wrongfulness of a violation of international law, therefore any development in the lawfulness of self-defence observed in the law of the use of force will affect such circumstance. In this sense, developments in the concept of ‘armed attack’, the possibility of self-defence against armed attacks by non-State actors, and the legality of pre-emptive self-defence are not necessarily a matter of analysis by the law of State responsibility but will affect the extension of such rule through the concept of ‘lawful measure’.

³³² This chapter pays particular attention to State practice, which is important to assess the emergence of new rules of the law of the use of force in recent decades. Recent State practice in which such circumstances were directly or indirectly claimed by States to justify the use of force is analysed considering reactions of the international community to such justifications, in special in the UN Security Council. The episodes of State practice selected cover a period of twenty years following the adoption of the ARSIWA, which also allows the identification of trends that would have established new rules regarding the use of force after the conclusion of the works of the ILC on State responsibility.

consent is listed as one of the main examples of the application of this rule.³³³ On the other hand, it is also widely recognized that the prohibition of the use of force, or at least of serious forms of the use of force such as some acts of aggression, is a peremptory norm of general international law.³³⁴ The problem lies in the fact that circumstances precluding wrongfulness cannot preclude the wrongfulness of violations of peremptory norms of international law, as recognized by Article 26 of the ARSIWA.³³⁵ If the application of an imperative rule cannot be ruled out by an agreement between States in the form of a treaty as recognized by Article 53 of the Vienna Convention on the Law of Treaties, the same will logically happen by the eventual consent to the commission of a specific act, since ‘one State cannot dispense another from the obligation to comply with a peremptory norm’.³³⁶ In this sense, there is an antinomy between the rule that proscribes the use of consent as a circumstance precluding the wrongfulness of violations of the imperative rule that prohibits some uses of force and the practice of States that widely admits them.³³⁷

Special Rapporteur Ago had already observed such a contradiction when he proposed the inclusion of consent as a circumstance precluding wrongfulness in 1979. Ago considered that the consent of the victim State in a particular situation acts as a ‘special agreement’ between victim and wrongdoer and the validity and force of the obligation remain unaffected, the reason why the *jus cogens* obligation would be a logical exception to the principle of consent as a circumstance precluding wrongfulness. Nevertheless, the Special Rapporteur did not confirm the existence of this exception and considered it premature at the time to draw conclusions from State practice due to the still recent character of the concept of *jus cogens*.³³⁸

Several solutions have been proposed to resolve this antinomy. The most adopted by the doctrine is to consider consent as part of the primary rule prohibiting the use of force, so as to exclude the existence of a violation when force is used with the consent of the State.³³⁹ This seems also to be the solution adopted by the Commission, according to which ‘in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its

³³³ Commentaries to Article 20, para 5. See, for instance, Ago, Eight Report (n 70) 31 (para 58); M Shaw, *International Law* (6th edn, CUP 2008) 793; Kolb, *The International Law of State Responsibility* (n 17) 115.

³³⁴ Commentaries to Article 26, para 5. The same fact is recognized by the same authors. Ago, Addendum – Eight Report (n 267) 61 (para 104); Shaw (n 333) 126; Kolb, *The International Law of State Responsibility* (n 17) 57.

³³⁵ ‘Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law’. This rule is a consequence of the non-derogable nature of imperative norms of general international law, as recognized by Article 53 of the VCLT.

³³⁶ Commentaries to Article 26, para 6.

³³⁷ In this case, there is an antinomy between the rule in Article 26 of the ARSIWA and the exculpatory effect of consent on the violation of the prohibition of the use of force recognized by State practice. A similar antinomy was analysed in section 3.2 of part one of the present chapter in relation to self-defence as a circumstance precluding wrongfulness of the violation of the prohibition of the use of force. See n 269.

³³⁸ Ago, Eight Report (n 70) 38 (para 76). See also C Farhang, ‘The Notion of Consent in Part One of the Draft Articles on State Responsibility’ (2014) 27 *Leiden Journal of International Law* 55-73.

³³⁹ Crawford, Second Report (n 280) 63 (para 242.b); Hilmersen (n 272) 177-178; G Hafner, ‘Problèmes actuels du recours à la force en droit international, Sous-groupe: Intervention sur invitation’ (2009) 73 *Annuaire de l’Institut de Droit International* 297, 373.

territory for a lawful purpose'.³⁴⁰ This explanation is coherent with the consideration that each State holds exclusive competence regarding its territory and is sovereign to decide on the foreign military presence in its territory or any other kind of restriction to its own sovereignty.³⁴¹ According to Abass, the very notion of consent is contrary to the use of force:

A consensual use of force cannot be viewed as a coercive use of force, which Article 2(4) of the UN Charter must be understood to prohibit. Surely, Article 2(4) of the UN Charter does not take away the sovereign right of States to permit other states to use force on their territory. States have the power to consent to limitations on their independence, and may surrender their independence altogether to merge with other states.³⁴²

Nevertheless, this solution does not eliminate the fact that some forms of use of force are prohibited even with the consent of the State, such as acts of aggression.³⁴³ For this reason, a second possible solution is to rule out the mere presence of foreign troops in the territory of a State, the most common example of this antinomy, as a violation of the prohibition of the use of force. Since in this specific case armed force is not effectively used, by definition the action cannot be considered a violation of the prohibition of the use of force.³⁴⁴ Thus, the wrongfulness of the presence of foreign troops is due to the violation of the sovereignty and territorial integrity of the host State, violations that can be justified by consent. However, the prohibition of the use of force is usually interpreted broadly and covers any threat or use of armed force, the conduction of military operations, or the military presence beyond the limits agreed with the host State, even if the armed force is not aimed against the sovereignty or territorial integrity of the host State.³⁴⁵

Another solution concerns the content of the preemptory norm of general international law that prohibits the use of force, with some authors maintaining that only the prohibition of aggression has *jus cogens* character. As a consequence, the prohibition of 'less serious' uses of force would not have imperative character.³⁴⁶ This seems to be Roberto Ago's understanding, which 'hesitated' to ascribe to the prohibition of certain limited actions involving the use of force 'the same force of *jus cogens* as must (...) be accorded to the

³⁴⁰ Commentaries to Article 26, para 6.

³⁴¹ *S.S. 'Wimbledon' (United Kingdom, France, Italy and Japan v Germany)* (Merits) PCIJ Rep Series A No 1, 25; Daillier and others (n 262) 1051.

³⁴² A Abass, 'Consent Precluding State Responsibility: A Critical Analysis' (2004) 53 *International and Comparative Law Quarterly* 211, 224 (footnotes omitted).

³⁴³ *Ibid.*, 225. The case of the *Anschluss* is an example, as it was considered by the International Military Tribunal of Nuremberg as an act of aggression with or without Austria's valid consent. A similar conclusion was attributed to the invasion of Czechoslovakia with President Hácha's alleged consent. 'International Military Tribunal (Nuremberg) Judgment and Sentences (October 1, 1946)' (1947) 41 *AJIL* 172-333, 192-194 (Austria) and 325 (Czechoslovakia).

³⁴⁴ Corten, *The Law Against War* (n 188) 255.

³⁴⁵ For military presence outside the established limits, see the case of the *Armed Activities case of 2005 (Armed Activities on the Territory of the Congo)* (n 14) 224 (para 149)). The interpretation according to which only the use of force aimed against the sovereignty or territorial integrity of a State would be prohibited by international law is largely rejected (Gray, *International Law and the Use of Force* (n 226) 37-40).

³⁴⁶ Helmersen (n 272) 189. Some authors even question the character of *jus cogens* of the prohibition of the use of force. See for instance J Green, 'Questioning the Preemptory Status of the Prohibition of the Use of Force' (2011) 32 *Michigan Journal of International Law* 215-257.

prohibition of aggression'.³⁴⁷ This position contradicts the express recognition of the prohibition on the use of force of Article 2(4) of the UN Charter as one having an imperative character. In addition, not all activities considered as acts of aggression involve the use of force and consequently not always are serious forms of violation of the prohibition on the use of force.³⁴⁸

Another solution is to consider that the content of the peremptory rule prohibiting the use of force is determined by the international community of States according to its interests, which may not correspond exactly to the content of Article 2(4) of the UN Charter. In this sense, if a specific behaviour is considered lawful by a segment of the international community the non-derogable character of its prohibition is excluded since by definition an imperative norm is a norm accepted and recognized by the international community of States as a whole.³⁴⁹ This explanation, however, opens loopholes for abuse and uncertainty.

As seen, there is no simple legal solution to the antinomy and the academic controversy persists. A pragmatic solution suggested by Roberto Ago is to verify how State practice solves the conflict. State practice demonstrates that consented use of force is widely accepted in principle and that the antinomy does not manifest itself when consent meets certain requirements, since only the form and validity of the consent given are questioned when analysing the legality of a particular action. It should be observed, however, that the violation of the prohibition of the use of force seems to be the only violation of a rule of *jus cogens* that admits the possibility of being precluded by consent.³⁵⁰ Some recent cases of State practice are helpful to clarify this point, as done in the following section.

2.1. State Practice

The antinomy pointed out is manifested in cases where consent is not so clear and its validity is questioned, in opposition to classic examples of the use of military bases in allied countries or the permission given to troops to cross the territory of a friendly State. The military intervention in Mali in 2013 by invitation of the interim government in Bamako is a good example of how in practice a possible violation of a *jus cogens* rule can be precluded by consent.³⁵¹ The French action was not opposed by any member of

³⁴⁷ Ago, Addendum – Eight Report (n 267) 41 (para 59) and 44 (para 66).

³⁴⁸ Y Dinstein, 'Aggression' (September 2015) in R Wolfrum (ed), *MPEPIL* (online edn).

³⁴⁹ N Ronzitti, 'Use of Force, Jus Cogens and State Consent' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff 1986) 147, 150.

³⁵⁰ This clearly could not happen with the violation of the prohibitions of genocide or torture and the obligation to respect the basic rules of international humanitarian law applicable to armed conflicts. The right of self-determination is related to the prohibition of the use of force, so at first sight, its violation could also be justified by consent. On the other hand, the 'free and genuine expression of the will of a people concerned' seems to be an intrinsic element of the concept of self-determination, as pointed out by the ICJ in the *Chagos Advisory Opinion of 2019 (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965)* (Advisory Opinion) [2019] ICJ Rep 95, 137 (para 172)). See also I Papanicolopulu and T Burri, 'Human Rights and the Chagos Advisory Opinion' in T Burri and J Trinidad (eds), *The International Court of Justice and Decolonization* (CUP 2021) 187-206.

³⁵¹ French intervention was requested by Mali's interim government in January 2013 after an imminent risk of the taking of Bamako by jihadist groups operating from the north of the country. Given the threat presented by the armed groups, the UN Security Council had approved by Res 2085 (20 December 2012) the deployment of a regional peacekeeping operation led by the Economic Community of West African States (ECOWAS) and the African Union (para 9). However, the unexpected advance of the armed groups

the UN Security Council at the time, receiving support from several countries, African regional organizations, and eventually even the Security Council.³⁵² Although the intervention was posteriorly justified also based on the authorization of the Security Council and collective self-defence, Mali's consent was used primarily as its legal basis.³⁵³ The virtual absence of opposition and the recognition of the legality of the action by the Security Council demonstrates the acceptance of the justification offered.

Although based on the same justification, the intervention carried out by Russia in the Crimean Peninsula in 2014 contrasts with the French operation in Mali of the previous year for the negative international reaction received. Russia claimed the consent of the former Ukrainian President Viktor Yanukovich as 'a democratically and legally elected President' as one of the legal bases for the intervention together with the need to protect its nationals in the region, a justification analysed in section 5.³⁵⁴ Russia's justifications were not accepted by the majority of the international community since Yanukovich was no longer the *de facto* or *de jure* President of Ukraine at the time of the request for intervention.³⁵⁵

In the following year, the Saudi Arabian-led intervention in Yemen was also justified based on the request of President Rabbo Mansour Hadi.³⁵⁶ The UN Security Council

led to the request by the Interim President of Mali for unilateral action, which was not authorized by the Security Council (UN Doc S/2013/17). The so-called 'Operation Serval' started on the same day of the request and lasted for 18 months. For an account of the events, see B Lecocq, 'Mali: This Is Only the Beginning' (2013) 14 *Georgetown Journal of International Affairs* 59, 63-64.

³⁵² See manifestations in the 6905th meeting of the Security Council (22 January 2013) S/PV.6905. In April 2013 the Security Council adopted Res 2100 (25 April 2013), which contained a paragraph '[w]elcoming the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali' (preambular para 5).

³⁵³ In particular, UNSC Res 2085 (20 December 2012) was used as a legal basis (Commission de la Défense nationale et des Forces armées, Rapport d'information sur l'opération Serval au Mali (n 1288, 2013)). See also A Laird, 'Mali: A Legally Justifiable Intervention by France' (2012) 10 *New Zealand Yearbook of International Law* 123-138, 127; A Seyedfarshi, 'French Interventionism in the Age of R2P: A Critical Examination of the Case of Mali' (2016) 7 *Creighton International and Comparative Law Journal* 2-36.

³⁵⁴ After the political crisis that led to the impeachment of President Viktor Yanukovich by the Ukrainian Parliament on February 22, 2014, Russia announced that Yanukovich had requested Moscow's help to 'use the armed forces of the Russian Federation to establish legitimacy, peace, law and order and stability in defence of the people of Ukraine' (UN Doc S/PV.7125, 3-4). According to Russia, the request was made on March 1 and accepted on the same day, when Yanukovich had already been exiled in Moscow. According to reports, unidentified 'self-defence groups', probably Russian troops, had taken strategic points in Crimea since the end of February (UN Doc S/PV.7124, 2; see also V Bílková, 'The Use of Force by the Russian Federation in Crimea' (2015) 75 *ZaöRV* 27, 34-37). President Putin admitted later that they were Russian troops (A Tancredi, 'The Russian annexation of the Crimea: questions relating to the use of force' (2014) 1 *QIL* 5, 8).

³⁵⁵ In the UN Security Council, a draft resolution sponsored by 42 countries rejecting the annexation of Crimea and reaffirming the obligation of non-recognition of territorial acquisition resulting from the threat or use of force was approved by 13 members of the Council but vetoed by Russia (UN Doc S/2014/189). A few days later the General Assembly passed Res 68/262 (27 March 2014) by 100 votes to 11, which contained similar provisions and called upon States to 'desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means' (para 2).

³⁵⁶ As in the case of Mali, the action was the result of a request made by the head of government in response to the action of armed groups. Hadi, elected President of Yemen in 2012, was facing the opposition of Houthi groups and was considered legitimate even without exercising effective control over the entire territory of the State. After the fall of Sana'a, Hadi requested assistance from Saudi Arabia (UN Doc S/2015/217), and on March 26, 2015, Operation Decisive Storm began. For this operation, see T Ruys and

passed Res 2216 (14 April 2015), which, despite not expressly pronouncing the legality of the intervention, appears to implicitly consent to it by mentioning Hadi's letter of request of intervention and recognizing him as Yemen's legitimate President.³⁵⁷ The only official manifestation expressly opposed to the intervention was made by Iran, and even in this case criticism was directed to the worsening of the humanitarian crisis experienced by Yemen and not the legality of foreign participation in the conflict.³⁵⁸

2.2. Analysis

The three episodes allow the drawing of some conclusions. The first is the evident and widely accepted conclusion that consent allows the use of force, which would otherwise be considered unlawful conduct. Although this does not necessarily confirm the nature of consent as a circumstance precluding wrongfulness, as noted by some authors and Special Rapporteur Crawford,³⁵⁹ it means that in practice consent acts as an element that legitimizes the use of armed force by States in their international relations, even in situations of non-international armed conflict.³⁶⁰

On the three occasions, the possibility of consent as a legal basis for the use of force was not questioned. The opposition to the use of force, especially in the case of the Russian intervention in Crimea, occurred especially concerning the *validity* of consent. According to the ILC, to be accepted as a justification, consent must be 'valid', a question not determined by the rules of the law of State responsibility. Despite this, the Commission indicated that consent must be given in advance, made by a competent authority, and must not be vitiated by coercion or any other factor.³⁶¹ One specificity of the use of consent as a justification for the use of force is that it must be given by the State's highest authority due to its impact on territorial integrity and sovereignty.³⁶² In all three cases analysed, the

L Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65 *International and Comparative Law Quarterly* 61, 70-79; Gray, *International Law and the Use of Force* (n 226) 99-100; E Buys and A Garwood-Gowersy, 'The (Ir)Relevance of Human Suffering: Humanitarian Intervention and Saudi Arabia's Operation Decisive Storm in Yemen' (2018) 24 *JCSL* 1, 4-7.

³⁵⁷ UNSC Res 2216 (14 April 2015) preambular paras 2 and 8. The resolution passed with 14 votes in favour and Russia's abstention, justified by Russia's Representative on the lack of incentives in the text for the political solution and the absence of an arms embargo, not on the legality of Saudi Arabia's intervention (7426th meeting (14 April 2015) S/PV.7426, 2-3). The legality of the action was expressly questioned by Foreign Minister of Russia Sergey Lavrov in an interview in April 2015. See also Ruys and Ferro (n 356) 69.

³⁵⁸ Iran does not question, however, the general legality of foreign participation in the conflict, but its actions in worsening the humanitarian crisis experienced by Yemen. UN Doc S/2015/263.

³⁵⁹ Crawford, Second Report (n 280) 63 (para 243). See also Pellet, 'Les articles de la CDI' (n 264) 6.

³⁶⁰ The principle of non-intervention in civil wars was considered a rule of international law derived from the principles of non-intervention and self-determination, being applied especially during the Cold War and expressed by a resolution adopted by the *Institut de droit international* in 1975. Nowadays this rule is in disuse or seems to no longer exist, partly because of the greater role of the United Nations in internal crises and its practice of recognition of legitimate governments. Thus, the rule does not apply and does not prevent the use of consent as a circumstance precluding wrongfulness. For the opposition to the current validity of the rule, see L Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *BYIL* 189-252; Gray, *International Law and the Use of Force* (n 226) 104; E de Wet, 'The (im)permissibility of military assistance on request during a civil war' (2020) 7 *Journal on the Use of Force and International Law* 26-34. For the confirmation of the existence of the rule, see Ruys and Ferro (n 356) 86-89.

³⁶¹ Commentaries to Article 20, paras 3 and 4.

³⁶² Corten, *The Law Against War* (n 188) 259-262.

alleged consent was sought by the president of the countries that suffered the intervention. This authority must be recognized as legitimate to represent the State, the reason why the request from regional authorities or opposition groups is not considered as valid consent.³⁶³

Although effective control is traditionally considered the most important criterion,³⁶⁴ State practice has shown that more weight is being assigned to the criterion of international recognition of the authority.³⁶⁵ In cases in which the capacity to request intervention is not clear, the criteria of effective control over the territory and international recognition should be used to determine the authority capable of expressing the legitimate will of the State.³⁶⁶ In this sense, the criterion of effective control over the territory is subsidiary to the domestic and international legitimacy in determining the validity of the request for intervention. Authorities that are not exercising effective control over the territory of the State or exercise control over a reduced portion may be recognized as legitimate,³⁶⁷ as in the cases of Mali and Yemen. As a result, the rules regarding the validity of consent for the use of force may have application criteria stricter than those generally recognized for precluding the wrongfulness of the breach of other obligations. However, such criteria cannot be considered as special rules derogating from the general rules of State responsibility, since these requirements are *complementary* to those set out by Article 20 of the ARSIWA.

3. Armed Countermeasures

International law allows a State to take some types of measures that may or may not be a violation of international obligations in reaction to prior illegal conduct that affects its rights. Traditionally, the violation of the prohibition on the use of force in response to a previous offence is only justified insofar as the use of force constitutes a measure of legitimate self-defence against a previous armed attack, a measure that has a purely defensive character and aims the repulsion of the armed attack, as seen in part one. However, it can be questioned whether it would be possible to use force as a measure that is not merely repulsive. In other words, one may question whether armed countermeasures are accepted by international law.

A preliminary observation must be made regarding the concepts adopted by the law of State responsibility. The terms ‘self-help’, ‘countermeasures’, ‘forcible’ or ‘armed

³⁶³ Tancredi, ‘The Russian annexation of the Crimea’ (n 354) 14-15; Corten, *The Law Against War* (n 188) 260-266. The principle was affirmed by the ICJ in the *Nicaragua* case (*Military and Paramilitary Activities in and against Nicaragua* (n 14) 126 (para 246)). An exception to this rule is to aid of a people in the context of decolonization. See Daillier and others (n 262) 1051-1052.

³⁶⁴ Doswald-Beck (n 360) 194.

³⁶⁵ Yanukovych and Hadi requested military intervention when they were outside their respective countries, indicating that they had no effective control over the territory. However, the loss of effective control of Hadi’s case was offset by widespread international recognition of the legitimacy of his government, including by the Security Council. This was not the case of Yanukovych, impeached by the Ukrainian Parliament before the request. The same international recognition was made regarding Traoré, which also had effective control over a small portion of Mali at the time of the French intervention but had been elected Interim President and was internationally recognized as such. Ruys and Ferro (n 356) 85; Buys and Garwood-Gowersy (n 356) 6.

³⁶⁶ Ruys and Ferro (n 356) 81-82. W A Qureshi, ‘The Crisis in Yemen: Armed Conflict and International Law’ (2020) 45 *North Carolina Journal of International Law* 227, 243.

³⁶⁷ Ruys and Ferro (n 356) 85. Tancredi, ‘The Russian annexation of the Crimea’ (n 354) 14-15.

countermeasures' and 'reprisals' were often used interchangeably by doctrine and jurisprudence but today they have well-established meanings. The term 'self-help' is a general concept not frequently used anymore that encompasses several types of measures adopted unilaterally by States for the protection of their legal interests against violations on the part of other States.³⁶⁸ According to some authors, international law still recognizes a general genre of self-help that is justified not only against unlawful conduct or an armed attack by a State but also to protect the legal interest of an obligation, replacing the State originally responsible for it.³⁶⁹ This might be observed in the case of the territorial State which is unable to protect organs or citizens of the intervening State, case in which, as observed by Tancredi, the action is justified not as a defence against the action of the territorial State but by its omission regarding the duty to protect.³⁷⁰ This question was addressed by chapter 1.

Self-defence is a type of self-help that has a special logic. While reprisals and countermeasures seek several purposes, such as obtaining reparations or terminating the offence,³⁷¹ measures are taken in self-defence solely and exclusively to halt an armed attack,³⁷² as observed in part one.

The term 'reprisals' has also been used in the past to refer to a general type of self-help different from self-defence which was admissible in response to an act contrary to international law as a form of coercion to constrain a wrongdoer State to cease or repair the offence committed. In the pre-Charter period, the use of armed reprisals was allowed as a form of coercion short of war.³⁷³ In turn, the term 'countermeasure' started to be used frequently in the specialized literature to designate peaceful reprisals and nowadays is a technical designating such peaceful measures.³⁷⁴ By definition, countermeasures do not involve armed force, so the terms 'armed countermeasures' or 'forcible countermeasures' are used to designate the modality of such measures that make use of force.

Countermeasures in general are widely accepted in contemporary international law under certain circumstances.³⁷⁵ Several authors recognize that countermeasures cannot imply

³⁶⁸ The use of self-help as a means of redress is related to the inexistence of mechanisms of effective enforcement of the rules of international law and expresses an *ultima ratio* available by States to, on their own account, adopt measures against an offender. Kelsen, 'Collective Security and Collective Self-Defense' (n 251) 783; Schwarzenberger (n 255) 343; O Schachter, 'International Law in Theory and Practice' (1982) 178 *RCADI* 9, 167.

³⁶⁹ Morelli, *Nozioni di Diritto Internazionale* (n 93) 352.

³⁷⁰ Tancredi, 'Il problema della legittima difesa nei confronti di milizie non statali' (n 155) 987-989. This logic can also be applied in relation to the use of force against non-State actors. See Tancredi, 'Doctrinal Alternatives to Self-Defence Against Non-State Actors' (n 177) 69-73.

³⁷¹ Sicilianos, *Les réactions décentralisées à l'illicite* (n 257) 58-69.

³⁷² Zanardi, *La legittima difesa nel diritto internazionale* (n 246) 133-134. Contra see Daillier and others (n 262) 876 considering that '*la légitime défense n'est qu'une forme particulière de contre-mesures*'.

³⁷³ Y de la Brière, 'Évolution de la doctrine et de la pratique en matière de représailles' (1928) 22 *RCADI* 237, 241; Brownlie, *International Law and the Use of Force by States* (n 20) 281.

³⁷⁴ The term started to be adopted especially after its employment in the *Air Services Agreement* case of 1978. It was adopted by the ILC in 1979 by suggestion of the Drafting Committee to replace the term 'legitimate application of a sanction' used by Special Rapporteur Ago in his 8th Report. The term 'sanction', in turn, is now used by the Commission as the equivalent of 'action taken against a State by a group of States or mandated by an international organization'. As the Commission itself attests, the term is imprecise and is sometimes replaced by 'collective countermeasures' (Commentaries to Part Three, Chapter II, para 3).

³⁷⁵ Commentaries to Part Three, Chapter II, para 2; Crawford, *State Responsibility* (n 10) 684.

armed force, admitting that self-defence is the only form of self-help that can justify the use of force unilaterally by States in international law.³⁷⁶ This finding is supported by reference to decisions of international courts³⁷⁷ and by UNGA Res 2625 (XXV) (1970), according to which ‘States have a duty to refrain from acts of reprisal involving the use of force’.³⁷⁸ This position was also reflected in the ARSIWA, which established in Article 50, paragraph 1(a), that countermeasures shall not affect ‘the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations’, what is considered to be ‘consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial and other bodies’.³⁷⁹

Even with strong evidence confirming the prohibition of armed countermeasures, some authors and States maintain that such measures are (or should be) legal under international law.³⁸⁰ The main argument raised is that sometimes the use of force is imperative in situations other than self-defence, especially due to the inaction of the Security Council in exercising a monopoly on the use of force outside cases of individual or collective self-defence.³⁸¹ In this sense, there would be a *de facto* recognition of the legality of armed countermeasures.³⁸² According to Franck, one of the main proponents of the idea in recent times, State practice points to the recognition of ways to defend legal rights not foreseen

³⁷⁶ Ago, Addendum – Eight Report (n 267) 56 (para 93). Kelsen, ‘Collective Security and Collective Self-Defense’ (n 251) 784; Martin (n 130) 493-497; Arcari, ‘Il mantenimento della pace e l’uso della forza’ (n 195) 325.

³⁷⁷ In the *Corfu Channel* case of 1949, the ICJ rejected the United Kingdom’s claim that the minesweeping operation carried out in the territorial sea of Albania would be justified as a measure of ‘self-help’ (*Corfu Channel Case* (n 178) 35). On the other hand, the Court recognized that Operation Retail ‘was designed to affirm a right which had been unjustly denied’ and that ‘the Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied’ (ibid), in a way accepting the existence of such a measure. See also Waldock (n 248) 500; N Tsagourias, ‘Necessity and the Use of Force: A Special Regime’ (2010) 41 *NYIL* 11, 25-26. In the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion of 1996, the Court held that it did not ‘have to examine (...) the question of armed reprisals in time of peace, which are considered to be unlawful’ ((n 282) 246 (para 46)). Likewise, in the *Guyana v Suriname* case of 2007 the arbitral tribunal rejected the claim made by Suriname according to which the expulsion of an oil rig and drill ship by its navy from the maritime area claimed by both countries was a countermeasure, stating that the rule according to which countermeasures may not involve the use of force ‘a well established principle of international law’ (PCA Case No 2004-04, 147-148 (para 447)).

³⁷⁸ UNGA Res 2625 (XXV) (24 October 1970) para 1.

³⁷⁹ Commentaries to Article 50, para 5 (footnotes omitted). The limitation was proposed by Special Rapporteur Arangio-Ruiz based on considerable evidence in State practice of the prohibition of armed reprisals. G Arangio-Ruiz, Fourth Report on State Responsibility, ILC Yearbook 1992, Vol II(1) 23-28 (paras 58-69) and 35 (para 96).

³⁸⁰ Morelli, *Nozioni di Diritto Internazionale* (n 93) 361; Dinstein, *War, Aggression and Self-Defence* (n 159) 249.

³⁸¹ D Bowett, ‘Reprisals Involving Recourse to Armed Force’ (1972) 66 *AJIL* 1, 2; T M Franck, *Recourse to Force* (CUP 2002) 132. This was to some extent the argument raised by the United Kingdom in the *Corfu Channel* case, according to which the use of force in Operation Retail would be derived from a ‘right of intervention’ exercised in function of a serious breach of international law creating a situation of immediate necessity and in view of the inaction of the Security Council (1948 ICJ Written Proceedings 283-284).

³⁸² This is the conclusion reached by Bowett, one of the main voices in favour of recognizing the legality of armed countermeasures, after analysing the reaction of the international community and the UN Security Council to armed operations of Israel against its neighbours in the decade of 1970 (Bowett, ‘Reprisals Involving Recourse to Armed Force’ (n 381) 2). The Security Council’s practice would have remained the same until the end of the Cold War. See also W V O’Brien, ‘Reprisals, Deterrence and Self-Defense in Counterterrorism Operations’ (1990) 30 *Virginia Journal of International Law* 421, 474.

by the drafters of the UN Charter but that would be compatible with the law of State responsibility:

[I]n exception cases the use of force in self-help, while prohibited by the Charter text, may be justified by the evident legitimacy of the cause in which self-help is deployed; and a widespread perception of that legitimacy is likely to mitigate, if not actually exculpate, the resort to force. This may be recognized implicitly by the International Law Commission's Report on State Responsibility which, although prohibiting countermeasures taken in derogation of the 'obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations' leaves open recourse to such measures when not actually prohibited by the Charter.³⁸³

State practice can provide answers to the admissibility of the use of countermeasures to justify the use of force. In particular, recent practice regarding one-off airstrikes in the Middle East as retaliation for conducts considered to be illegal acts provides episodes in which the rhetoric of countermeasures is used in the justification of the use of force, although such legal basis is not expressly invoked.

3.1. State Practice

The airstrikes launched by the United States against the Al-Shayrat military airbase of Syria on April 6, 2017, were justified as a response to the chemical attack made two days earlier at Khan Shaykhun, attributed to the Syrian government. The airstrikes received more expressions of approval than rejection, being expressly criticized only by a minority of members of the UN Security Council.³⁸⁴ Despite the scarcity of legal arguments by the United States, the language used by its authorities to justify the action points to the use of countermeasures in reaction to the previous use of chemical weapons by the Assad regime.³⁸⁵ According to the Representative of the United States on the Security Council:

[W]hen the international community consistently fails in its duty to act collectively, there are times when States are compelled to take their own action. The indiscriminate use of chemical weapons against innocent civilians is one of those times. The United States will not stand by when chemical weapons are used. It is in our vital national security interests to prevent the spread and use of chemical weapons. Our military destroyed the airfield from which this week's chemical strike took place. We were fully justified in doing so.³⁸⁶

Three characteristics of the practice of armed countermeasures can be observed in the justification made by the Representative of the United States. The first characteristic refers to the existence of a prior wrongful act attributed to the State target of the measures. In this case, there is a clear identification of the Khan Shaykhun attack as the event that triggered the attack, even though previous attacks have been listed as evidence of

³⁸³ Franck, *Recourse to Force* (n 381) 132.

³⁸⁴ The violation of the ban on the use of force was only criticized by Syria and Bolivia, which emphasized the prohibition of the unilateral use of force by international law. Russia criticized only on the harmful effects of the attack in the fight against terrorism in the region and the absence of evidence attributing the Khan Shaykhun attack to the Syrian regime. 7919th meeting (7 April 2017) S/PV.7919, 3-20. See also K Daugirdas and J D Mortenson, 'Contemporary Practice of The United States Relating to International Law' (2017) 111 *AJIL* 751, 784-785.

³⁸⁵ M Arcari, 'La risposta statunitense all'uso di armi chimiche in Siria e la (con) fusione delle categorie dello ius ad bellum' (2017) 11 *Diritti Umani e Diritto Internazionale* 375, 381.

³⁸⁶ 7919th meeting (7 April 2017) S/PV.7919, 17.

recurring behaviour.³⁸⁷ The absence of any allegation of a prior armed attack by the Syrian government against the United States or its allies precludes the possibility of using self-defence as a justification, and this is one of the main differences between armed countermeasures and measures of self-defence.³⁸⁸

The second characteristic refers to the punitive and deterrent functions of the action since according to the US President, the action was done ‘in order to degrade the Syrian military’s ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons’.³⁸⁹ Classically, repressive or punitive purposes are considered intrinsic characteristics of armed reprisals.³⁹⁰ Currently, the law of State responsibility attributes to countermeasures instrumental objectives such as the cessation and reparation of the injury, but the maintenance of a punitive character of such measures is not clear. The ARSIWA considers that the requirement of proportionality of countermeasures, established by Article 51, prevents this kind of measure from having a punitive aim.³⁹¹ Connected to the punitive function is the deterrent function of armed countermeasures, inducing the wrongdoing State to follow the law.³⁹²

³⁸⁷ Evidence suggests that the attack with sarin gas in the locality was carried out by the Syrian government, as well as dozens of other previous attacks against the civilian population. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (8 August 2017), UN Doc A/HRC/36/55, 14 (para 67) and 29 (para 35).

³⁸⁸ Bowett, ‘Reprisals Involving Recourse to Armed Force’ (n 381) 3; Ago, Addendum – Eight Report (n 267) 54 (para 89); D Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum’ (2013) 24 *EJIL* 235, 253-254.

³⁸⁹ According to the United States, the Shaykhun attack was considered by it and by several members of the UN Security Council as a ‘crime’ (White House, Letter to Congressional Leaders on United States Military Operations in Syria (8 April 2017)). See also manifestation of States in the 7919th meeting (7 April 2017) of the UN Security Council supporting this position, in particular by the United Kingdom, Egypt, Uruguay, France, Kazakhstan, Sweden, Ethiopia and Ukraine. See also Arcari, ‘La risposta statunitense all’uso di armi chimiche in Siria’ (n 385) 382.

³⁹⁰ As observed by Morelli, ‘la rappresaglia non è, come ritengono alcuni, semplicemente un mezzo di cui uno Stato può servirsi per costringere un altro ad eseguire l’obbligo di riparare il torto commesso. Essa ha invece una funzione sua propria, che è una funzione afflittiva e repressiva; e, sotto questo aspetto, merita la qualifica di sanzione e, più specificamente, di pena’. Morelli, *Nozioni di Diritto Internazionale* (n 93) 363. See also Bowett, ‘Reprisals Involving Recourse to Armed Force’ (n 381) 3; Ago, Addendum – Eight Report (n 267) 54 (para 90).

³⁹¹ Commentaries to Article 51, para 6. Special Rapporteur Arangio-Ruiz, the proponent of the rule, considered that ‘in no case could the taking of countermeasures in the form of actions or omissions by an injured State in order to inflict punishment upon the State which committed the internationally wrongful act be lawful’, although a punitive intention is always present in the decision of States to adopt countermeasures (Arangio-Ruiz, Fourth Report (n 379) 7 (paras 3 and 4)). In this sense, despite the application of the principle of proportionality, it can be said that some aspects of ‘afflictive colouring’ are still considered as inherent to the concept of countermeasures (Sicilianos, *Les réactions décentralisées à l’illicite* (n 257) 57). See also Ago, Eight Report (n 70) 39 (para 79); P Malanczuk, ‘Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission’s Draft Articles on State Responsibility’ (1983) 43 *ZaöRV* 705, 787; E Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’ (2001) 12 *EJIL* 889–916.

³⁹² According to Bowett, such measures ‘may be regarded as being at the same time both a form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party’. Bowett, ‘Reprisals Involving Recourse to Armed Force’ (n 381) 3. See also R W Tucker, ‘Reprisals and Self-Defense The Customary Law’ (1972) 66 *AJIL* 586, 591.

The United States alleged that the attack on the Al-Shayrat military airbase was aimed ‘to prevent the spread and use of chemical weapons’.³⁹³

The third characteristic is the failure or inaction of the international community to punish such conduct, in special the institutional structure of the United Nations. The risk of ‘impunity’ was raised by the United States, according to which crimes against humanity committed by Syria ‘could no longer be met with empty words’.³⁹⁴ One can observe the attempt to ‘substitute’ the function of the UN Security Council (or in a broader perspective, of the international community as a whole) in dealing with serious violations of international law, reasoning similar to the one adopted regarding self-help in international law.³⁹⁵

The attack of Iran against the Ayn al-Asad airbase in Iraq on January 8, 2020, also has typical elements of armed countermeasures.³⁹⁶ According to Iran, the attack on the airbase was an exercise of self-defence under Article 51 of the UN Charter and was ‘a measured and proportionate military response targeting an American airbase in Iraq from which the cowardly armed attack against Martyr Soleimani was launched’.³⁹⁷ On the other hand, elements of armed countermeasures can be identified. Firstly, a previous unlawful act, the assassination of Major General Soleimani, was pointed out by Iran as the justification for the attack.³⁹⁸ Secondly, the action appears to have been a retaliation or a punitive measure for the United States’ attack, considered by Iran as ‘an obvious example of State terrorism’ and ‘a gross violation of the fundamental principles of international law’.³⁹⁹ Thirdly, the lack of action on the part of the international community was highlighted by

³⁹³ 7919th meeting (7 April 2017) S/PV.7919, 17. The justification is similar to that of pre-emptive self-defence, although the attack was not aimed at avoiding further attacks against the United States or its allies but to avoid other chemical attacks, as those which had been taking place against the civilian population of Syria.

³⁹⁴ 7919th meeting (7 April 2017) S/PV.7919, 17. Several other members of the UN Security Council also expressed concern about the risk of impunity, concerns which were reinforced by the vetoed by Russia and China in February 2017 of a draft resolution sponsored by 43 States imposing measures against Syria for the use of chemical weapons (UN Doc S/2017/172), with the negative vote by Bolivia, China and Russia and abstention of Egypt, Ethiopia and Kazakhstan. See also the manifestations of United Kingdom, Italy, France, Sweden and Ukraine in the 7919th meeting (7 April 2017) of the Security Council.

³⁹⁵ Morelli, *Nozioni di Diritto Internazionale* (n 93) 352; Tancredi, ‘Doctrinal Alternatives to Self-Defence Against Non-State Actors’ (n 177) 69-73.

³⁹⁶ The attack, named ‘Operation Martyr Soleimani’, was a response to the drone strike carried out by the United States under the justification of the exercise of self-defence on January 3 at the Baghdad International Airport that killed ten Iraqi and Iranian nationals alongside Major General Qasem Soleimani from Iran.

³⁹⁷ UN Doc S/2020/19; 8699th meeting (9 January 2020) 45. Despite being identified as an ‘American air base’ by Iran, the Ayn al-Asad air base is Iraqi and used by the armed forces of the United States, the United Kingdom and other countries.

³⁹⁸ Although Soleimani was an Iranian military official and his assassination could arguably be regarded as an armed attack against an external manifestation of Iran, the five-day interval between the assassination of the Major General and the attack on the Ayn al-Asad airbase disqualifies the action as one of self-defence. For an analysis of the concept of ‘external manifestation’, see Ruys, ‘*Armed Attack*’ (n 217) 143. See also the consideration of the continuing character of the violation of the prohibition of the use of force analysed in section 3.2 of part two of chapter 1.

³⁹⁹ UN Doc S/2020/13. In addition, Iran’s Foreign Minister has linked the attacks to the United States’ ‘rogue behaviour’ regarding its international obligations and the imposition of sanctions against Iran, indicating that the action would also be based on previous actions by Washington. He also condemned, in a contradictory way, the omission of other States that ‘encourage the lawless unilateralist to bully them’. 8699th meeting (9 January 2020) S/PV.8699, 45-46.

Iran.⁴⁰⁰ The attack was not specifically discussed by the UN Security Council, but some contrary reactions have been noted.⁴⁰¹

The third and fourth recent cases in which self-defence was used to justify an action that has elements characteristic of armed countermeasures are the attacks carried out by the United States against non-State actors in 2021 near Abu Kamal, Syria (February 25) and in Iraq and Syria in their border region (June 28), concerning attacks suffered by the US and allied personnel. Several legal arguments have been advanced by the United States, which claimed that attacks were carried out in self-defence and were taken to defend its personnel against further attacks.⁴⁰² Despite the claims of self-defence, the United States' actions have marked characteristics of armed countermeasures. Firstly, the measures were carried out in response to a specific action attributed to non-State armed groups, in the case of the attacks against US military personnel and contractors in Iraq.⁴⁰³ Secondly, the punitive and deterrent functions of the measures can be verified in the allegation that the action aimed to 'defend United States personnel and to deter further attacks'.⁴⁰⁴ The risk of impunity for the action and the inaction of the international community, however, apparently were not mentioned in this case. The international response to the attacks was limited also in this case.⁴⁰⁵

⁴⁰⁰ Although not expressly claiming the lack of action by Security Council in response to the killing of Soleimani, Iran's Foreign Minister warned to the risk of 'other States become passive unilateralists' and 'encourage the lawless unilateralist to bully them', arguing that the 'rogue behaviour' of the United States could undermine the multilateralism and compromise the UN Charter principles. On the other hand, the inaction of the Security Council was observed by the Representative of Syria. 8699th meeting (9 January 2020) S/PV.8699, 36 and 46.

⁴⁰¹ The action was criticized by Iraq as unacceptable and constituting a breach of its sovereignty, the principle of good-neighbourliness, the UN Charter, and international law (UN Doc S/2020/26). Russia and Turkey criticized the 'exchange of attacks and use of force' by the United States and Iran and warned of the possibility of a 'new cycle of instability' in the region (UN Doc S/2020/31). Other reactions, especially from European leaders, referred mainly to the possibility of escalating tensions and not the legality of the action itself (S/PV.8699, 8; M Anssari and B Nußberger, 'Compilation of States' Reactions to U.S. and Iranian Uses of Force in Iraq in January 2020' (*Just Security*, January 22, 2020) accessed 06 March 2021).

⁴⁰² According to the United States, the attacks were directed against facilities 'used by Iran-supported non-State militia groups' responsible for attacks against forces of the Operation Inherent Resolve, in special an attack, carried out on February 15 near Erbil (Iraq), which resulted in five US nationals wounded and the death of one Filipino contractor (UN Doc S/2021/202) and rocket attacks made between April and June 2021 against several US airbases or facilities (UN Doc S/2021/614). Washington also argued regarding the Abu Kamal attack that Syria was 'unwilling or unable' to prevent the use of its territory by non-State militia groups, an aspect missing from the justification for the attacks carried out also in Iraq in June 2021 (White House, Letter to the Speaker of the House and President pro tempore of the Senate Consistent with the War Powers Resolution (27 February 2021)).

⁴⁰³ Previous 'escalating series of threats and attacks' were mentioned to support the claims. The time-lapse of several days or weeks between the attacks and the airstrikes precludes the possibility of justification for exercising self-defence. Furthermore, in both cases it was not proven that the attacks on the US personnel were carried out by the non-State actors from the target facilities.

⁴⁰⁴ The attack of June 2021 was also claimed to be a 'deliberate action designed to limit the risk of escalation but also to send a clear and unambiguous deterrent message'. Department of Defense, Statement (27 June 2021).

⁴⁰⁵ Russia alleged that the Abu Kamal attack violated Syrian sovereignty and territorial integrity and Foreign Minister Sergey Lavrov stated that 'the United States' presence in Syria is illegal and breaks every norm of international law' (Ministry of Foreign Affairs of the Russian Federation, Foreign Minister Sergey Lavrov's statement and answers to media questions (26 February 2021)). The attack was also classified by Iran as an aggression and a violation of international law and by Iraq as a 'breach of sovereignty' (A Berry, 'Iran condemns US airstrikes in Syria' *DW* (Berlin, 26 February 2021); J Davison, 'Iraqi military issues rare condemnation of U.S. air strikes on Syria border' *Reuters* (28 June 2021)).

3.2. Analysis

The main observation that can be made by the analysis of the cases selected is that in any of them States claimed that the use of force would be justified as a countermeasure for a previous wrongful act. This in itself would be strong evidence against the admissibility of countermeasures as a category to justify the use of force. If a State does not use a certain legal argument to justify its conduct, it probably does not believe in its legality under international law.

Disregarding the lack of invocation of the justification, there are still two obstacles to the recognition of the legality of armed countermeasures. The first relates to the impossibility of the use of circumstances precluding wrongfulness such as countermeasures to justify the violation of peremptory rules, expressed by Article 26 of the ARSIWA. Unlike the case of the consented use of armed force analysed in section 2, acts perpetrated as armed countermeasure are armed attacks that resemble acts of aggression, which would undoubtedly be inserted in the content of the rule of *jus cogens* prohibiting the use of force. In any case, the prohibition of armed countermeasures could be challenged by opposed State practice, which is precisely the claim made by some authors, as mentioned.

State practice constitutes a second obstacle. In the selected cases, the condemnation of the use of force is not robust but nevertheless exists. More important, clear manifestations supporting them are rare. Under such conditions, it would be difficult to accept that there is a practice, or even a tendency, to accept the use of force based on armed countermeasures. There is, at most, tolerance for such measures in specific contexts.⁴⁰⁶ In the absence of the establishment of a recognized and accepted practice indicating the admission of such justification, one cannot speak on the existence of special rules related to the use of force that derogates from the general rules established by the law of State responsibility.

From another angle, however, State practice may indicate a possible alteration in the practice of self-defence. The existence of less rigid criteria for the configuration of an armed attack as in the case of the use of force by Iran in response to the assassination of Major General Soleimani, or the possibility of using force in self-defence against an armed attack by a non-State actor, as in the case of the attacks carried out by the United States on Syrian and Iraqi territory in 2021, may eventually be recognized.⁴⁰⁷ As mentioned in section 1, such a change would not mean the existence of a specific rule for the use of force concerning the general law of State responsibility. In any case, it should be noted that in some situations it is difficult to differentiate between armed countermeasures and measures taken in self-defence.⁴⁰⁸ In this way, self-defence itself

⁴⁰⁶ Kretzmer (n 388) 258. Regarding silence and the recognition of exceptions to the prohibition of the use of force, see G P Buzzini, 'Les comportements passifs des États et leur incidence sur la réglementation de l'emploi de la force en droit international général' in E Cannizzaro and P Palchetti (eds), *Customary International Law On The Use of Force* (Brill 2005) 79-117.

⁴⁰⁷ See, for example, the opinion of Judge Simma in the *Oil Platforms* case of 2003, where he argues the possibility of the legality of the use of force on a smaller scale to face unlawful uses of force short of an armed attack within the meaning of Article 51 of the UN Charter. *Oil Platforms* (Merits) (Separate Opinion of Judge Simma) [2003] ICJ Rep 324, 331-332 (para 12). For a criticism to Simma's proposal, see Corten, *The Law Against War* (n 188) 229-231.

⁴⁰⁸ Dinstein, *War, Aggression and Self-Defence* (n 159) 245.

can be seen as the special form of countermeasure applicable to the context of the use of force.⁴⁰⁹

4. Humanitarian Intervention and Necessity

Necessity as a circumstance precluding wrongfulness finds its rationale in extraordinary situations in which a State acts to safeguard an essential interest, a clear manifestation of self-preservation in international law. Article 25 of the ARSIWA provides a modern version of the concept, stating that the conduct of a State that would otherwise be considered unlawful can be exceptionally justified when ‘is the only way for the State to safeguard an essential interest against a grave and imminent peril’.

At first glance, the requirements of the existence of an emergency situation and the need to safeguard an ‘essential interest’ against a ‘grave and imminent peril’ seem to fit perfectly into the old rule of international law according to which *in extremis* necessity States can intervene, including with the use of armed force, to prevent mass atrocities against the civilian population of a State. The use of force against the territory of a State to protect its population against serious and systematic violations of human rights was an established practice of international law, although the abusive use of the concept and the absence of its recognition as an exception to the prohibition of the use of force by the UN Charter led to its disappearance from State practice for many years until it gained momentum in the 1990s.⁴¹⁰ This section seeks to analyse the possibility of the use of necessity as a circumstance that precludes the wrongfulness of the violation of the use of force for humanitarian purposes.

Humanitarian intervention can be understood both as a ‘right’ of States to act, therefore as a primary norm of international law.⁴¹¹ Since the UN Charter does not provide for this ‘right’, its legality as an autonomous basis for the use of force is very unlikely.⁴¹² On the other hand, it is possible to argue that humanitarian intervention may be a *justification* for the violation of the prohibition of the use of force, therefore a secondary norm of international law. In this case, the concept of necessity could ‘harbour’ the doctrine of humanitarian intervention since it is considered as an exceptional action aimed to safeguard the ‘essential interest’ represented by the lives of the civil population of a State, against a grave and imminent peril by the occurrence of genocide, mass murder or other serious violations of human rights.

The codification efforts of the law of State responsibility were always reluctant to consider the use of necessity as a justification for the violation of the prohibition of the use of force, which is explained in large part by abuses committed in the past under this

⁴⁰⁹ Corten, *The Law Against War* (n 188) 224.

⁴¹⁰ Brownlie, *International Law and the Use of Force by States* (n 20) 340-341; Allott (n 262) 17; S Murphy, *Humanitarian Intervention* (University of Pennsylvania Press 1996) 11-12. On the origins of humanitarian intervention, see A von Ungern-Sternberg, ‘Religion and Religious Intervention’ in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 295, 308.

⁴¹¹ L Oppenheim, *International Law (Vol 1 – Peace)* (Roxburgh R ed, 3rd edn, Longman 1920) 229.

⁴¹² Franck, *Recourse to Force* (n 381) 136. The justification was discussed and rejected at the San Francisco Conference and one of the reasons for this was the use of the excuse of protection of ethnic minorities for the invasion of neighbouring countries by Nazi Germany. Brownlie, *International Law and the Use of Force by States* (n 20) 340; N Rodley, ‘Humanitarian Intervention’ in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 775, 779.

justification, including invasions and annexations.⁴¹³ As a result, the modern concept of necessity is regulated strictly by the law of State responsibility and has three limitations that, at least in theory, would prevent its application to justify the violation of the use of force.

The first limitation has a general character and refers to the fact that the prohibition of the use of force is considered a peremptory rule of general international law, and consequently that necessity or any other circumstance cannot be applied to preclude the wrongfulness of the violation of a *jus cogens* rule, as expressed in Article 26 of the ARSIWA.⁴¹⁴ The second restriction refers to limitations imposed by essential interests of other States since Article 25 of the ARSIWA establishes as a basic condition for the invocation of necessity that the act ‘does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole’.⁴¹⁵ The use of force against the territory of another State, even aiming for humanitarian purposes, undeniably violates the State’s essential interest in having its sovereignty and territorial integrity respected.⁴¹⁶

The third restriction imposed by the law of State responsibility is that necessity may not be invoked if the international obligation excludes the possibility of invoking it.⁴¹⁷ Only in very specific situations necessity may be used to justify violations and rules aimed to operate at exceptional situations of urgency where essential interests of the State are threatened in some way. This is the case of treaties of international humanitarian law, applicable in situations of armed conflicts and therefore excluding the possibility of the

⁴¹³ There is a special preference to the proclamation made by the German Chancellor Bethmann-Hollweg in relation to Belgium’s neutrality in 1914. G Ottolenghi, *Corso di Diritto Internazionale Pubblico* (Giappichelli 1956) 442; Commentaries to Article 25, para 2 (note 373); S Heathcote, ‘Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 491, 492; Crawford, *State Responsibility* (n 10) 305; Kolb, *The International Law of State Responsibility* (n 17) 128.

⁴¹⁴ Although the provision was added by the Commission to the ARSIWA in 1999, the limitation is not new in relation to necessity. Special Rapporteur Ago considered ‘inconceivable’ for States to accept necessity as a justification for acts of aggression, although he left open the possibility of the use of necessity as a justification for less serious violations of the prohibition of the use of force. Ago, Addendum – Eight Report (n 267) 21 (para 16). 1613rd meeting (17 June 1980), ILC Yearbook 1980, Vol I, 159 (para 31). See also A Marchesi, ‘Stato di necessità e intervento umanitario. Brevi considerazioni’ in M Spinedi, A Gianelli and M L Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (Giuffrè 2006) 181-188.

⁴¹⁵ Article 25 (1).

⁴¹⁶ Arcari, ‘La risposta statunitense all’uso di armi chimiche in Siria’ (n 385) 378. *Military and Paramilitary Activities in and against Nicaragua* (n 14) 128 (para 251). Furthermore, it can be considered that the violation of the prohibition on the use of force also impairs an essential interest of the international community as a whole, due to the peremptory nature of this rule.

⁴¹⁷ Article 25(2)(a). As explained by the Commentaries to Article 25, such limitation refers to cases where the international obligation excludes expressly or implicitly the possibility of reliance on necessity or cases in which the obligation is ‘intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests’ (para 19).

invocation of ‘military necessity’.⁴¹⁸ This is also the case of rules relating to the use of force.⁴¹⁹ According to the Commission:

As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of “military necessity”. It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to *humanitarian intervention*. *The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.*⁴²⁰

Despite these three restrictions, some authors and States argue that a new exception to the prohibition on the use of force in international law could be arising from the use of necessity to justify armed humanitarian interventions. This transformation, which would have NATO’s intervention in Kosovo in 1999 as a turning point, would be a process observed through the practice of humanitarian intervention developed between the 1970s and 2000s, with episodes of unilateral use of force by States justified based on humanitarian purposes without the authorization of the Security Council.⁴²¹ Some episodes of the recent practice of the States can clarify this allegation.

4.1. State Practice

The most cited episode to justify the change in international law concerning humanitarian intervention is the case of NATO’s intervention in Kosovo in 1999.⁴²² At first, there were no clear justifications for Operation Allied Force, the action clearly could not be considered as the exercise of collective self-defence and had not been authorized by the Security Council.⁴²³ The main justification for the action, raised by the United Kingdom,

⁴¹⁸ Commentaries to Article 25, para 19. According to Corten, the same logic is applied in relation to the *jus ad bellum*. Corten, ‘La nécessité et le *jus ad bellum*’ (n 207) 145-147.

⁴¹⁹ On the other hand, for Crawford the reason why rules of use of force were excluded from the field of application of Article 25 was because of the possibility of violation of a peremptory norm of general international law (Article 26). 2592nd meeting (23 June 1999), ILC Yearbook 1999, Vol I, 180 (para 43).

⁴²⁰ Commentaries to Article 25, para 21 (footnotes omitted, emphasis added). This conclusion had been reached by the Commission already in 1980, observing that State practice until that moment, with the exception of the Belgian intervention in Congo in 1960, indicated that interventions for humanitarian purposes were generally not justified by necessity. ILC, Report of the ILC on the work of its thirty-second session’ (5 May-25 July 1980) UN Doc A/35/10, 45 (para 26).

⁴²¹ Among the episodes identified as humanitarian interventions since 1945 are the invasion of East Pakistan by India in 1971, invasion of Uganda by Tanzania in 1978, invasion of the Kampuchea by Vietnam in 1978 and invasion of the Central African Empire by France in 1979, in addition to the bombings in northern Iraq in 1991 to protect the Kurds carried out by Western States, the intervention of the Economic Community of West African States (ECOWAS) in Liberia and Sierra Leone between 1989 and 1999 and NATO intervention in the Kosovo crisis of 1999. It should be noted that in many of these episodes, humanitarian intervention was not used as a justification for the action. Franck, *Recourse to Force* (n 381) 139-170; Rodley (n 412) 787-788.

⁴²² The episode can be resumed as consisting of aerial bombardments against strategic targets in the then Federal Republic of Yugoslavia (FRY) between March 24 and July 10, 1999 by military forces of NATO. The action, named Operation Allied Force, was a response to the growing deterioration in the humanitarian situation in Kosovo caused by offensives by the Yugoslav armed forces against the local civilian population. For an account on the events, see Independent International Commission on Kosovo, *The Kosovo Report* (OUP 2000) 85.

⁴²³ Rodley (n 412) 787.

was its character as ‘an exceptional measure to prevent an overwhelming humanitarian catastrophe’.⁴²⁴ In addition to the United Kingdom, another State that explicitly adopted the justification of humanitarian intervention was Belgium, especially in the proceedings of the case concerning the *Legality of Use of Force* before the ICJ.⁴²⁵ The justifications raised by the United Kingdom and Belgium were based on the balancing of the fundamental interests involved in the issue, since ‘international law does not require that respect for the sovereignty and integrity of a State must in all cases be given priority over the protection of human rights and human life’.⁴²⁶ Despite this, different legal bases were claimed by States involved and few seemed convinced by the legality of the doctrine of humanitarian intervention.⁴²⁷ Several States and organizations criticized both the actions carried out by NATO and the concept of humanitarian intervention in general.⁴²⁸ The action did not appear to have influenced the Commission, which was discussing the article concerning necessity during the operations.⁴²⁹

⁴²⁴ 3989th meeting (26 March 1999) S/PV.3989, 7.

⁴²⁵ The FRY instituted proceedings before the Court against ten countries that had participated in the action asking, among other things, for interim measures to stop the use of armed force. In the incidental proceedings before the Court, Belgium claimed that the action was completely lawful and that humanitarian intervention is generally compatible with Article 2(4) since the use of force, in this case, is not made against the territorial integrity and sovereignty of the territory of the State that suffers the intervention, but to alleviate human suffering. Alternatively, the Belgian agent argued that if considered as a violation of the use of force, the action would have its wrongfulness precluded by necessity in order to ‘save values greater than those protected by the violated rule’ in face of grave and imminent peril. In his words, ‘le danger imminent, grave et imminent (...) est toujours là, c’est la catastrophe humanitaire constatée par les résolutions du Conseil de sécurité - danger imminent. Quelles sont les valeurs supérieures que cette intervention tend à sauvegarder? Mais ce sont les droits qui relèvent du *jus cogens*. C’est la sécurité collective de toute une région’ (*Legality of Use of Force* (Serbia and Montenegro v Belgium) (Application instituting proceedings) [1999] (Verbatim record 1999/15 of 10 May 1999) ICJ Oral Proceedings 16 and 18). The Court did not rule on the argument in its Order and subsequently decided that it had no jurisdiction to hear the case. See also A Laursen, ‘The Use of Force and (the State of) Necessity’ (2004) 37 *Vanderbilt Journal of Transnational Law* 485, 518-519.

⁴²⁶ C Greenwood, ‘Humanitarian intervention: the case of Kosovo’ (2002) 10 *Finnish Yearbook of International Law* 141, 162. See also A Cassese, ‘A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*’ (1999) 10 *EJIL* 791, 797-798; M P Scharf, ‘Striking a Grotian Movement: How the Syrian Airstrikes Changed International Law Relating to Humanitarian Intervention’ (2019) 19 *Chicago Journal of International Law* 586, 596-597.

⁴²⁷ A Henriksen and M Schack, ‘The Crisis in Syria and Humanitarian Intervention’ (2014) 1 *Journal on the Use of Force and International Law* 122, 139.

⁴²⁸ *Ibid.*, 139. A possible evidence of the rejection of the doctrine of humanitarian intervention is the attempt in the following years to develop the concept of Responsibility to Protect, which seeks to integrate concerns of the protection of civilians in armed conflicts and the United Nations collective security system. The doctrine, applied by the Security Council in Libya in 2011, is considered by some authors ‘less a doctrine of its own than a refocusing of humanitarian intervention’ (J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 755). Despite the similarities, the doctrine of the Responsibility to Protect differs substantially from the doctrine of humanitarian intervention by requiring the approval of any use of force by the Security Council. In this sense, the application of the doctrine is linked to the authorization of the use of force by the Security Council, an independent legal basis for the use of force established by the UN Charter. International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty’ (IDRC 2001) 50 (para 6.15); C Focarelli, ‘La dottrina della “responsabilità di proteggere” e l’intervento umanitario’ (2008) 91 *RDI* 317-346.

⁴²⁹ Some members expressly rejected the possibility of use of the doctrine of humanitarian intervention concerning necessity (see for instance the manifestations of Mr Kateka, Mr Elaraby, Mr Economides and Mr Dugard in the 2591st and 2592nd meetings of the ILC (22 and 23 June 1999), ILC Yearbook 1999, Vol I). In his Second Report, Special Rapporteur Crawford had specifically analysed the use of the doctrine in relation to necessity and rejected it (Crawford, Second Report (n 280) 72 (paras 288 and 289)).

Despite its presumed rejection by the international community in the case of Kosovo in 1999, the application of the doctrine of humanitarian intervention was again raised concerning the Civil War in Syria that started in 2011. In response to a chemical weapons attack on civilians in Ghouta, on August 21, 2013, several States have expressed the need for the international community to act to prevent further attacks.⁴³⁰ Another attack using chemical weapons against the civilian population attributed again to the Syrian government took place in Khan Shaykhun on April 4, 2017.⁴³¹ As seen in section 3.1, on this occasion the armed force was used unilaterally by the United States, which attacked the Al-Shayrat military airbase a few days later as the result of the attack of April 4. Despite not claiming specific legal bases to support its activities, the United States presented arguments whose language could be related to necessity, claiming to have been ‘compelled to take their own action’ in face of the fact that ‘the international community consistently fails in its duty to act collectively’, which is related to the logic of necessity.⁴³² The country also referred to its ‘vital national security interests’ in preventing the use of chemical weapons, a clear mention of the interests considered in the action.⁴³³

On April 7, 2018, another major episode of the use of chemical weapons against civilians took place in Douma. In response, the United Kingdom, the United States, and France carried out a joint attack on three Syrian facilities allegedly involved in the research,

⁴³⁰ Recourse to unilateral action was initially considered by the United States, France, the United Kingdom, and Denmark. The idea of an intervention without authorization of the Security Council was abandoned after a compromise was reached between the United States, Russia, and Syria for the destruction of the Syrian arsenal of chemical weapons, determined by Res 2118 (27 September 2013). Only the United Kingdom cogitated expressly the use of the doctrine of humanitarian intervention and the government of the British Prime Minister David Cameron requested to the British Parliament in late August 2013 authorization for the use of force in Syrian territory, claiming that ‘the legal basis for military action would be humanitarian intervention; the aim is to relieve humanitarian suffering by deterring or disrupting the further use of chemical weapons’ (Prime Minister’s Office, Chemical weapon use by Syrian regime: UK government legal position (29 August 2013)). The British position was better evidenced in 2014 in an official response issued by the Foreign Office to questions made by the House of Commons, in which the government concluded that ‘it would be lawful for the UK to use force against Syria or any other State without a UN Security Council resolution authorising the use of such force’ due to the fact that ‘it is permitted under international law to take exceptional measures in order to avert a humanitarian catastrophe’ (Minister of State, Foreign and Commonwealth Office, Further supplementary written evidence from the Rt Hon Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office: Humanitarian Intervention and the Responsibility to Protect (14 January 2014)). See also Henriksen and Schack (n 427) 141; A Sarvarian, ‘Humanitarian Intervention after Syria’ (2016) 36 *Legal Studies* 20, 32-36.

⁴³¹ Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (8 August 2017), UN Doc A/HRC/36/55, 29 (para 35).

⁴³² 7919th meeting (7 April 2017) S/PV.7919, 17. According to the US President, the action was carried out in order to ‘degrade de Syrian military’s ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons’ and consequently ‘promoting the stability of the region and averting a worsening of the region’s current humanitarian catastrophe’ (White House, Letter to the Speaker of the House and President pro tempore of the Senate (8 April 2017)). See also Arcari, ‘La risposta statunitense all’uso di armi chimiche in Siria’ (n 385) 377.

⁴³³ On the occasion, the representative of the United Kingdom in the Security Council also considered that the action was a response to ‘unspeakable acts’ that give rise to ‘overwhelming humanitarian distress’ (7919th meeting (7 April 2017) S/PV.7919, 5). Similar terms were adopted by the US Senate (Foreign Relations Committee, Authorization for the Use of Military Force Against the Government of Syria to Respond to Use of Chemical Weapons (SJRes.21 113AD, 2013)). See also Arcari, ‘La risposta statunitense all’uso di armi chimiche in Siria’ (n 385) 377; A Kleczkowska, ‘The US Strike of 7 April 2017 and How It Influenced the Law on the Use of Force’ (2017) 56 *Military Law and Law of War Review* 11, 25.

production, and storage of chemical weapons.⁴³⁴ Each State claimed a different legal basis to justify the attacks. While the United States claimed similar justifications as for the Al-Shayrant strikes in 2017,⁴³⁵ the United Kingdom has explicitly invoked humanitarian intervention as the basis for action, claiming that the action was ‘an exceptional measure on grounds of overwhelming humanitarian necessity’, being the country ‘permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering’.⁴³⁶ France did not claim specific legal bases, although the French Representative to the Security Council alleged that the ‘strikes are a necessary response to the chemical massacres in Syria (...) (and) to the repeated violations by the Syrian regime of its obligations’.⁴³⁷

The mention of humanitarian concerns by France and the United States could, to some extent, represent a certain implicit recognition of the doctrine of humanitarian intervention by these countries, in addition to the United Kingdom which traditionally supports such justification. However, the greater opposition to the actions taken by the Security Council undoes this perception.⁴³⁸

4.2. Analysis

Necessity to prevent a humanitarian catastrophe is not recognized by international law or by the international community as a circumstance precluding the wrongfulness of the violation of the prohibition of the use of force. Under international law, this hypothesis has been constantly considered by authors and by the ILC and systematically rejected. Humanitarian purposes can effectively be considered as ‘essential interests’ to be safeguarded against a grave and imminent peril, but this particular essential interest does not authorize the use of force. Self-defence is the only hypothesis admitted by the law of State responsibility in which the use of force is allowed as a measure to safeguard an essential State interest. As explained by Tsagourias:

[N]ecessity is the source of the rules on the use of force which as primary legal titles have already taken into account considerations of necessity. It is indeed for this reason that necessity does not need to be invoked in order to justify the entitlement to use force itself. When a State for example uses force in self-defence, it asserts a

⁴³⁴ Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (9 August 2018), UN Doc A/HRC/39/65, 3-4 (para 7).

⁴³⁵ The country indicated that the attack aimed to ‘degrade the Syrian military’s ability to conduct further chemical weapons attacks’ and to dissuade the Syrian government from using them. In this case, however, the justification included the contention that the action was taken ‘in the vital national security and foreign policy interests of the United States to promote the stability of the region, to deter the use and proliferation of chemical weapons, and to *avert a worsening of the region’s current humanitarian catastrophe*’ (White House, Letter to Congressional Leaders on United States Military Operations in Syria (April 15, 2018) (emphasis added)).

⁴³⁶ 8233rd meeting (14 April 2018) S/PV.8233, 7; Prime Minister’s Office, Syria action – UK government legal position (14 April 2018).

⁴³⁷ 8233rd meeting (14 April 2018) S/PV.8233, 9.

⁴³⁸ Only Poland openly supported the actions of the three permanent members. The action was openly criticised by half of the members of the Security Council, and vigorously by Russia, China, and Bolivia (UN Doc S/PV.8233). Even though the action was criticised by several members, a Russian-sponsored draft resolution condemning the ‘aggression against the Syrian Arab Republic by the US and its allies’ was rejected by the majority of the Council (UN Doc S/2018/355).

right; it does not need to invoke necessity in order to justify its right of self-defence as such.⁴³⁹

State practice points out to the conclusion that the doctrine of humanitarian intervention is neither coherently invoked nor peacefully accepted by the international community.⁴⁴⁰ In the past two decades, only the United Kingdom has explicitly claimed the legality of humanitarian intervention as a legal basis for the use of force. Even so, the justification was rejected by several States. In this sense, any allegation of the existence of evidence of the formation of an international custom regarding the legality of humanitarian intervention in international law is excluded.

5. Intervention to Rescue Nationals Abroad

Like humanitarian intervention, the possibility for a State to intervene militarily in another to protect its nationals from threats was a common practice whose legal basis was uncertain even before the UN Charter.⁴⁴¹ Authors were divided between its characterization as an autonomous right of intervention, a case in which its incompatibility with the Charter is more patent, or as a justification for the use of force. In the latter case, its legal basis is associated with concepts such as self-defence, necessity, distress, and humanitarian intervention.⁴⁴²

The association of the use of force for the protection of nationals abroad with self-defence is generally based on the equation between an attack against nationals of a State and an armed attack against the State itself, especially if one considers permanent population as an essential element of the concept of State.⁴⁴³ In this way, the defence of nationals of a State is considered to be the defence of the State itself.⁴⁴⁴ The identification of the protection of nationals abroad with the exercise of self-defence was proposed by Special Rapporteur John Dugard, who suggested its inclusion in the ILC's Articles on Diplomatic Protection.⁴⁴⁵

⁴³⁹ Tsagourias, 'Necessity and the Use of Force' (n 377) 29.

⁴⁴⁰ Corten, *The Law Against War* (n 188) 549.

⁴⁴¹ Brownlie, *International Law and the Use of Force by States* (n 20) 292-298.

⁴⁴² M Forteau, 'Rescuing Nationals Abroad' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 947, 952.

⁴⁴³ Oscar Schachter, 'Self-Defense and the Rule of Law' (1989) 83 *AJIL* 259-277, 271; Tsagourias, 'Necessity and the Use of Force' (n 377) 22. Permanent population is considered to be a qualification of a State by the Montevideo Convention of 1933 together with a defined territory, a government and the capacity to enter into relations with other States. *Convention on Rights and Duties of States* (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, Article 1.

⁴⁴⁴ Bowett, for example, considers the 'right of protection over nationals' as one of the types of rights that a State is entitled to protect by armed force in the exercise of self-defence, along with territorial integrity, political independence, and certain economic rights. Bowett, *Self-Defence in International Law* (n 195) 270. See also Basdevant (n 260) 547; Franck, *Recourse to Force* (n 381) 96; Forteau, 'Rescuing Nationals Abroad' (n 442) 955.

⁴⁴⁵ Dugard proposed that: 'The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where: (a) The protecting State has failed to secure the safety of its nationals by peaceful means; (b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State; (c) The nationals of the protecting State are exposed to immediate danger to their persons; (d) The use of force is proportionate in the circumstances of the situation; (e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued'. In particular, Dugard's proposal identified the protection of nationals abroad with the exercise of self-defence

On the other hand, some authors consider that the intervention for the protection of nationals abroad is justified on necessity. According to such authors, the protection of nationals would be an ‘essential interest’ of a State, which in situations of grave and imminent peril could justifiably use armed force to protect them.⁴⁴⁶ As mentioned in the previous section, the problem of invoking necessity to justify the use of force is not so much the essential interest to be protected, but the impact of the action on the essential interests of other States.⁴⁴⁷ Even if it seeks to protect important interests of the intervening State, such a justification inevitably affects the territorial integrity and sovereignty of the intervened State.

A third group of authors considers that the intervention to rescue nationals abroad is a specific type of distress, a circumstance that precludes the wrongfulness of an act of a State when the author has no other reasonable way of saving its own life or the lives of other persons entrusted to its care.⁴⁴⁸ In this situation, the author of the act has his choice nullified by the existence of a danger to human lives.⁴⁴⁹ In the *Rainbow Warrior* case, the arbitral tribunal recognized the possibility of application of distress in a situation of ‘extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State’, which includes risks to the physical integrity or health of a person.⁴⁵⁰ The tribunal established a less rigid criterion for the admission of the justification of distress than the one adopted by Article 24 of the ARSIWA, which requires the existence of a situation of serious danger jeopardizing the very existence of the individual.⁴⁵¹ Arguably, this less rigid criterion can be used to justify the rescue of nationals in similar circumstances. However, even in this case, the application of the justification of distress requires a situation more serious than an emergency and with an evident threat to the physical integrity of individuals, which is not observed in most cases of the rescue of

according to the customary rule that preceded the formulation of Article 51 of the UN Charter (J Dugard, First Report on Diplomatic Protection, ILC Yearbook 2000, Vol II(1) 218-220 (paras 47-60)). The proposal was not accepted mainly because the subject was external to the issue of diplomatic protection, but in principle the possibility of intervention to rescue nationals abroad has not been entirely rejected by both the Commission and the Sixth Committee. See also N Ronzitti, ‘Rescuing Nationals Abroad Revisited’ (2019) 24 *JCSL* 431, 442; Forteau, ‘Rescuing Nationals Abroad’ (n 442) 959-960.

⁴⁴⁶ Salmon, for example, considers the protection of the population and human life as examples of essential interests of States comparable to the very existence of the State and able to be safeguarded by an action taken in necessity (J Salmon, ‘Faut-il codifier l’état de nécessité en Droit international?’ in J Makarczyk (ed), *Études de droit international en l’honneur du juge Manfred Lachs* (Martinus Nijhoff 1984) 235, 247-248). To Waldock, ‘only an absolute necessity could justify an intervention to protect nationals’, being an intervention justified by the existence of an imminent threat of injury to nationals and in case of failure or inability of the territorial State to protect them (Waldock (n 248) 467). See also Ago, Addendum – Eight Report (n 267) 39 (para 56); J Raby, ‘The State of Necessity and the Use of Force to Protect Nationals’ (1988) 26 *Canadian Yearbook of International Law* 253, 266.

⁴⁴⁷ According to Article 25(1) of the ARSIWA, the invocation of necessity is only admitted when the act in question ‘does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole’. See Section 4.

⁴⁴⁸ Szurek (n 329) 486-487.

⁴⁴⁹ Commentaires to Article 24, para 1.

⁴⁵⁰ France claimed distress to justify the removal of its agents from the island of Hao in violation of the obligations agreed with New Zealand for the settlement of the dispute concerning the destruction of the Rainbow Warrior in the port of Auckland in 1986. *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* (New Zealand/France) (1990) 20 RIAA 215, 254-255.

⁴⁵¹ Commentaires to Article 24, para 6.

nationals abroad. In most of these cases, there is an abstract danger to foreigners in a given State, not an imminent threat to their physical integrity or lives.⁴⁵²

Other authors believe that intervention to protect nationals abroad would be a specific type of humanitarian intervention since both measures aim to protect civilians from serious human rights violations.⁴⁵³ The difference between them would be the nationality of the individuals protected since the action in humanitarian intervention benefits the own population of the State target of the intervention while the protection of nationals abroad benefits part of the population of the intervening State.⁴⁵⁴ The logic of the two concepts is different, however. Humanitarian intervention has its *raison d'être* in the existence of a risk of serious violations of human rights. The use of force to rescue nationals abroad, diversely, is legitimized by the existing link between the intervening State and the rescued individuals, being related to the exercise of personal jurisdiction of the State over its nationals.⁴⁵⁵

The inaccuracy of the legal basis to which the protection of nationals abroad belongs calls for the need to analyse recent State practice on the subject. In the last decades, there have been several rescue operations of nationals abroad, but few can be considered as proper interventions.⁴⁵⁶

5.1. State Practice

The largest rescue of nationals abroad in recent times occurred in 2006, during the war in Lebanon.⁴⁵⁷ Due to the unexpected nature of the war, approximately 200,000 migrants of different nationalities were unable to leave the country during the first days of the conflict and evacuation operations were organized by several States,⁴⁵⁸ in special by the United

⁴⁵² Gray, *International Law and the Use of Force* (n 226) 169.

⁴⁵³ Schachter, 'International law in theory and practice' (n 368) 144. Ago, Addendum – Eight Report (n 267) 43 (para 64).

⁴⁵⁴ N Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff 1985) XIV.

⁴⁵⁵ Forteau, 'Rescuing Nationals Abroad' (n 442) 948.

⁴⁵⁶ The choice of the cases analysed in this section is based on the absence of clear consent from the State that suffers the intervention since consent is itself an autonomous justification for the use of force, and the use of military force by the intervening State, including the employment of soldiers and military equipment even without the substantial use of armed force.

⁴⁵⁷ On July 13, 2006, in response to Hezbollah attacks on Israeli territory that resulted in the death of eight soldiers and the capture of two others, Israel launched attacks by air, land, and sea against Lebanon. Naval and air blockades were established by Israel without prior notice. The operations lasted until a ceasefire on August 14 and the withdrawal of Israeli troops on October 1. Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1 (23 November 2006), UN Doc A/HRC/3/2, 20-21 and 62.

⁴⁵⁸ 5489th meeting (14 July 2006) S/PV.5489, 9. Large part of the foreigners have been evacuated by land via Syria or Israel, although most of them were transported from Beirut to Cyprus by military ships, leased commercial ships, or helicopters (UN Doc A/60/957-S/2006/578, 14-15; State Department, The July 2006 Evacuation of American Citizens from Lebanon (GAO-07-893R, June 07, 2007)).

States,⁴⁵⁹ the members of the European Union,⁴⁶⁰ and Canada.⁴⁶¹ No clear legal basis was used to justify the operations and Lebanon's consent is unclear since no State expressly claimed the authorization of the Lebanese authorities.⁴⁶² The debates in the UN Security Council are also not very helpful in clarifying the legal circumstances of the actions.⁴⁶³

A more extreme scenario of the use of force to rescue nationals abroad occurred during the 2008 Russo-Georgian War.⁴⁶⁴ Russia justified its participation in the conflict alongside the separatists as an attempt to prevent genocide by Georgia against Ossetians and to protect Russian nationals living in South Ossetia, including Russian troops employed in the Joint Peacekeeping Forces stationed there since 1992.⁴⁶⁵ The country mentioned the occurrence of an armed attack against its troops and threats to its nationals,

⁴⁵⁹ The United States claimed to have evacuated 15,000 nationals from Lebanon and the US Department of State considered the evacuation to be one of the largest in the history of the country. Although usually responsible for the evacuation of US nationals, the Department of State stated that 'the size and unforeseen nature of the Lebanon evacuation required the assistance of the Defense Department', which had the 'ability to secure safe passage for American nationals in a war zone'. According to it, the operation was 'conducted during an ongoing conflict where air and land evacuation routes were blocked'. State Department, The July 2006 Evacuation of American Citizens from Lebanon (GAO-07-893R, June 07, 2007).

⁴⁶⁰ The European Union reported the evacuation of more than 40,000 nationals from EU Members and third States with the assistance of the government of Cyprus and in contact with Israeli authorities. European Union, Joint press release: EU action in response to the crisis in Lebanon (25 July 2006).

⁴⁶¹ Canada established 'Operation Lion' on July 19 and evacuated 15,000 nationals by August 15, including nationals of other countries. According to Canada, 'Israeli and Lebanese authorities supported the evacuation by allowing the passage of the civilians and allowing the ships to enter Lebanese waters'. Government of Canada, 'Operation LION' (12 November 2018).

⁴⁶² Except for a mention of the 'support' of the authorities in a publication of 2018 from the government of Canada, the reference to the Lebanese authorities is almost non-existent in official statements, being the mention of Israeli authorities much more frequent. On the other hand, it can be considered that Lebanon did not have effective control over its territory and therefore the consent of the government would not be necessary. This specific case is analysed by Tancredi in relation to its impact in the exercise by Lebanon of its duty of protection. Tancredi, 'Il problema della legittima difesa nei confronti di milizie non statali' (n 155) 1005.

⁴⁶³ One of the few mentions to the protection of nationals was made by the representative of France, which stated that the country could not accept 'that its citizens should be prevented from returning to their country' and affirmed that Paris 'will work to ensure that a very rapid solution to this situation is found' (UN Doc S/PV.5489, 18; S/PV.5493, 19). Several States stressed the necessity of establishing 'humanitarian corridors' to enable the sending of humanitarian aid but also the evacuation of third-States nationals, a factor which puts in doubt the existence of consent on the part of both Lebanon and Israel for the operations (See for instance the manifestations of Peru, the United Kingdom, Argentina, Switzerland, Brazil and Australia made during the 5489th meeting of the Security Council (14 July 2006)).

⁴⁶⁴ The conflict was the final step of escalating tensions in the South Ossetia region of Georgia, which began on August 7 and spread across the country. Five days later, on August 12, a ceasefire agreement mediated by France was signed between Russia and Georgia.

⁴⁶⁵ UN Doc S/2008/545. 5952nd meeting (8 August 2008) S/PV.5952, 5. According to Russia, several soldiers were killed or wounded in confrontation with Georgian forces. The number of victims varies from 2 to 10 killed and 5 to 30 injured (Council of the European Union, *Independent International Fact-Finding Mission on the Conflict in Georgia* (Volume I, September 2009) 21 (para 17); 5952nd meeting (8 August 2008) S/PV.5952, 4). Moscow claimed the exercise of self-defence as a justification for the action and stated that the use of force was proportionate to the scale of the attack, asserting that the operation aimed 'no other goal but to protect the Russian peacekeeping contingent and citizens of the Russian Federation from the illegal actions of the Georgian side and to prevent future armed attacks against them (UN Doc S/2008/545).

and expressly invoked the exercise of self-defence along with Article 51 of the UN Charter.⁴⁶⁶ Reactions to the intervention were mostly negative.⁴⁶⁷

The protection of nationals abroad was also used as a justification for the use of force during the Crimea crisis of 2014.⁴⁶⁸ According to Russia, the authorities that took power after Yanukovich's impeachment started a process of repression of Russian culture in Ukraine and persecution of its population, including the approval by the Ukrainian Parliament of measures 'limiting the language rights of minorities' and to 'criminalize the use of the Russian language'.⁴⁶⁹ In this sense, the existence of a 'threat to the lives of citizens of the Russian Federation' and the military personnel stationed in Crimea were listed as reasons for the intervention.⁴⁷⁰ Although international reactions were largely opposed to the operation, the argument for the protection of nationals was not directly criticised,⁴⁷¹ which may suggest its acceptance by the international community.

⁴⁶⁶ C Gray, 'The Protection of Nationals Abroad: Russia's Use of Force in Georgia' in A Constantinides and N Zaikos (eds), *The Diversity of International Law* (Martinus Nijhoff 2009) 133, 150. During the oral proceedings for provisional measures in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case before the ICJ in 2008, Russia claimed only self-defence as a basis for its action ((Verbatim record 2008/23 of 8 September 2008) ICJ Oral Proceedings 11-12). Nevertheless, it is possible to notice some elements of the rhetoric associated with armed countermeasures in the justifications provided, such as the existence of a proportional measure in response to Georgia's 'illegal actions' and the aim of preventing further attacks (UN Doc S/2008/545).

⁴⁶⁷ The use of armed force and the attack on Georgia's territorial integrity were criticised by representatives of several States in the UN Security Council (see manifestations of Croatia, United States, Panama, France, United Kingdom, Costa Rica, and Italy UN Doc S/PV.5952; S/PV.5953; S/PV.5969). Nonetheless, the validity of the legal basis of protection of nationals abroad was not specifically challenged, in part by the fact that this justification was used before by the Western States. Thus, criticisms were mainly aimed at the occurrence of armed clashes and the occupation of the territory (see in special manifestations of the United Kingdom, United States and Panama, S/PV.5952; S/PV.5953). See also Gray, 'The Protection of Nationals Abroad' (n 466) 150.

⁴⁶⁸ UN Doc S/PV.7124, 3. For a legal analysis of this justification, see Tancredi, 'The Russian annexation of the Crimea' (n 354) 10-13.

⁴⁶⁹ 'Self-defence brigades' were established in the region and effective intervention from Russian official forces did not take place until March 1, 2015, three days later from the start of the action of those unofficial forces. In February 2014 a draft provision to repeal a 2012 law that protected the linguistic plurality of Ukraine, trying to make Ukrainian the only recognized language was rejected. UN Doc A/HRC/27/75, 15 (para 62).

⁴⁷⁰ 'Putin's letter on use of Russian army in Ukraine goes to upper house' *TASS* (Moscow, March 1, 2014); 7125th meeting (3 March 2014) S/PV.7125, 4. As reported by the UN High Commissioner for Human Rights, there was no evidence of real threats to the civilian population or of armed attacks against the Black Sea Fleet of the Russian Federation in Ukraine (UN Doc A/HRC/27/75, 21 (para 89)); see also P M Olson, 'The Lawfulness of Russian Use of Force in Crimea' (2014) 53 *Military Law and Law of War Review* 17, 34; Bílková (n 354) 39. In the Crimean case, Russia did not claim self-defence as a basis for the protection of its nationals, as done in the case of Georgia in 2008. On the other hand, the threat to Russian military installations and Russian military personnel stationed on the peninsula was used in conjunction with the threat to the local Russian civilian population, similarly to what was done in relation to the allegation of threats to Russian peacekeeping troops in South Ossetia in 2008 (for this aspect, see Tancredi, 'The Russian annexation of the Crimea' (n 354) 12). For the connection between self-defence, protection of nationals abroad and the 'passportisation' policy adopted by Russia regarding former members of the Soviet Union, see Council of the European Union, Independent International Fact-Finding Mission on the Conflict in Georgia (Volume II, September 2009) 147-150; Gray, 'The Protection of Nationals Abroad' (n 466) 136; Ronzitti, 'Rescuing Nationals Abroad Revisited' (n 445) 439-440.

⁴⁷¹ The representative of the United Kingdom to the Security Council questioned the threat to the local Russian population, not the justification itself. The same was made by the representative of the United States, according to who there would be no danger to ethnic Russians and therefore 'military action cannot

5.2. Analysis

The analysis of recent State practice proves that there is no established connection between any specific circumstance precluding wrongfulness and the aim of a State to rescue its nationals abroad. In some cases, there is a claim that the protection of nationals is done in connection to the exercise of self-defence, as made by Russia on the occasion of the 2008 Russo-Georgian War. This justification, as seen, was not repeated by Russia concerning the Crimean Crisis in 2014, despite similar circumstances.

In situations in which the intervention does not result in major armed action and there is reduced effects on the territorial State legal justifications are not provided by the intervening State and few substantial negative reactions from the international community are observed. This is the case of the Lebanon War in 2006, the largest operation in recent times to rescue foreign nationals, and also dozens of operations carried out by France in countries that were former colonies in Africa.⁴⁷² According to Ronzitti, the absence of negative reactions to some cases and the inclusion of such justification in domestic laws and manuals of military operations reveal an increasing trend of acceptance of the practice among the international community.⁴⁷³

It cannot be said, however, that the protection of nationals abroad constitutes a new exception to the prohibition of the use of force having the effect of precluding the wrongfulness of an illegal intervention. If considered as a special type of self-defence, the practice would have its legitimacy based on the justification provided for in Article 21 of the ARSIWA. If considered as a special type of necessity, the use of force would not be permitted to protect nationals abroad for the reasons listed in section 4.2. In both cases, the rescue of nationals abroad would not be considered a specific rule of the law of the use of force that derogates from the general rules of State responsibility. Finally, due to the lack of support in State practice as an autonomous legal basis, the hypothesis also cannot be considered as an autonomous circumstance precluding wrongfulness. At most, the protection of nationals abroad could be considered as an element of mitigation of international responsibility.⁴⁷⁴

be justified on the basis of threats that have not been made and are not being carried out'. A disqualification of the facts, and not of the justification, was also done by the representative of France (7125th meeting (3 March 2014) S/PV.7125, 4-6; 7134th meeting (13 March 2014) S/PV.7134, 7; 7157th meeting (16 April 2014) S/PV.7157, 8). See also M Vashakmadze, 'The Russian Practice of the Forcible Protection of Nationals Abroad: Legal Implications' in W Czapliński and others (eds), *The Case of Crimea's Annexation under International Law* (Scholar 2017) 181, 195.

⁴⁷² Such as in Mauritania (1977 and 1979), Chad (1978, 1979, 1990 and 2008), Gabon (1990 and 2007), Rwanda (1990 to 1994), Central African Republic (1996 and 2003), Côte d'Ivoire (2002 and 2004), Liberia (2003), Zaire (1978, 1991 and 1993) and Niger (2011). T Ruys, 'The Protection of Nationals Doctrine Revisited' (2008) *13 JCSL* 233, 251; Forteau, 'Rescuing Nationals Abroad' (n 442) 957.

⁴⁷³ Ronzitti, 'Rescuing Nationals Abroad Revisited' (n 445) 440. Ronzitti also considers such type of intervention as an autonomous exception to the prohibition of the use of force (N Ronzitti, *Diritto internazionale dei conflitti armati* (7th edn, Giappichelli 2021) 49). Part of these cases is currently identified as 'Non-Combatant Evacuation Operations' (NEOs), adopted by several States and accepted as legal by part of the doctrine (Ruys, 'The Protection of Nationals' (n 472) 265).

⁴⁷⁴ Sicilianos, *Les réactions décentralisées à l'illicite* (n 257) 475.

6. Conclusion

The four circumstances presented in this chapter are considered the main hypotheses that would justify the use of force in international law in addition to the exercise of individual or collective self-defence. Consent, armed countermeasures, humanitarian intervention in necessity, and the rescue of nationals abroad are contrasting hypotheses with varying degrees of utilization and acceptance which have in common only the attempt to excuse the use of armed force.

Consent rivals with self-defence as a widely claimed circumstance to justify the use of force. Applied to the use of force, however, consent has more strict requirements for the validity of authorization given, which is explained by the seriousness of the rights affected by armed intervention. To be valid and justify the use of force, consent must be given by the highest authority of the State recognized as legitimate and competent to do so. Elements such as international recognition and effective control over the territory of the State should be considered to determine the legitimacy of the authority requiring the use of force in some cases. These requirements are complementary to the general rule of consent as a circumstance precluding wrongfulness provided for in Article 20 of the ARSIWA, although not constituting special rules derogating from the general rules of State responsibility.

In opposition, recent international practice does not seem to admit the legality of the use of force based on armed countermeasures, which is also largely rejected by doctrine and international jurisprudence. The reason for this is found in the fact that the self-defence already performs functions attributed to armed countermeasures, justifying the use of force against a determined previous wrongful act, an armed attack. Questions such as the use of armed countermeasures to prevent armed attacks or in response to armed attacks by non-State actors are hypotheses that actually belong to the discussion of the limits of the concept of self-defence.

Something similar happens with the hypothesis of the use of force based on humanitarian intervention, connected with the circumstance of necessity. Recent State practice points to the non-acceptance of this justification by the international community. In any case, humanitarian intervention does not seem to be allowed under the law of State responsibility due to the fact that necessity is not admitted as a justification for the violation of rules specially designed to regulate exceptional situations. In the case of *jus ad bellum* rules applicable only in extreme situations of threat to the sovereignty and territorial integrity of a State by an armed attack, the only emergency measure admitted is self-defence. In this specific case, it could be said that self-defence acts as *lex specialis* of the general rules of State responsibility, being a specific case of application of necessity.

Intervention for the protection of nationals abroad is the hypothesis that has the least connection with the prevailing circumstances precluding wrongfulness. Its acceptance by State practice is considerable but uncertain, to the point of hindering a clear judgment about its legality. In some cases, this excuse was used to justify military occupations, which perverts the hypothesis and makes the analysis of its legality more problematic. In any case, the invocation of this kind of excuse is usually associated with the exercise of self-defence.

Excepting the case of consent, which provides for a stricter criterion of application than those provided for in the general rule, none of the circumstances analysed affect the application of the general rules of international responsibility of States and none of them can be considered as *lex specialis*. Most of the hypotheses raised are justifications constructed to excuse the unilateral use of force with the pretext to protect an essential interest against imminent danger. As pointed out, self-defence already provides a justification for specific actions in this case, in which the use of force is authorized.

CHAPTER 3 – THE USE OF FORCE AND LEGAL CONSEQUENCES OF INTERNATIONALLY WRONGFUL ACTS

The legal consequences of an internationally wrongful act are the core set of rules of the law of State responsibility for determining the legal relationships arising from the violation of an international obligation. The general rights and obligations of the injured and responsible States and other States are provided for in Part Two of the ARSIWA, which comprises general principles, the rules on reparation for injury, and an aggravated regime of State responsibility applicable to serious breaches of obligations under peremptory norms of general international law. The present chapter aims to analyse how primary rules related to the prohibition of the use of force may affect the general rules regarding the consequences of internationally wrongful acts (part one) or may deviate from them (part two).

Part I – Contribution of the Prohibition of the Use of Force to the General Legal Consequences of Internationally Wrongful Acts

1. Introduction

The basic principle of the law of State responsibility is that the breach of an obligation by a State entails its international responsibility, creating a new legal relationship between the interested States based on new rights and obligations that may vary with the rule violated and determines the legal consequences that will follow from the violation.⁴⁷⁵ As a general rule, rights and obligations derived from the commission of an internationally unlawful act are limited by the relationship between the victim State and the wrongdoing State. The general consequences of the violation of an obligation are provided for by Part Two of the ARSIWA, which establishes that as a consequence of the violation the State responsible has the duty to perform the obligation breached (Article 29), the obligation of cessation of the wrongful conduct (Article 30(a)), the obligation of offering assurances and guarantees of non-repetition of the wrongful act (Article 30(b)) and the obligation of reparation for the injuries caused by it (Article 31).

Some violations of international law may have additional consequences in respect to those provided for in Articles 29 to 31 of the ARSIWA. For instance, the contemporary law of State responsibility establishes additional consequences for serious breaches of international obligations protecting interests of the international community such as the duty of States to cooperate to bring to an end through lawful means any serious breach of obligation arising under a peremptory norm of international law (Article 41(1)), the duty of States not to recognize as lawful a situation created by a serious breach (Article 41(2)), and the duty of States not to render aid or assistance in maintaining the situation created by a serious breach (Article 41(2) *in fine*).

Both the general legal consequences of a wrongful act and the additional consequences creating obligations to third States contained in the regime of aggravated responsibility

⁴⁷⁵ Anzilotti, *Cours de droit international* (n 64) 467.

can also be observed in the cases of rules relating to the *jus ad bellum*, since the law of the use of force contains some rules guided by a logic of ‘communitarian action’ that goes beyond the bilateral logic of conventional legal relations.⁴⁷⁶ This aspect is explained by the fact that the prohibition of the use of force is considered a fundamental principle of international law that protects fundamental values of the international community and its enforcement justifies the establishment of special rules. Among these special rules is the possibility of the collective invocation of certain obligations for the wrongdoing State and obligations that arise for States not directly affected by serious violations of the prohibition of the use of force. It can be argued that some of these practices or rules regarding additional consequences established by the law of the use of force have influenced the development of rules of the general regime of aggravated responsibility. Thus, consequences that were previously developed by international law for the violation of the prohibition of the use of force began to be applied also concerning violations of rules protecting other common interests of States. This section is dedicated to exploring this statement and can be divided into two parts.

The first part refers to the practice of States and the United Nations concerning the recognition, invocation, and application of legal consequences of wrongful acts related to violations of the prohibition of the use of force. Some of the consequences generally attributed to violations of international law, in particular, the obligations for the wrongdoing State of cessation, provision of appropriate assurances and guarantees of non-repetition (section 1.1) and reparation (section 1.2), are regularly applied to violations of the prohibition on the use of force often through the action of the UN Security Council, which this way conveys a collective interest in the fulfilment of obligations that at first sight appear to be bilateral.

The second part refers to the regime of aggravated responsibility established by the ARSIWA and codified by the ILC partly based on the concept of international crimes of State, which included prominently the crime of aggression. In this way, it can be said that part of the existing regime of aggravated responsibility was strongly influenced by the consequences of serious violations of the prohibition on the use of force such as aggression (section 3.1). Among these consequences, already present in the law of the use of force, are collective obligations incumbent on third States, such as the obligation of cooperation (section 3.2), the obligation of non-recognition (section 3.3), and the obligation of non-assistance (section 3.4). Some conclusions are made in section 4.

2. Legal Consequences of the Illegal Use of Force

As a consequence of the fact that the law of State responsibility is meant to cover all possible violations of international law obligations by States, this regime aims to establish specific legal consequences which are in principle adaptable to each type of violation. Among the several possible legal consequences for internationally wrongful acts inevitably there will be a minimum common denominator of rules or ‘core legal consequences’ generally applicable to all wrongful acts. The core consequences of every internationally wrongful act identified in the ARSIWA are the duty to cease the wrongful

⁴⁷⁶ For Anzilotti the communitarian action of States to prevent or suppress a wrongful act was possible, although not being considered as an exercise of a right or a duty, just a ‘licit’ action. Anzilotti, *Teoria generale della responsabilità dello Stato* (n 3) 93.

conduct or to offer appropriate assurances and guarantees of non-repetition (Article 30) and to make full reparation for the injury caused by the wrongful act (Article 31).

This section reviews the practice related to such obligations as developed in the field of the law of the use of force. It can be argued that such a practice demonstrates that the possibility of a collective reaction to a wrongful act of a serious nature is influenced by how the international community, especially through the United Nations, deals with serious violations of the use of force. As will be seen, in many cases the invocation of the obligations of an aggressor State is made by the international community to protect collective values such as the maintenance of international peace and security, even if at first glance the obligations invoked have an immediate effect on the bilateral relationship between the aggressor and victim.

2.1. Obligations of Cessation and Non-repetition

According to Article 30 of the ARSIWA, the State responsible for the wrongful act is under an obligation to cease that act and to offer appropriate assurances and guarantees of non-repetition. The obligation of cessation seeks to ensure the end of continuous wrongful conduct, being a ‘negative aspect of future performance’.⁴⁷⁷ The obligation of cessation is especially relevant to the use of force due to the character of continuous acts of unlawful occupation of a territory or the maintenance of troops in another State without its consent, situation in which the wrongdoing State has an obligation to stop the use of force and to end the occupation by the withdrawal of its armed forces.⁴⁷⁸

Even if aimed at the discontinuance of a wrongful act that causes individual injuries to a State or a determined group of States, the obligation of cessation can assume a function of protection of collective interests of the international community ‘in the preservation of, and reliance on, the rule of law’.⁴⁷⁹ Such a function is also recognized by Article 48 of the ARSIWA, which establishes that any State other than an injured State is entitled to invoke the responsibility of another for breaches of obligations owed to a group of States or the international community as a whole and to claim the cessation of the internationally wrongful act and assurances and guarantees of non-repetition from the responsible State.

⁴⁷⁷ Commentaries to Article 30, para 1. Despite its recognition by the ARSIWA as a consequence of an unlawful act, the character of secondary rule of the obligation of cessation is questioned by some authors, including Special Rapporteur Arangio-Ruiz (G Arangio-Ruiz, Preliminary Report on State Responsibility, ILC Yearbook 1988, Vol II(1) 13 (para 31)). See also C Deman, ‘La cessation de l’acte illicite’ (1990) 23 *Revue Belge de Droit International* 476-495; G Gaja, ‘Do States have a duty to ensure compliance with obligations erga omnes by other States?’ in Maurizio Ragazzi (ed), *International Responsibility Today* (Martinus Nijhoff 2005) 31, 35; Kolb, *The International Law of State Responsibility* (n 17) 149.

⁴⁷⁸ Commentaries to Article 14, para 3. See also Ago, Seventh Report (n 46) 42 (para 28); Salmon, ‘Duration of the Breach’ (n 187) 386; O Corten, ‘The Obligation of Cessation’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 545. The character of a continuing wrongful act of military occupation was discussed by the ICJ in the *Armed Activities* case of 2005, in which the DRC claimed that the maintenance of forces from Uganda in its territory without its consent constituted a wrongful act of continuing nature and requested the cessation of the act by the immediate withdrawal of the troops of its territory (ICJ Written Proceedings 237-243). As a result of the departure of the Ugandan troops of the DRC in 2003 before the delivery of the decision on the merits, the Court rejected the allegation of the existence of a wrongful act which was continuing from the time of the beginning of the proceedings, despite determining the obligation of reparation for damages committed during the period of occupation. *Armed Activities on the Territory of the Congo* (n 14) 254-255 (paras 252-254).

⁴⁷⁹ Commentaries to Article 30, para 5.

Due to the protection of interests of the international community as a whole, not only other States but also international organizations can claim the cessation of a wrongful conduct violating certain obligations, which can be especially seen in the case of serious violations of the prohibition of the use of force.⁴⁸⁰ Accordingly, the practice of the United Nations demonstrates that in several situations the Security Council requested the withdrawal of the forces of a State from occupied territory,⁴⁸¹ buffer zones or protected areas for civilians or humanitarian personnel created in zones of conflict.⁴⁸² The cessation of wrongful uses of force is requested by the Security Council on some occasions without the use of its powers under Chapter VII of the UN Charter, a fact that seems to corroborate the conclusion about the customary character of the obligation.⁴⁸³

⁴⁸⁰ Commentaries to Article 30, para 4.

⁴⁸¹ Among the earlier episodes in which the evacuation of troops was requested by the Security Council, the withdrawal of North Korean forces to the 38th parallel in 1950 requested by Res 82 (25 June 1950) following the armed attack in June (Section I) and of Belgian forces from the Republic of Congo (Leopoldville) requested by Res 143 (14 July 1960, para 1) are prominent examples. In some cases, the Security Council first expressly recognized the military invasion of the territory before requiring the withdrawal, as done by Res 384 (22 December 1975) in relation to Indonesian forces from East Timor (para 2), and by Res 502 (3 April 1982) in relation to Argentinian forces from the Falkland Islands (Malvinas) (para 2). On other occasions, the Council highlighted the existence of violations of the sovereignty and territorial integrity of the victim State by the illegal use of force before determining the withdrawal of foreign troops. For instance, by Res 425 (19 March 1978) the Security Council called upon Israel to ‘cease its military action against Lebanese territorial integrity’ and to withdraw its forces from the territory (para 2, also present in Res 1559 (2 September 2004, para 2)). The Security Council also requested the withdrawal of South African forces from Zambia and Angola after the commission of ‘acts of aggression’ against both States, highlighting violations committed against their sovereignty and territorial integrity respectively by Res 466 (11 April 1980, paras 1 and 2) and 577 (6 December 1985, para 4). By Res 660 (2 August 1990), the Security Council condemned the Iraqi invasion of Kuwait and demanded ‘immediately and unconditionally’ the withdrawal of the invader forces, acting under Articles 39 and 40 of the UN Charter (paras 1 and 2). Res 1304 (16 June 2000) recognized the violation of the sovereignty and territorial integrity of the DRC and determined the departure of the forces of Uganda and Rwanda from Congolese territory based on Chapter VII in conformity with the timetable established by the Ceasefire Agreement of 2000, specifying the manner of compliance with the obligation (para 4). In Res 1862 (14 January 2009), the Council requested the evacuation of Eritrean troops from disputed territory with Djibouti but instead of recognizing the violation of sovereignty and territorial integrity over the land, it highlighted the existence of a ‘military action’ against Djibouti (para 5). In this case, the Security Council probably employed these words to avoid taking a position on the sovereignty over the disputed territory.

⁴⁸² In Res 802 (25 January 1993), for example, the Security Council requested the disengagement of the Croatian armed forces from the UN Protected Area under the protection of the UNPROFOR (para 1). The Council also requested the withdrawal of the Croatian armed forces from the zones of separation between the Croatian government and local Serb forces by Res 994 (17 May 1995, paras 2 and 10). Similarly, Res 819 (16 April 1993, para 2) and 1004 (12 July 1995, para 1) requested the evacuation of Bosnian Serbs forces from the vicinity of Srebrenica, designated as a safe area. In this particular case, the withdrawal of troops is related to compliance with a previous decision of the Security Council, not necessarily to the violation of the prohibition on the use of force.

⁴⁸³ By Res 54 (15 July 1948) the UN Security Council ordered the governments and authorities concerned in the Palestine War to the end of military action and the issue of cease-fire orders within three days (para 2). This is the case of Res 289 (23 November 1970), in which the Council demanded the cessation of the armed attack made by Portuguese forces against Guinea, including the withdrawal of troops and military equipment used in the attack (paras 1 and 2). This is also the case of UNSC Res 403 (14 January 1977), which requested the ‘immediate and total cessation’ of hostile acts committed by Southern Rhodesia against Botswana, including acts of harassment and military attacks from the border (para 1). A similar resolution was adopted in 1985 after a military operation in Gaborone by South African commandos, demanding the ‘immediate, total and unconditional cessation of all acts of aggression’ by South Africa against Botswana (UNSC Res 568 (21 June 1985) para 3). More recently, the Council requested by Res 1701 (11 August 2006) the immediate cessation of ‘all offensive military operation’ by Israel in Lebanon on the occasion of the Lebanese War of 2006 (para 1). For the earlier practice, see Bailey, *How Wars End I* (n 310) 110-123

Article 30 of the ARSIWA also establishes the obligation of the wrongdoing State to offer appropriate assurances and guarantees of non-repetition, which aims to reinforce the respect *pro futuro* of the obligation breached and to prevent the repetition of the violation.⁴⁸⁴ Such obligation is controversial and many authors consider it more a measure of progressive development of international law than the codification of a rule of customary law, a statement which is reinforced by the fact that international practice on the topic is still relatively scarce.⁴⁸⁵

Like the obligation of cessation, the obligation to offer assurances and guarantees of non-repetition can be claimed from the responsible State by other States and by international organizations, especially concerning serious violations of the prohibition of the use of force.⁴⁸⁶ In the case of the United Nations, the practice is not as uniform as concerning the obligation of cessation. On some occasions, the Security Council demanded from States to abstain from repeated behaviours of wrongful use of force.⁴⁸⁷ As evidenced by the practice of the organ, such measures are not generally adopted on the express basis of Chapter VII of the UN Charter, which could to some extent reinforce the customary basis of the obligation.

2.2. *Obligation of Reparation*

The obligation to make full reparation for the injury caused by the wrongful act is the second general consequence derived from a violation of international law and intends to

⁴⁸⁴ For this reason, the obligation is often considered to be a form of reparation. Crawford, *State Responsibility* (n 10) 475.

⁴⁸⁵ S Barbier, 'Assurances and Guarantees of Non-Repetition' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 551, 553. The *Armed Activities* case of 2005 is an important example involving the use of force, in which guarantees and assurances of non-repetition were sought by the DRC regarding the wrongful acts committed by Uganda before the withdrawal of its troops from the Congolese territory. The applicant requested the measures in the form of a solemn declaration from Kampala committing itself to refrain from pursuing a policy that violates the sovereignty of the DRC and the rights of its population and to issue specific instructions to this purpose to its agents. The Court rejected the request arguing that such guarantees would not be necessary because of the conclusion of an agreement between the countries, already establishing the mutual obligation to respect the sovereignty, territorial integrity, and non-interference in the internal affairs of each one. *Armed Activities on the Territory of the Congo* (n 14) 255 (para 255).

⁴⁸⁶ Vide Article 48 (2) of the ARSIWA.

⁴⁸⁷ This can be seen, for instance, in UNSC Res 189 (4 June 1964), in which the Council determined that South Vietnam should take all appropriate measures to 'prevent *any further* violation of the Cambodian frontier' after armed incidents in Cambodia (para 3). UNSC Res 573 (4 October 1985), adopted in response to the attack by Israel on the Palestine Liberation Organization (PLO) headquarters in Tunisia, demanded Israel to refrain from perpetrating '*such* acts of aggression' (para 2). This is also the case of Res 1093 (14 January 1997), which called upon Croatia and the Federal Republic of Yugoslavia to 'cease and refrain from all violations and from military or other activities which may increase tension', referring to the same kind of actions (para 4). By Res 479 (28 September 1980) the Security Council demanded that Iran and Iraq refrained from '*any further* use of force' during the conflict between both countries, a case in which Article 24 of the UN Charter was mentioned expressly (para 1). Similarly, by Res 1298 (17 May 2000) the Security Council demanded to Eritrea and Ethiopia to 'immediately cease all military action and refrain from the *further* use of force' (para 2). Some measures of limitation on a State's arsenal may be seen also as a measure to guarantee the non-repetition of the unlawful use of force, such as in the case of the destruction or removal of ballistic missiles and chemical and biological weapons adopted by the Security Council under Res 687 (3 April 1991, para 8) against Iraq. See for instance B Conforti, 'Non-Coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War' (1991) 2 *EJIL* 110-113. The limitation of weapons as a consequence of the use of force is analysed in section 3 of part two of the present chapter.

‘as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.⁴⁸⁸ The reparation for violations of the prohibition of the use of force presents some special features that will be analysed in part two of the present chapter. For the moment, it can be said that the general rules are also generally applied to such violations.

According to Article 48(2) of the ARSIWA, in the case of violations of obligations owed to a group of States or the international community as a whole, any State other than an injured State is entitled to claim from the responsible State the performance of the obligation of reparation ‘in the interest of the injured State or to the beneficiaries of the obligation breached’. Apart from a great deal of controversy sparked by the provision, which has already been extensively analysed by the doctrine,⁴⁸⁹ it is worth noting that the claim of the performance of the obligation of reparation can also be made through international organizations, such as the United Nations.

The first form of reparation, restitution, is provided for in Article 35 of the ARSIWA and consists of ‘re-establish the situation which existed before the wrongful act was committed’, taking into account the material possibility and the proportionality between the burden arising from restitution and the benefit generated by this form instead of compensation. Restitution can be applied in different ways to the violation of the prohibition of the use of force. In the case of the occupation of a territory through the illegal use of force, the withdrawal of troops of the wrongdoing State can be seen both as a measure of cessation of the wrongful act and restitution in respect of the occupied territory, as well as the return of people and goods seized in the process of occupation.⁴⁹⁰ In addition to the restitution of occupied territory through the withdrawal of troops (seen in the previous section), the UN Security Council affirms the obligation of restitution in the cases of unlawful use of force by the obligation to release people detained or to return property unlawfully taken in military occupations or operations.⁴⁹¹

⁴⁸⁸ *Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 47.

⁴⁸⁹ B Graefrath, ‘Responsibility and Damages Caused: Relationship between Responsibility and Damages’ (1984) 185 *RCADI* 9-149; M Iovane, *La riparazione nella teoria e nella prassi dell’illecito internazionale* (Giuffrè 1990); B Stern, ‘The Obligation to Make Reparation’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 563-572; E Fasoli, *La riparazione dei danni immateriali nei rapporti tra Stati* (Editoriale Scientifica 2012).

⁴⁹⁰ Commentaries to Article 35, para 6. Several examples may be found in the jurisprudence of the International Court of Justice. In the *Temple of Preah Vihear* case of 1962, the ICJ considered that Thailand was under the ‘obligation to withdraw any military or police forces, or other guards or keepers’ stationed in the Temple or its vicinity and to return objects that have been removed from the area by Thai authorities (ICJ Rep 37). In the *Armed Activities* case of 2005, the DRC requested as measures of restitution the evacuation of the armed forces of Uganda from its territory, the liberation of persons detained, and the restitution of Congolese natural resources unlawfully explored by the occupying Power. The ICJ considered that Uganda was under the obligation to make reparation to the DRC for the injuries committed by the wrongful acts against the Congolese territory, not commenting on the requests of restitution (*Armed Activities on the Territory of the Congo* (n 14) 281 (para 257)). Until April 2021, the Court had not yet ruled on the reparation due to the DRC. In the case concerning *Land and Maritime Boundary between Cameroon and Nigeria* of 2002, the Court decided that the parties had the obligation to withdraw any administration or military or police forces from the areas that according to the judgment fell within the sovereignty of the opposite party (ICJ Rep 451-452 (para 315)).

⁴⁹¹ This was made, for instance, by UNSC Res 268 and 275 (28 July and 22 December 1969), in which the Security Council requested to Portugal respectively the release and repatriate civilians from Zambia

The second form of reparation is compensation or reparation by equivalent, that according to Article 36 of the ARSIWA is the obligation of the wrongdoing State to compensate the damage caused ‘insofar as such damage is not made good by restitution’. As the purpose of compensation is ‘to fill in any gaps so as to ensure full reparation for damage suffered’,⁴⁹² the obligation is present in many cases of unlawful use of force due to the material damage that is normally observed as a result of the use of armed force.⁴⁹³

The practice of the UN Security Council concerning compensation for injuries generated by the unlawful use of force can be divided into two stages. In the first, the obligation to compensate is stated until 1990 in several resolutions along with other measures as a consequence of armed attacks, acts of aggression, and invasions.⁴⁹⁴ The second period is observed since 1990 with the establishment of a mechanism for adjudicating claims for

kidnapped and to return property unlawfully taken from Zambian territory by its forces (paras 3 and 4) and the release of a Guinean civilian plane, a motor barge and their passengers captured by Portuguese authorities in military operations in Guinea (paras 3 and 4). Similarly, the Security Council requested by Res 316 and Res 317 (26 June and 21 July 1972) the release of Syrian and Lebanese military and security personnel abducted by Israel on Lebanese territory (para 3). UNSC Res 387 (31 March 1976) requested the restitution of equipment and material seized by South Africa from the territory of Angola (para 4). As a consequence of the Iraqi invasion of Kuwait, the Security Council requested through Res 667 (16 September 1990, para 2) and 686 (2 March 1991, para 3) the release of foreign nationals abducted by Iraq in the territory occupied and of prisoners of war, basing its actions on Chapter VII.

⁴⁹² Commentaries to Article 36, para 3.

⁴⁹³ The obligation to compensate damages caused by the illegal use of force is often recognized by the ICJ. In the *Nicaragua* case (1986), the applicant claimed compensation for several injuries caused by the military and paramilitary activities of the United States in its territory, including loss of life, physical damage to property, and damage to the economy of the country. The Court recognized the obligation of the United States to make reparation to Nicaragua for all injuries caused to it by breaches of the prohibition of the use of force, although it did not decide on the amount of reparation due (*Military and Paramilitary Activities in and against Nicaragua* (n 14) 149). In the *Oil Platforms* case (2003), Iran requested compensation from the United States for the attack on its oil platforms, including compensation for the destruction of the facilities and the loss of life that resulted from it. As the Court rejected the contention that the attacks were a violation of the Treaty of Amity, Economic Relations and Consular Rights between both States, i.e., the legal basis for Iran’s claims, it also rejected the request for compensation made by Iran (*Oil Platforms* (n 227) 218). Similarly, in the *Armed Activities* case, the DRC claimed compensation for several injuries caused by the armed forces of Uganda or irregular forces supported by it, including the destruction of the infrastructure, the exploitation of natural resources of its territory, and economic losses caused by the reduction of economic activities and investments. The Court recognized the obligation of Uganda to make reparation to the DRC for the injuries caused and in 2020 appointed experts to evaluate the loss of human life due to the armed conflict, the loss of natural resources, and the property damage by the actions of Ugandan armed forces (*Armed Activities on the Territory of the Congo* (DRC v Uganda) (Order of 12 October 2020) 2).

⁴⁹⁴ By Res 189 (4 June 1964) the Security Council requested the payment of ‘just and fair’ compensations to Cambodia by South Vietnam as a result of the penetration of its troops into Cambodian territory (para 1). A similar request for compensation was made by Cambodia in 1970 against the United States for the destruction of a barracks of the Khmer police, the deaths of three nationals, and the wounding of three others following an attack by forces of the United States and South Vietnam against Cambodian territory (UN Doc S/9694). A ‘full compensation’ for damages to life and property was also requested by UNSC Res 290 (8 December 1970) following the invasion of Guinea by Portugal, including also the request of support by the Secretary-General in assisting Guinea in the determination of the extent of damage caused (para 3). By UNSC Res 455 (23 November 1979), the Security Council requested the payment of ‘full and adequate compensation’ to Zambia for the damage to life and property resulting from acts of aggression of Southern Rhodesia, which were ‘aimed at destroying the economic infrastructure’ of the country (para 5). The Council also requested ‘full and adequate’ compensation to be paid by South Africa for the loss of life and property following its ‘acts of aggression’ against Angola in Res 387 (31 March 1976, para 4) and 567 (20 June 1985, para 4), Botswana in Res 572 (30 September 1985, para 4) and Lesotho in Res 580 (30 December 1985, para 2).

compensation after the Gulf War.⁴⁹⁵ This step represents a change in the way the Security Council deals with issues of State responsibility, especially for its role regarding reparations for serious breaches of obligations owed to the international community as a whole. Due to their special characteristics, the measures established by UNSC Res 687 (1991) will be analysed in part two of the present chapter.

The third form of reparation is satisfaction, an exceptional and symbolic remedy that aims to repair injuries suffered by the victim State that are not financially assessable, such as legal, moral, or political injuries to the victim State.⁴⁹⁶ This modality of reparation imposes a form of self-inflicted punishment by the wrongdoing State, having a satisfactory or afflictive nature that should not be confused with a 'punitive' function.⁴⁹⁷ For its afflictive nature, satisfaction is strictly linked to the illegal use of force in the sense that violations of the State's sovereignty or territorial integrity are especially considered as forms of moral or political damages regardless of the occurrence or not of actual material damage.⁴⁹⁸ In general, requests of satisfaction related to the illegal use of force are made after violations of the territorial integrity and sovereignty of the victim State,⁴⁹⁹ which includes invasion of territory or border incidents⁵⁰⁰ and attacks on external

⁴⁹⁵ Due to the extensive human and material damage resulting from the invasion of Kuwait by Iraq in 1990, the Council decided to create a fund to pay compensations for claims regarding compensation for 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations' resulted from the invasion. The fund was established by UNSC Res 687 (8 April 1991) and is fed by contributions made by Iraq according to the percentage of the value of its exports of petroleum and is administered by the United Nations Compensation Commission, that is a subsidiary body of the Security Council created for that purpose (paras 16-19).

⁴⁹⁶ Commentaries to Article 37, paras 1 and 3.

⁴⁹⁷ As observed by Morelli, '[L]a soddisfazione presenta una certa analogia con la pena. Anche questa adempie una funzione satisfattoria. D'altra parte, la soddisfazione, al pari della pena, ha un carattere afflittivo, in quanto persegue il fine a cui è diretta mediante un male che il soggetto responsabile subisce. La differenza sta in ciò che, mentre la pena è un male che viene inflitto da un altro soggetto, nella soddisfazione il male consiste in una certa condotta dello stesso soggetto responsabile' (Morelli, *Nozioni di Diritto Internazionale* (n 93) 358). As noted by Arangio-Ruiz, '[t]hough its role is certainly not a punitive one, (satisfaction) does perform the very general function of dissuasion from, and prevention of, the commission of wrongful acts' (G Arangio-Ruiz, Second Report on State Responsibility, ILC Yearbook 1989, Vol II(1) 40 (para 136)).

⁴⁹⁸ C Barthe, 'Réflexions sur la satisfaction en droit international' (2003) 49 *AFDI* 105, 106-107; E Wyler and A Papaux, 'The Different Forms of Reparation: Satisfaction' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 623, 625.

⁴⁹⁹ This can be seen regarding the *Corfu Channel* controversy. As a result of the incidents of May and October 1946, the United Kingdom demanded an apology from Albania for the 'unprovoked attacks upon the Royal Navy', as well as assurances of non-repetition and reparation for the damage suffered. Albania rejected the request arguing that battery fire against the HMS Orion and HMS Superb on 15 May was in response to an act 'directed against the sovereignty of Albania' by the warships and that it was not responsible for the incident of 22 October which damaged the destroyers HMS Saumarez and HMS Volage (UN Doc S/247, 14). Before the ICJ, the Special Agreement between the parties questioned the existence of a duty of Albania to pay compensation for the incident of 22 October and of the United Kingdom to give satisfaction related to its activities in Albanian waters. In its decision of 9 April 1949, the Court rejected the claim according to which the United Kingdom has violated Albanian sovereignty, considering first the Corfu Channel as an international waterway and the presence of British warships as licit. However, the Court considered that the minesweeping operations carried out by the Royal Navy constituted a violation of Albanian sovereignty (*Corfu Channel Case* (n 178) 26-35). According to the Court, this declaration of violation was in accordance with the request of Albania and was 'in itself appropriate satisfaction' (ICJ Rep 35).

⁵⁰⁰ This is observed in episodes of violations of the territory of Cambodia during the Vietnam War. In 1964 Cambodia complained of a raid of South Vietnamese forces into its territory, which resulted in several

manifestations of the State, such as military units, military installations, and diplomatic missions.⁵⁰¹

The obligation of satisfaction ‘may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality’ and the most common form of satisfaction is the official and public apology, which aims at retraction of the offence committed against the victim State and to ‘cancel’ its effects.⁵⁰² However, other forms of satisfaction are admitted, such as the investigation and conviction of the agents responsible for the violation and the payment of a pecuniary sum,⁵⁰³ demands of abrogation of legislation, the institution of free elections, restoration of fundamental rights and freedoms, dismantling of polluting industrial plants and the obligation of the wrongdoing State not to refuse demands of fact-finding.⁵⁰⁴ State practice demonstrates

Cambodian nationals being killed and property looted (UN Doc S/5967). Even after South Vietnam recognized the violation and apologized for it, the UN Security Council passed Res 189 (4 June 1964), which reaffirmed Cambodia’s territorial integrity, took note of the ‘apologies and regrets tendered to the Royal Government of Cambodia in regard to those incidents and the loss of life they have entailed’ and requested that ‘just and fair compensation should be offered’ to Cambodia as well as appropriate measures to prevent further violations (preambular para 4, operative paras 2 and 3). In 1969 Cambodia requested compensation for the victims and damage caused by an attack with machine gun fire and napalm made by the United States and South Vietnam against a Cambodian military post at Dak Dam. Although Cambodia did not ask specifically for apologies (UN Doc S/9526; S/9527), the United States apologized for the attack and agreed to pay compensation for the injuries (UN Doc S/9692). A similar situation occurs regarding the violation of the territorial sea of a State. After the capture of the USS *Pueblo* and its crew by North Korea in 1968, the United States apologized for ‘the grave acts of espionage committed by the US ship’ and gave ‘firm assurance that no US ship will intrude again in future into the territorial waters’ of North Korea. The United States claimed that the apology was made for ‘purely humanitarian reasons’ to get the crew back (K L Gatz (edn), *Foreign Relations of the United States: 1964 - 1968*, vol XXIX (United States Government Printing Office 2000) documents 316 and 324; see also A Watts, ‘The Art of Apology’ in M Ragazzi (ed), *International Responsibility Today* (Martinus Nijhoff 2005) 107, 113). Border incidents in Latin America also generated the obligation of reparation by satisfaction. In March 2008 Colombia apologized for military operations against training camps of the Revolutionary Armed Forces of Colombia (FARC) in Ecuadorian territory, despite claiming that the attack was carried out in its own territory (UN Doc S/2008/146; C Ospina, Permanent Representative of Colombia to the OAS, Speech of Ambassador Ospina before OAS (Washington, 4 March 2008) <http://www.oas.org/en/media_center/speech.asp?sCodigo=08-0021> accessed 20 April 2021. See also Gray, *International Law and the Use of Force* (n 226) 225). In January 2013, three armed Bolivian soldiers entered Chile’s territory and were detained by Chilean police forces. The facts were confirmed by Bolivia and, according to Chile, an apology was made by La Paz (A/67/764), although not confirmed by Bolivia (UN Doc A/67/743).

⁵⁰¹ The Cuban government apologized and agreed to compensate for the damage caused in 1980 by the invasion of the Bahamas airspace and the aerial attack which resulted in the sinking of the patrol vessel HMBS *Flamingo*, carried out after the attempt of the vessel to arrest Cuban fishermen who would be illegally in the territorial waters of the Bahamas (UN Doc S/13955). Likewise, as a result of the bombing of the Chinese Embassy at Belgrade in 1999 by NATO, Beijing expressed its ‘utmost indignation and severe condemnation’ of the action, classified as a ‘gross violation of Chinese sovereignty’ (UN Doc A/53/952 - S/1999/535). The US Secretary of State Madeleine Albright claimed that the attack, which resulted in the death of three Chinese journalists and other 27 injured, was accidental and apologized for the loss of life, injury, and damages resulting from the attack (2000 *Digest of United States Practice in International Law* 426). In 2004, Côte d’Ivoire requested ‘prompt apologies from France’ and compensation for the damage caused after the destruction of the fleet of the Ivorian Air Force by France. The acts were retaliation for an attack suffered by a France airbase in the country on 6 November and were classified by Côte d’Ivoire as ‘unfriendly attacks on the honour and sovereignty’ (UN Doc S/2004/910). Regarding the concept of ‘external manifestations of a State’, see Ruys, ‘*Armed Attack*’ (n 217) 99 *et seq.*

⁵⁰² Commentaries to Article 37, para 5; Ottolenghi (n 413) 445.

⁵⁰³ Ottolenghi (n 413) 445; Morelli, *Nozioni di Diritto Internazionale* (n 93) 358.

⁵⁰⁴ G Arangio-Ruiz, Seventh Report on State Responsibility, ILC Yearbook 1995, Vol II(1) 10-11 (para 32).

that the payment of pecuniary satisfaction⁵⁰⁵ and the request of an internal investigation⁵⁰⁶ are especially relevant in the case of violations of the prohibition of the use of force.

The recognition that a wrongful act has been committed by a State is considered by some international tribunals as a form of satisfaction.⁵⁰⁷ It is possible to question whether other international organs such as the UN Security Council or the UN General Assembly may also provide reparation for non-material injuries committed by States by merely recognizing violations of the prohibition on the use of force. This position is defended by Graefrath:

The explicit statement of the violation of an international obligation expressed by the Security Council, today, is generally regarded as an important form of satisfaction, even if it naturally does not replace an apology, the prosecution of culprits or the compensation of material damages. The authoritative public statement that an international obligation has been violated expressed by a competent

⁵⁰⁵ In the *Armed Activities* case, the DRC requested official apologies from the Ugandan authorities for the occupation of its territory and insults against the emblems of the State, a pecuniary satisfaction to assure an integral reparation and ‘in the interest of the international community as a whole, to dissuade Uganda from repeating its policy of aggression’. *Armed Activities on the Territory of the Congo* (DRC v Uganda) (Memorial of the DRC of 6 July 2000) ICJ Written Proceedings 266. The judgment on the question of reparations was announced to be delivered by the ICJ by February 9, 2022.

⁵⁰⁶ In 1983 the Nicaraguan government submitted a formal complaint against Honduras regarding armed attacks in its territory by mercenaries with the support of Honduras, demanding an investigation of the incidents (UN Doc S/15952). That same year, Nicaragua complained of a similar situation, in which mercenaries attacked a Nicaraguan customs post from Costa Rica without any reaction from the country’s authorities. Nicaragua demanded from Costa Rica ‘the immediate investigation of the facts, the detention, disarmament and prosecution of those involved and the discontinuance of such criminal actions’ (UN Doc S/16012). Similarly, in 1984 Honduras protested against the invasion of its territory by members of the Sandinista People’s Army, considering the attacks as ‘acts of aggression’ and urging an investigation on the events by the Nicaraguan authorities (UN Doc S/16285). In the same year, Honduras protested the downing of a helicopter belonging to the Honduran Air Force in the Gulf of Fonseca, resulting in the death of eight persons. The act, attributed to Nicaragua and considered as an ‘expression of an act of aggression’ and ‘compared only to the most heinous crimes against humanity recorded by history’, led to the request for a ‘scrupulous investigation of the crime’, followed by ‘appropriate sanctions to the culprits’ and compensation to the families of the victims and to Honduras (UN Doc A/39/256 – S/16560). The DRC requested also in the proceedings of the *Armed Activities* case the establishment of disciplinary action against Ugandan officers accused of ‘serious misconduct and criminal acts’ regarding the acts of aggression and human rights violations (*Armed Activities on the Territory of the Congo* (DRC v Uganda) (Memorial of the DRC of 6 July 2000) ICJ Written Proceedings 268). After the shooting down of a Georgian drone in the territory of Abkhazia by the Russian air force in 2008, Tbilisi requested an official apology from Russia ‘for the act of aggression’, appropriate compensation for the material loss, and an international inspection of the military base from which the aircraft that carried out the attack would have taken off (UN Doc A/62/850 - S/2008/345). As a result of the unsuccessful attempt of intervention by dissidents and mercenaries in Venezuela in 2020, which Caracas considered as an ‘armed attack’ and ‘aggression’ and attributed to Colombia and the United States, Venezuela demanded to the authorities of the latter to ‘promptly initiate the relevant investigations for the purpose of apprehending’ the authors of the operation and to comply with international legal obligations, including the extradite or prosecute principle (UN Doc A/74/861 - S/2020/399).

⁵⁰⁷ This possibility was accepted by the ICJ in the *Corfu Channel* case of 1949 (*Corfu Channel Case* (n 178) 35) and the *Bosnian Genocide* case of 2007 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 13) 234-235 (paras 463-465)). This is also the practice of human rights courts, such as the Inter-American Court of Human Rights and the European Court of Human Rights. J P Costa, ‘Responsibility for Violations of Human Rights Obligations: European Mechanisms’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 763, 770-771; J M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, CUP 2013) 204-205. See in general Watts (500) 107-116.

international organ or independent body contains an essential element of satisfaction for the injured State. It affirms continuation of the violated obligation and is aimed at protecting it against erosion that might threaten from frequent violations. This function is even more effectively fulfilled through a public declaration by an independent organ than through an apology or the like.⁵⁰⁸

Nevertheless, the ILC considers that only a declaration by a judicial organ can be treated as a form of satisfaction and in the case in which this declaration is sought as such by one or more parties to the dispute.⁵⁰⁹ In the case of the UN Security Council, this correlation cannot be maintained due to the character of the latter organ as a non-judicial body. As pointed out by Forteau, a declaration by the Security Council is not objective and legitimate as a form of satisfaction since the function of the recognition of a violation depends on the perception of the actors involved, although it may be considered as a form of pressure against the wrongdoing State and an attenuated and indirect measure of satisfaction by the victim State.⁵¹⁰

3. Aggravated Consequences of the Illegal Use of Force

The recognition of legal concepts related to the protection of collective values impacted international law in several ways. The system of collective security of the United Nations was a solution found in the post-war period to deal with the maintenance of international peace and security. In a later stage, specific rules were developed by the law of State responsibility to address violations of obligations *erga omnes* or peremptory rules of general international law. Given the primacy of the maintenance of international peace and security as a collective value by the international community, it is possible to consider that the rules established to deal with the violation of the prohibition of the use of force by States were adapted or extended to other serious violations of international law.

This section aims to analyse how the rules of the *jus ad bellum* have influenced the formulation of a special regime of State responsibility aimed to govern the consequences of serious violations of rules protecting the fundamental values of the international community. Preliminary it will examine the development and origins of the current regime of aggravated responsibility (section 3.1). The section then analyses the content of such a regime, which is characterized by the formulation of additional obligations to third States such as the obligations of cooperation (section 3.2), non-recognition (section 3.3), and non-assistance (section 3.4).

3.1. The Influence of the Prohibition of the Use of Force in the Development of the Regime of Aggravated Responsibility

The regime of aggravated responsibility established by the ARSIWA is the (impoverished) result of a rich theorization of the concept of international crimes by States carried out by the ILC for almost four decades, which in its turn was largely inspired by the specific and particularly serious wrongful act of aggression. In this way,

⁵⁰⁸ Graefrath, 'Responsibility and Damages Caused' (n 489) 86.

⁵⁰⁹ As observed by the Commission, 'such declarations are not intrinsically associated with the remedy of satisfaction'. Commentaries to Article 37, para 6.

⁵¹⁰ M Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'État* (Pedone 2006) 194.

there is a direct link between the general regime of consequences of serious breaches of obligations of peremptory nature and well-established consequences resulting from serious violations of the prohibition of the use of force.

The notion of a special regime of consequences for serious violations of certain obligations of international law related to human rights, international humanitarian law, or the maintenance of international peace and security has developed since the late 1940s and was reinforced by the recognition by international law of the existence of rules of *jus cogens* and *erga omnes* obligations.⁵¹¹ This *zeitgeist* was expressed by Jessup:

Breaches of the law must no longer be considered the concern of only the state directly and primarily affected. There must be something equivalent to the national concept of criminal law, in which the community as such brings its combined power to bear upon the violator of those parts of the law which are necessary to the preservation of the public peace.⁵¹²

The existence of different consequences arising from serious violations of obligations protecting values of the international community also drove the change in the approach of the ILC in its efforts of codification of the rules of State responsibility and even in the purpose of such efforts.⁵¹³ The notion of the existence of a regime dealing with consequences of serious violations of international law was introduced in the works of the Commission by Special Rapporteur Ago through the concept of international crimes of States. Draft Article 19 [1976] defined an ‘international crime of States’ as a breach of an international obligation ‘essential for the protection of fundamental interests of the international community’ and stipulated criteria for identifying such breaches.⁵¹⁴ Examples of international crimes were also provided by Draft Article 19 [1976], among which ‘a serious breach of an international obligation of essential importance for the maintenance of international peace and security, *such as that prohibiting aggression*’ was listed first.⁵¹⁵ Aggression was considered by Ago as ‘the supreme international crime’

⁵¹¹ G. Abi-Saab, ‘The Concept of “International Crimes” and its Place in Contemporary International Law’ in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of State* (De Gruyter 1989) 141, 142; G. Gaja, ‘Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts’ in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of State* (De Gruyter 1989) 151-160.

⁵¹² P. C. Jessup, *A Modern Law of Nations* (Macmillan 1948) 2.

⁵¹³ Several members of the Commission and States in the Sixth Committee of the General Assembly proposed that the Commission prioritize the rules of international responsibility related to violations of international peace and security (Ago, First Report (n 6) 137 (para 75) and 140 (para 93)). In addition, the General Assembly itself had emphasized that the codification of the international law governing State responsibility would be ‘desirable for the maintenance and development of peaceful relations between States’. UNGA Res 799 (VIII) (7 December 1953).

⁵¹⁴ ILC, Report of the ILC on the work of its twenty-eighth session’ (3 May-23 July 1976) UN Doc A/31/10, 75. R. Ago, Fifth Report on State Responsibility, ILC Yearbook 1976, Vol II(1) 54 (para 155). See also M. Spinedi, ‘Legislative History’ in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of State* (De Gruyter 1989) 7, 22.

⁵¹⁵ ILC, Report of the ILC on the work of its twenty-eighth session’ (3 May-23 July 1976) UN Doc A/31/10, 75 (emphasis added).

with a superior ‘degree of seriousness’ than other international crimes and was widely accepted as a serious wrongful act for a long time.⁵¹⁶

The responsibility for establishing the consequences of international crimes was entrusted to Special Rapporteur Willem Riphagen, which considered that the consequences of the violations stated in Draft Article 19 [1976] would go beyond the ‘core legal obligations’ generally applicable to all wrongful acts and also affect third States. Such effect was explained by the *erga omnes* character of such violations and the application of a sort of ‘principle of solidarity’ between the members of the international community when confronted with an international crime.⁵¹⁷ In this sense, Riphagen proposed that third States would be obliged not to recognize as legal the situation created by an international crime, not to render aid or assistance to the wrongdoing State in maintaining the situation created and to assist other States to fulfil the two previous obligations.⁵¹⁸

A simplified version of Riphagen’s proposals was adopted by the Commission in the First Reading of the ARSIWA in 1996 but the consensus on the concept and place of international crimes in the Draft Articles has changed.⁵¹⁹ Based on several justifications, Special Rapporteur Crawford proposed to exclude the concept of international crimes from the ARSIWA.⁵²⁰ Crawford’s proposition faced a strong division inside the

⁵¹⁶ Ago, Fifth Report (n 514) 39 (para 117); B Graefrath and M Mohr, ‘Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait’ (1992) 43 *Austrian Journal of Public and International Law* 109-138. Aggression began to be used as a synonym for the illicit use of force after the First World War and even considered as an international crime of States by some instruments, notably the Geneva Protocol of 1924. The preambular paragraph 3 of the Protocol considered that ‘a war of aggression constitutes a violation of this solidarity and an international crime’ (‘Protocol for the Pacific Settlement of International Disputes’ (1925) 5 *Yearbook of the League of Nations* 609-619). See also Brownlie, *International Law and the Use of Force by States* (n 20) 351-358.

⁵¹⁷ W Riphagen, Sixth Report on State Responsibility, ILC Yearbook 1985, Vol II(1) 14 (Commentary 6 to Article 14).

⁵¹⁸ Riphagen, Third Report (n 9) 48-50 (Article 6); W Riphagen, Fourth Report on State Responsibility, ILC Yearbook 1983, Vol II(1) 10 (para 50). Not all international crimes would have the same consequences, but for Special Rapporteur Riphagen the consequences suggested could be considered as a ‘minimum common element’ of those. In the case of aggression, for instance, in addition to the minimum consequences related to international crimes third States would have the same rights as the victim State to use military force against the aggressor State through the exercise of collective self-defence. Riphagen’s proposals on the existence of specific consequences for international crimes were mostly accepted by the Commission and were included in Draft Articles 14 (regarding international crimes in general) and 15 (regarding acts of aggression) of the Second Part of the Draft Articles. Riphagen, Sixth Report (n 517) 13-15.

⁵¹⁹ Report of the ILC on the work of its forty-eighth session, UN Doc A/51/10, ILC Yearbook 1996, Vol II(2) 64 (Article 53). Although personally opposed to the idea of international crimes of States, Special Rapporteur Arangio-Ruiz contributed to the regime of consequences of serious violations of international obligations, in special regarding special features of the obligation of reparation and the regime of countermeasures. Arangio-Ruiz also proposed additional consequences for international crimes such as the implementation of the *aut dedere aut judicare* principle and the obligation to cooperate with international bodies, some of which are analysed in part two of the present chapter, and specific solutions for the institutionalization of the consequences of international crimes, which are analysed in chapter 4. The suggestions of the Special Rapporteur were rejected by the Commission.

⁵²⁰ Taking advantage of some negative reactions in the Sixth Committee, Crawford criticized the concept of international crimes adopted by Draft Article 19 [1976] and the regime elaborated in the following years. Although recognizing the existence of an ‘embryonic practice’ of States supporting the notion of international crimes, the Special Rapporteur observed a discrepancy between the alleged gravity of international crimes and the limited consequences drawn from them by the Commission after the rejection of Arangio-Ruiz’s proposals (Crawford, First Report (n 7) 9-14 (paras 43-54) and 23 (paras 89-91)). A ‘loud and vociferous but sparse’ (Mr Pellet, 2533rd meeting (20 May 1998), ILC Yearbook 1998, Vol I,

Commission and the compromise reached was to replace the notion of international crimes in the ARSIWA with a set of specific rules for consequences of serious breaches of obligations of peremptory nature. As a consequence, Chapter III was added to the Second Part of the ARSIWA, and this Chapter together with Article 48 (Chapter I of the Third Part) contributes to establishing a ‘regime of aggravated responsibility’.⁵²¹

A two-step approach was adopted, in which ‘less serious’ wrongful acts entail the consequences described in Chapter I of Part Two of the ARSIWA⁵²² and ‘serious’ wrongful acts entail the application of the general consequences provided for in Chapter I and also the additional consequences provided for in Chapter III of Part Two of the ARSIWA, that is, the obligations of cooperation (Article 41, paragraph 1), non-recognition (Article 41, paragraph 2) and non-assistance (Article 42, paragraph 2 *in fine*). In this sense, these consequences represent an additional step to the general consequences of internationally wrongful acts. According to Article 40(1), the regime is applicable only as a result of a ‘serious breach by a State of an obligation arising under a peremptory norm of general international law’.⁵²³ Article 41 establishes as consequences of such serious breaches the duty to cooperate to bring to an end through lawful means the breach, the duty not to recognize as lawful a situation created by the breach, and the duty not to render aid or assistance in maintaining the situation created.⁵²⁴ In practice, the logic behind the concept of international crimes continued to be present in the ARSIWA in the form of a quite limited special regime of aggravated responsibility.⁵²⁵

100 (para 17)) opposition to the concept of international crime has been emerging among the members of the Commission and in the Sixth Committee. Claims that the concept was ‘criminalizing’ international responsibility, was an ‘indigestible, politically charged brew’, and that it could make the Security Council ‘unease’ condemning the conduct of States have been made (respectively, Mr Schwebel (1601st meeting (2 June 1980), ILC Yearbook 1980, Vol I, 92 (para 13); Mr Simma (2534th meeting (22 May 1998), ILC Yearbook 1998, Vol I, 105 (para 10)); and Mr Crawford (2532nd meeting (19 May 1998), ILC Yearbook 1998, Vol I, 96 (para 77)). See also Spinedi (n 514) 87.

⁵²¹ Despite being part of the regime of aggravated responsibility, Article 48 of the ARSIWA provides for rules of invocation of responsibility by a State ‘other than an injured State’ and will be dealt with in chapter 4.

⁵²² Those are the duty of performance (Article 29), the obligations of cessation and provision of assurances and guarantees of non-repetition (Article 30), and the obligation to make full reparation (Article 31 and 34 to 39).

⁵²³ Article 40 is similar to former Draft Article 19 [1976] by establishing that the regime is applicable when the elements of a violation of an obligation arising under a peremptory norm of general international law and the gravity of the breach are met, although not trying to define those breaches as its predecessor. According to the Commentaries on Article 40, the obligations to which the article refers arise from ‘those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values’ (para 3), such as the prohibition of aggression, the prohibition against slavery, genocide and racial discrimination, the prohibition of torture, basic rules of international humanitarian law and the obligation to respect the right of self-determination, as provided by the Commission in a non-exhaustive list (paras 4-6).

⁵²⁴ Article 41 is basically the same as the provision suggested in 1982 in Draft Article 6 by Special Rapporteur Riphagen regarding the consequences of international crimes. See also Pellet, ‘Les articles de la CDI’ (n 264) 11.

⁵²⁵ In its final form, the regime contained a ‘disguised reference to the notion of crime, the crime that dare not speak its name’, as feared by Special Rapporteur Crawford (Crawford, First Report (n 7) 21 (para 81)). See also E Wyler, ‘From ‘State Crime’ to Responsibility for ‘Serious Breaches of Obligations under Peremptory Norms of General International Law’’ (2002) 13 *EJIL* 1147, 1158. As observed by Arcari, the absence of mention of Articles 40 and 41 by the ICJ in the advisory opinions regarding the *Wall* (2004) and *Chagos* (2019) can be read as a sign of the ‘weakening’ of the aggravated regime adopted by the ARSIWA. Arcari, ‘Forma o sostanza’ (n 10) 205-207.

3.2. *Obligation of Cooperation*

According to Article 41(1) of the ARSIWA, ‘States shall cooperate to bring to an end through lawful means’ serious breaches of obligations arising under peremptory norms of general international law, a provision recognized as a ‘positive duty to cooperate’.⁵²⁶ For Special Rapporteur Riphagen, the obligation is an expression of a duty of mutual assistance between third States ‘required and justified by the solidarity in the face of an infringement of fundamental interests of the community of States as a whole’.⁵²⁷ Even if clearly related to solidarity between States in order to deal with the effects of a serious violation of international law, how the obligation must be fulfilled is not clear.⁵²⁸ The only requirement in Article 41 is that such cooperation shall be made ‘through lawful means’. Despite the absence of formal requirements, the Commission seems to favour the fulfilment of the obligation of cooperation ‘in the framework of a competent international organization, in particular the United Nations’, although it ‘also envisages the possibility of non-institutionalized cooperation’.⁵²⁹ Institutionalized cooperation is one of the hallmarks of the international system of collective security, defined properly by the fact that ‘each state in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, the peace’.⁵³⁰

According to Special Rapporteur Riphagen, the inclusion of the obligation of cooperation in the ARSIWA was inspired by Article 49 of the UN Charter, which establishes the obligation of the UN Member States to ‘join in affording mutual assistance in carrying

⁵²⁶ Commentaries to Article 41, para 2.

⁵²⁷ Riphagen, Third Report (n 9) Article 6 and commentaries, para 13.

⁵²⁸ Different definitions were provided in this regard. For Special Rapporteur Riphagen the obligation expressed the assistance in carrying out the obligations of non-recognition and non-assistance. Special Rapporteur Arangio-Ruiz considered it as an obligation to cooperate in the application of measures designed to eliminate the consequences of an international crime. Special Rapporteur Crawford considered the provision as a ‘modest obligation of solidarity’ and proposed to simplify it, establishing the obligation of cooperation ‘as far as possible’, which was not accepted by the Commission. Crawford, First Report (n 7) 21 (para 78); J Crawford, Third Report on State Responsibility, ILC Yearbook 2000, Vol II(1) 108 (para 412). Article 41(1) relates the obligation to obligation of cessation, which is observed also in the change of the of the order of obligations of the Article as originally proposed by Riphagen to mirror Article 30, as explained by Mr Tomka, Chairman of the Drafting Committee (2682nd meeting (30 May 2001), ILC Yearbook 2001, Vol I, 105 (para 17)). See also Gaja, ‘Do States have a duty to ensure compliance with obligations erga omnes by other States?’ (n 477) 34.

⁵²⁹ Commentaries to Article 41, para 2. N H Jørgensen, ‘The Obligation of Cooperation’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 695, 697; R Wolfrum, ‘Cooperation, International Law of’ (April 2010) in R Wolfrum (ed), *MPEPIL* (online edn) para 7. The fulfilment of the obligation of cooperation through international organizations seems also to be favoured by the ICJ. In the *Wall* Advisory Opinion of 2004, the Court stated that ‘is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion’. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 300) 200 (para 160).

⁵³⁰ V Lowe and others (eds), *The United Nations Security Council and War* (OUP 2008) 13. See also Kelsen, ‘Collective Security and Collective Self-Defense’ (n 251) 783; N Tsagourias and N White, *Collective Security* (CUP 2013) 20-32. The aspect of cooperation in the case of the collective security system established by the UN Charter is emphasized by UNGA Res 2625 (XXV) (1970), which establishes the obligation of all States to cooperate with other States in the maintenance of international peace and security and with the United Nations.

out the measures decided upon by the Security Council'.⁵³¹ The provision is not usually invoked by the UN Security Council, although several times the organ underlines the obligation of Member States to cooperate in implementing measures imposed under Chapter VII of the UN Charter, such as the implementation and supervision of embargoes on weapons and military equipment,⁵³² the sharing of information, provision of technical assistance and assistance in carrying out inspections,⁵³³ the cooperation with Panels of Experts created by the Council to assist it in the application of sanctions,⁵³⁴ and the assistance or training of national armed forces.⁵³⁵ Despite the practice of the United Nations, the content of the obligation to cooperate outside the institutionalized sphere, the

⁵³¹ Riphagen, Third Report (n 9) Commentaries to Article 6, para 13. Article 49 of the Charter, in turn, was inspired by Article 16(3) of the Covenant of the League of Nations, which established the obligation of Member States to 'mutually support one another in the financial and economic measures which are taken', although the UN version also refers to military measures. A Reinisch and G Novak, 'Article 49' in B Simma and others (eds), *The Charter of the United Nations* (3rd edn, OUP 2012) 1385, 1386.

⁵³² Among the most recent examples of the request of measures of cooperation by the Security Council are Res 2262 (27 January 2016) and Res 2428 (13 July 2018), by which the organ *authorized* all Member States to seize, register, and dispose of weapons, military vehicles, and equipment directed to Central African Republic (para 2) and South Sudan (para 9), respectively, and *decided* that all Member States *shall* cooperate in such efforts. In general, the obligation of cooperation relates to the assistance among all States, as demonstrated by UNSC Res 2321 (30 November 2016), in which the Council called upon all Member States to cooperate with each other in inspecting, detecting, and seizing military equipment, among other items whose export to North Korea is prohibited (para 38). The cooperation can also be directed to a specific State or entity. By Res 2441 (5 November 2018), for example, the Council called upon all States to cooperate with the Government of National Accord of Libya in the implementation of an arms embargo imposed on the country (para 10). On the practice of the Security Council concerning the imposition of military embargoes, see Bailey, *How Wars End I* (n 310) 195-201.

⁵³³ Such measures may be exemplified by the cases of UNSC Res 2399 (30 January 2018), determining the sharing of information of individuals of the Central African Republic designated by the Sanctions Committee (para 9) and the sharing of information and capacity-building of Libya against acts of migrant smuggling and human trafficking in its territory determined by UNSC Res 2240 (9 October 2015, paras 1 and 2) and Res 2312 (6 October 2016, paras 2 and 3). Another example of this measure is UNSC Res 2444 (14 November 2018), in which the Council urged the Member States to provide support to Somalia in the management of weapons and ammunitions (para 20).

⁵³⁴ In this case, the act of cooperation in helping or providing pieces of information is not to be confused with the obligation to implement the coercive measures decided by the Security Council based on its powers under Chapter VII of the UN Charter. By Res 2127 (5 December 2013), for example, the Council created a Panel of Experts to assist it in the implementation of an arms embargo to the Central African Republic and urged all Member States to cooperate with the Panel by ensuring its safety and providing 'unhindered access, in particular to persons, documents and sites in order for the Panel of experts to execute its mandate' (paras 54, 59 and 60). Similar measures were adopted by Res 2140 (26 February 2014, paras 17, 18, 21, and 23), 2206 (3 March 2015, para 19), and 2374 (5 September 2017, paras 8, 11, and 15) in relation to the Panels of Experts created to monitor sanctions against individuals or entities engaged in actions or policies that threaten the peace, security or stability of Yemen, South Sudan, and Mali, respectively.

⁵³⁵ As examples of such measures, it is possible to single out the request made to all States by Res 2184 (12 November 2014) to provide logistical support for counter-piracy forces of Somalia and to seize boats and arms used in the commission of piracy in the region (para 11). Another example is Res 2085 (20 December 2012), in which the Council urged Member States to 'provide coordinated assistance, expertise, training, including on human rights and international humanitarian law, and capacity-building support' to the Malian Defence Forces in order to restore its authority over its territory (para 7). Similarly, by Res 2485 (29 August 2019), the Council called upon Member States to assist the Lebanese Armed Forces in regaining control over its territory (para 26).

degree of commitment to cooperate, and the continuing existence of the obligation even after the fulfilment of the obligation of non-recognition remain uncertain.⁵³⁶

The obligation to cooperate appears to be based on customary international law, although only concerning serious violations.⁵³⁷ It can be said that at least the logic of the obligation to cooperate under Chapter VII of the UN Charter serves as the basis for the general obligation to cooperate under the law of State responsibility in the event of serious breaches of peremptory norms of international law.⁵³⁸ As observed by Forteau, the indeterminacy of the obligation to cooperate is intentional, since it gives rise to specific obligations for various branches of international law, such as in criminal international law and international environmental law. At the same time, this indeterminacy leads to an inevitable parallelism with the mechanism of Chapter VII of the UN Charter, to the point that the suggestion made by the Commission of considering the United Nations as a competent organization for the fulfilment of the obligation of cooperation operates as a ‘referral’ to the law of collective security.⁵³⁹

3.3. *Obligation of Non-Recognition*

Article 41(2) of the ARSIWA establishes that ‘no State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation’. This obligation is a ‘duty to abstain’ that actually comprises two obligations incumbent on all States of the international community in face of a serious breach of an obligation arising under a peremptory norm of general international law: the obligation of non-recognition of a situation created by such a breach and the obligation not to render aid or assistance to its maintenance,⁵⁴⁰ which is analysed in section 3.4.

The obligation of non-recognition derives from the application of the *ex iniuria ius non oritur* principle in international law, according to which a State cannot benefit from its own wrongful conduct, an attempt of the international legal order to prevent illegal

⁵³⁶ Jørgensen (n 529) 697. According to Cannizzaro, for example, the duty to cooperate does not mean the obligation to adopt positive measures, being the duty to adopt collective action incumbent only upon the international community as a whole. E Cannizzaro, ‘On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law’ in E Cannizzaro (ed), *The Present and Future of Jus Cogens* (Sapienza 2015) 133, 137.

⁵³⁷ Pellet, ‘Les articles de la CDI’ (n 264) 17. Contra: Kolb, *The International Law of State Responsibility* (n 17) 57; M Arcari, ‘International Reactions to the Crimea Annexation under the Law of State Responsibility: “Collective Countermeasures” and Beyond?’ in W Czapliński and others (eds), *The Case of Crimea’s Annexation under International Law* (Scholar 2017) 223, 226.

⁵³⁸ Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l’État* (n 510) 202. This is evidenced by the Special Rapporteurs of the ILC on State responsibility, which expressly admitted such influence, such as Riphagen, or sought to prove the existence of the obligation through examples of the application of measures of Chapter VII of the Charter, such as Arangio-Ruiz. Riphagen, Third Report (n 9) Commentaries to Article 6, para 13; Arangio-Ruiz, Seventh Report (n 504) 18-20 (paras 78-84).

⁵³⁹ Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l’État* (n 510) 205-206.

⁵⁴⁰ Commentaries to Article 41, para 4.

situations from being validated over time, becoming a *fait accompli*.⁵⁴¹ As sustained by Lauterpacht:

In a society in which the enforcement of the law is precarious, there is a natural tendency to regard successful breaches of the law as a source of legal right. Non-recognition obviates that danger to a large extent. It is the *minimum of resistance which an insufficiently organized but law-abiding community offers to illegality*; it is a *continuous challenge to a legal wrong*. In a sense, the effectiveness of non-recognition grows with the passage of years. For it brings into relief the contrast between the consolidating power of the successful defiance of the law and its status as a mere legal nullity.⁵⁴²

Although applicable to any kind of situation originated by a violation of international law, the obligation of non-recognition has become especially linked to territorial acquisition through armed force, as evidenced by its historical development.⁵⁴³ In this specific sense, it means that the legal title over territory cannot be derived from an internationally wrongful act since the law does not recognize situations generated by unlawful acts, as recognized by UNGA Res 2625 (XXV) (1970) and Res 3314 (XXIX) (1974).⁵⁴⁴

The obligation of non-recognition was introduced in the ARSIWA by the suggestion of Special Rapporteur Riphagen, according to which the provision was ‘inspired’ by the prohibition of recognition of territorial acquisition resulting from the threat or use of force of UNGA Res 2625 (XXV) (1970).⁵⁴⁵ In the Commentaries to Article 41, the Commission

⁵⁴¹ H Lauterpacht, *Recognition in International Law* (CUP 1947) 413; M Dawidowicz, ‘The Obligation of Non-Recognition of an Unlawful Situation’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 677, 678.

⁵⁴² Lauterpacht, *Recognition in International Law* (n 541) 430-431 (emphasis added).

⁵⁴³ The development of the obligation of non-recognition in State practice is often associated with the Stimson Doctrine, the United States official position of non-recognition of situations, treaties, or agreements originated by means contrary to the obligations of the Paris Treaty of 1928 enunciated by its Secretary of State Henry Stimson regarding the Sino-Japanese conflict in Manchuria in 1932. As a matter of fact, the consideration that territorial acquisitions derived from the use of force or other illegal acts would be void began to be observed in the practice of States as early as the 19th century and was expressly applied by the League of Nations. In the American continent, the obligation was codified in 1933 in the *Anti-War (Saavedra Lamas) Treaty* (Article II) and the *Montevideo Convention on the Rights and Duties of States* (Article 11). Brownlie, *International Law and the Use of Force by States* (n 20) 410. A similar note had been issued by the United States in 1915 regarding Japan’s ultimatum to China. Lauterpacht, *Recognition in International Law* (n 541) 415-416.

⁵⁴⁴ UNGA Res 2625 (XXV) (1970) states that ‘no territorial acquisition resulting from the threat or use of force shall be recognized as legal’ (para 1). UNGA Res 3314 (XXIX) (1974) determines that ‘no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful’ (Article 5, para 3). See also R Y Jennings, *Acquisition of Territory in International Law* (Manchester University Press 1963) 54; Kolb, *The International Law of State Responsibility* (n 17) 58.

⁵⁴⁵ According to the Special Rapporteur, the fundament of the obligation of non-recognition concerning third States would vary, being considered as an obligation by a collective decision to ensure the ‘credibility’ of the primary rule or in the case of an international crime, as a form of international enforcement of consequences. Riphagen also established that non-recognition would have different characteristics concerning third States and the injured State. In the latter case, it would be a faculty exempt him from respecting primary obligations of ‘recognition’ towards the wrongdoing State, such as rules on jurisdictional immunity. W Riphagen, Preliminary Report on State Responsibility, ILC Yearbook 1980, Vol II(1) 115-117 (paras 45-54) and 122 (para 74); Riphagen, Third Report (n 9) 48-49 (Commentaries to Article 6, para 7). Special Rapporteur Crawford initially opposed the inclusion of the obligation in the ARSIWA claiming that the provision might suggest that States would be allowed to recognize as legal situations generated by international delicts. Crawford, First Report (n 7) 11 (para 51). In the end, Crawford

considered the obligation of non-recognition as part of general international law and provided examples to illustrate its claim, almost all related to the prohibition of the use of force.⁵⁴⁶ It is also emphasized the collective character of the obligation, characterized as the orchestrated reaction of all States to a violation of an obligation that protects the interests of the international community:

[W]here a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.⁵⁴⁷

The insistence on the collective aspect of the reaction by the Commission demonstrates its understanding of non-recognition as a sort of ‘communitarian countermeasure’ aimed at restoring the *status quo ante*. In this case, the non-recognition rule is considered as a secondary rule that protects the international community’s interests through a collective reaction that does not necessarily depend on the authoritative determination of international bodies such as the UN Security Council or the ICJ.⁵⁴⁸ This view explains the autonomous and self-executing character of the obligation of non-recognition.⁵⁴⁹

The ‘communitarian approach’ is not the only possible conception of the obligation of non-recognition. It may also be considered as a rule of conduct not to recognize a situation, an autonomous primary obligation aiming at the protection of subjective rights of an injured State. It is also possible to conceive it as a sanction adopted by collective

considered that the obligation reflected general international law and that its inclusion as a consequence of a serious violation of a peremptory norm did not exclude its application concerning the violation of other norms. J Crawford, Fourth Report on State Responsibility, ILC Yearbook 2001, Vol II(1) 14 (para 52) and 25.

⁵⁴⁶ Commentaries to Article 41, paras 6-8. On the other hand, there are also several examples in State practice of non-recognition of violations of the self-determination of peoples, basic principles of international humanitarian law, and the prohibition of racial discrimination. See for instance Dawidowicz, ‘The Obligation of Non-Recognition’ (n 541) 678-679. In the commentaries to ARSIWA’s First Reading in 1996, the Commission considered both the obligations of non-recognition and to refrain from assisting the wrongdoing State as reflecting ‘an already well-established practice’, citing Security Council resolutions on Iraq and Rhodesia. ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 349 (Commentaries to Article 53, para 2).

⁵⁴⁷ Commentaries to Article 41, para 8.

⁵⁴⁸ E Milano, ‘Reactions to Russia’s Annexation of Crimea and the Legal Consequences Deriving from Grave Breaches of Peremptory Norms’ in W Czapliński and others (eds), *The Case of Crimea’s Annexation under International Law* (Scholar 2017) 201, 210-213; M Arcari, ‘The relocation of the US embassy to Jerusalem and the obligation of non-recognition in international law’ (2018) 50 *QIL* 1, 4.

⁵⁴⁹ This seems to be the understanding adopted by the ICJ in the *Wall* Advisory Opinion of 2004. On that occasion, the Court considered that Israel had violated certain obligations *erga omnes*, such as the respect of the right of the Palestinian people to self-determination and the certain obligations of international humanitarian law. It also recognized that ‘given the character and the importance of the rights and obligations involved’, all States would be ‘under an obligation not to recognize the illegal situation resulting from the construction of the wall’ in the Occupied Territories (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 300) 199-200 (paras 155 and 159)). In this sense, the Court seems to have accepted the understanding that the obligation of non-recognition arises from the violation of obligations *erga omnes*.

institutions and enforced individually by each State.⁵⁵⁰ However, the three understandings of the obligation of non-recognition are not mutually exclusive. State practice, in particular decisions by the UN General Assembly and Security Council, shows that the obligation is applied to different kinds of serious breaches of international law with varying effects, especially declarations that certain conducts are to be considered as null and void. Although the most classic example of the application of the obligation of non-recognition by the United Nations refers to its utilization concerning territorial acquisitions arising from the illegal use of force,⁵⁵¹ the obligation is also applied concerning territories administered by racist regimes.⁵⁵² In general, the role of the Security Council appears to be to reinforce the obligation of non-recognition and to specify how it should be fulfilled to coerce the wrongdoing State.

⁵⁵⁰ According to this understanding, non-recognition should be adopted by the collective institution such as the Security Council to be considered as an obligation, since it would not be a natural consequence of the commission of a wrongful act. Milano (n 548) 215-216. This appears to be the position adopted by the ICJ in the case of *East Timor* of 1995. *East Timor* (Portugal v Australia) [1995] ICJ Rep 90, 103 (para 31).

⁵⁵¹ This is the case of measures taken by Israel regarding territorial occupations made by it since 1967. For instance, the Security Council determined by Res 465 (1 March 1980) that ‘all measures taken by Israel to change the physical character, demographic composition, institutional structure or status’ of all Arab territories occupied since 1967 ‘have no legal validity’ and called upon all States ‘not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories’ (paras 5 and 7), what was also done by the UNGA Res 2949 (XXVII) (8 December 1972, para 7). The declaration of nullity of the measures and reaffirmation of the obligation of non-recognition was specifically recognized concerning the imposition of Israeli laws, jurisdiction, and administration in the Golan Heights (see for instance UNSC Res 497 (17 December 1981, para 1 and preambular para 2); UNGA Res 62/85 (21 January 2008); UNGA Res 57/122 (14 February 2003); UNGA Res 60/40 (10 February 2006), among others). UNSC Res 478 (20 August 1980) established that the obligation of non-recognition should be fulfilled through the withdrawal of diplomatic missions eventually established in Jerusalem (para 5), which was reflected in reactions by the international community about the opening of the United States Embassy in the city in 2018, although in this case, the establishment of diplomatic missions may also be a violation of the obligation of non-assistance, analysed in the following section. See for instance Arcari, ‘The relocation of the US embassy to Jerusalem’ (n 548) 6. Other situations held by military occupations that were considered as null and void and consequently generating the obligation of non-recognition were the annexation of Kuwait by Iraq in 1990 by UNSC Res 662 (9 August 1990, paras 1 and 2), the attempts of integration of parts of Croatia by the Federal Republic of Yugoslavia by UNGA Res 49/43 (9 February 1995, para 2) and the occupation of territories in Bosnia by the Republika Srpska between 1992 and 1995 and in Croatia by the Federal Republic of Yugoslavia in 1995 by the decision of the Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brčko Area of 1997 (UN Doc S/1997/126, paras 77-78).

⁵⁵² This is the case of the declaration of independence of Southern Rhodesia (see for instance UNGA Res 2022 (XX) (5 November 1965, para 9); UNSC Res 216 (12 November 1965, paras 1 and 2); UNSC Res 217 (20 November 1965, para 6)) and Bantustans such as Transkei (see UNGA Res 3411 D (XXX) (28 November 1975, para 3) and UNSC Res 402 (22 December 1976, para 1)). In the case of Namibia, the acts practiced by South Africa in the territory were considered null and void by the United Nations after the South African presence in the territory was equated with a ‘foreign occupation’ (see for instance UNGA Res 2324, 2325 (XXII) (16 December 1967) and 2248 (S-V) (19 May 1967); UNSC Res 264 (20 March 1969, preambular para 5). By Res 276 (30 January 1970), the Security Council declared that the presence of South Africa in Namibia was considered illegal, and all acts taken by it were to be considered as illegal and invalid (paras 2 and 5). In this case, the obligation of non-recognition has not been expressly stated. In the *Namibia* advisory opinion of 1971, the ICJ understood that the recognition of the existence of an illegal situation by the Security Council, as made by Res 276 (1970), ‘cannot remain without consequence’. In this sense, the Court considered the obligation of non-recognition as a natural consequence of the declaration of illegality. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 54-55 (paras 117 and 123).

The obligation of non-recognition is generally considered to be customary nowadays.⁵⁵³ However, its character as an obligation was only established in international law after the comprehensive prohibition of the use of force and the practice of States in not recognizing situations created by the violation of this rule. Although non-recognition is considered to be a corollary of the prohibition of the use of force, identified as a natural consequence of the illegal use of force in UNGA Res 2625 (XXV) (1970) and Res 3314 (XXIX) (1974), such obligation does not seem to be considered a natural consequence of other violations of international law, such as genocide or apartheid. This fact indicates that the application of the obligation of non-recognition as a consequence of other serious violations of international law is possibly the result of the influence exercised by serious violations of the prohibition of the use of force.⁵⁵⁴ Practice shows that the content of such obligation varies according to the primary obligation violated and that in the case of situations generated by the illegal use of force, the acts that may not be recognized appear to be broader than those resulting from situations generated by other violations.⁵⁵⁵

Under the influence of the prohibition of the use of force, the obligation of non-recognition has become the ‘minimal reaction’ of the international community to serious breaches of peremptory norms. The attractiveness lies in the simplicity of this prohibition, which only applies an obligation not to act, requires the least effort on the part of States, and adapts to different primary norms. In this sense, the obligation of non-recognition became a minimum common denominator of the reaction of States to different violations of their shared interests, a way of collective enforcement which fulfils the function identified by Lauterpacht as the ‘minimum of resistance which an insufficiently organized but law-abiding community offers to illegality’.⁵⁵⁶

3.4. *Obligation of Non-Assistance*

Article 41 of the ARSIWA provides the obligation of every State not to render aid or assistance in maintaining the situation created by a serious breach of an obligation arising under a peremptory norm of general international law.⁵⁵⁷ The logic behind the obligation lies in the adoption of a measure aimed at the cessation of an unlawful conduct, similarly to what happens with the obligation of non-recognition, the reason why both were always

⁵⁵³ Dawidowicz, ‘The Obligation of Non-Recognition’ (n 541) 684.

⁵⁵⁴ In the *Wall* Advisory Opinion of 2004, the ICJ considered that the prohibition of the use of force contains a ‘corollary entailing the illegality of territorial acquisition resulting from the threat or use of force’. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 300) 171 (para 87). See also Arcari, ‘The relocation of the US embassy to Jerusalem’ (n 548) 5. No mention of the obligation of non-recognition is made by instruments related to those crimes, such as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the UNGA Res 96 (I) (1946), or the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1974. See also the analysis of Co-Rapporteurs Aziz Tuffi Saliba and Christopher J Borgen on the final report of the International Law Association regarding recognition and non-recognition in international law. Committee on Recognition and Non-Recognition in International Law, ‘Fourth (Final) Report’ in International Law Association Report of the Seventy-Eighth Conference (Sydney 2018).

⁵⁵⁵ Dawidowicz, ‘The Obligation of Non-Recognition’ (n 541) 684.

⁵⁵⁶ Lauterpacht, *Recognition in International Law* (n 541) 431.

⁵⁵⁷ According to the Commission, the prohibition of aid or assistance should not be confused with the provision regarding aid or assistance in the commission of an internationally wrongful act provided for in Article 16 as it refers to conduct ‘after the fact’. On the other hand, elements of Article 16 must be taken into account to determine the concept of ‘aid or assistance’. Commentaries to Article 41, para 11.

associated in the ARSIWA and State practice.⁵⁵⁸ On the other hand, the obligation of non-assistance was not unknown in international law when Special Rapporteur Riphagen proposed its inclusion in the ARSIWA. The UN Charter lists as one of its principles in paragraph 5 of Article 5 that:

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and *shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action*.⁵⁵⁹

Some authors maintain that the obligation of Article 2(5 *in fine*) of the UN Charter would be an expression of the obligation of non-assistance codified in Article 41(2) of the ARSIWA.⁵⁶⁰ The obligations are similar in the sense that both establish the obligation of States not to impair a reaction of the international community against threats to its values. Nevertheless, the obligation of non-assistance in the law of State responsibility is a consequence of an internationally wrongful act in a decentralized legal order, while Article 2(5) of the UN Charter establishes an obligation linked with the exercise by the Security Council of its powers granted by Chapter VII of the Charter aiming at the maintenance of international peace and security. State practice shows also that the obligation of non-assistance as codified by Article 41(2) of the ARSIWA is applied autonomously to the obligation of Article 2(5) of the UN Charter.⁵⁶¹

⁵⁵⁸ Some authors point out that the obligation of non-assistance is a logical consequence of the obligation on non-recognition. This was recognized, for instance, by the ILC in its Draft Conclusions on Peremptory Norms of General International Law in 2019 (ILC, Report of the ILC on the work of its thirty-second session' (29 April - 7 June and 8 July - 9 August 2019) UN Doc A/74/10, 196, Commentaries to Conclusion 19, para 6). However, the two obligations establish different rules of conduct and have a separate scope of application. See for instance Commentaries to Article 41, para 12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 300) 200 (para 159); S Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: an Obligation without Real Substance?' in C Tomuschat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Brill 2005) 99, 105-114. Both obligations were proposed by Special Rapporteur Riphagen in separate paragraphs of the article dealing with the consequences of international crimes. According to the Special Rapporteur, the provision establishing the obligation for every State 'not to render aid or assistance to the author State in maintaining the situation' was necessarily drafted to be vague and would have been inspired by Article 71 *in fine* of the VCLT. Both provisions were merged in a single paragraph in the final version of the ARSIWA in 2001. Riphagen, Third Report (n 9) 48 (Article 6).

⁵⁵⁹ *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter) Article 2(5) (emphasis added).

⁵⁶⁰ Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'État* (n 510) 200; H P Aust, 'Article 2 (5)' in B Simma and others (eds), *The Charter of the United Nations* (3rd edn, OUP 2012) 235, 250.

⁵⁶¹ The obligation of non-assistance was considered by the ICJ to be a natural consequence of the recognition of the illegality of South Africa's presence in *Namibia* in its Advisory Opinion of 1971 regarding the matter. According to the Court, UN Member States were under the obligations to not to recognize South Africa's presence in Namibia and to 'refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia', even if such obligations were not expressly contained in the Security Council Resolution that recognized the illegality of the occupation (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 552) 54 (para 119)). The rule was confirmed by the *Wall* Advisory Opinion of 2004. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 300) 200 (para 159). In the practice of the Security Council, the obligation of non-assistance is usually asserted and the Council determines the specific actions from which that should not be taken by States, similarly to what happens to the obligation of non-recognition. In several of these cases the prohibited measures are specifically adopted under Chapter

4. Conclusions

The existence of a separate regime of aggravated responsibility of States is partly explained by the necessity of a collective reaction against the wrongdoer State in cases of serious violations of international obligations arising from peremptory norms of international law. This regime was at least in part influenced by some consequences of serious violations of the prohibition of the use of force already established by the law of the use of force and in special by the collective security system of the United Nations, in which collective reaction of States against serious violations takes the form of obligations shared by all States.⁵⁶²

The content of the obligations constituting the regime of aggravated responsibility also underlines this influence. The obligation of cooperation is a feature of any system of collective security, in which its members are obliged to joint efforts to neutralize the effects of a threat concerning them all. The obligation of non-recognition also gained its mandatory character in international law as a measure of resistance against situations created by the illegal use of force, in special the military occupations, and since then is applied to situations generated by other serious violations.

From the point of view of the law of the use of force, it is possible to see that there is no clear difference between the ‘core legal consequences’ of a wrongful act and specific consequences for the serious breaches provided for by the law of State responsibility, what reinforces the evidence of the influence and the intimate relationship existing between both sets of rules. In addition, rules of the law of State responsibility are frequently enforced by the UN Security Council as a collective and institutionalized reaction. Even though it is not a judicial body, the Council applies the obligations for the wrongful State and for third States analysed above as instruments of collective and institutionalized reaction by establishing their content and the ways of fulfilment.

VII of the Charter, and therefore can be considered as enforcement measures (for instance, see UN Doc S/RES/418, para 2; S/RES/661, para 4; S/RES/1874, para 19). In other cases, however, the specified measures have not been adopted by mentioning expressly Chapter VII. In Res 569 (26 July 1985), for instance, the Security Council urged the UN Member States to adopt measures against South Africa as a result of the apartheid regime, including the suspension of investments, restrictions on sports and cultural relations, prohibition of contracts in the nuclear field and prohibition of sales on computer equipment for the use of the army and policy, without mentioning Chapter VII (para 6). It also requested by Res 218 (13 November 1965) and Res 290 (8 December 1970), respectively, that ‘all States to refrain from offering any assistance to the Portuguese Government ‘which would enable it to continue its repression of the people of the Territories under its administration’, including preventing the sale and supply of weapons and military equipment to be used in the territories (para 6) or against other African States (para 6). In such cases, the obligation of non-assistance is not necessarily based on the powers conferred on the Council by Chapter VII of the UN Charter.

⁵⁶² Abi-Saab, ‘The Concept of “International Crimes”’ (n 511) 148; Wyler (n 525) 1151.

Part II – The Regime of the Use of Force and the Derogation from the General Legal Consequences of Internationally Wrongful Acts

1. Introduction

The legal consequences of an internationally wrongful act cover the rights and obligations of States involved in the wrongful conduct, such as the wrongdoer State and the victim State or the international community as a whole. Although there is a general regime of legal consequences of internationally wrongful acts, certain violations of international law create specific and distinctive consequences. The ARSIWA expressly recognize such special consequences, establishing in Article 41(3) a ‘without prejudice’ clause acknowledging other consequences for third States resulting from serious breaches of peremptory norms besides the ‘general consequences’ of Article 41 (the obligations of cooperation, non-recognition, and non-assistance).

Given the particular interest of the international community in the protection of international peace and security, it is reasonable to imagine the existence of special consequences connected with serious violations of the prohibition of the use of force. The ILC acknowledges that the prohibition of aggression may create ‘additional legal consequences’ to those already established as a general rule,⁵⁶³ which is also supported by State practice obligations imposed to States responsible for acts of aggression and armed attacks.

Part two of chapter 3 intends to analyse the existence of such special consequences related to violations of the prohibition of the use of force, especially serious breaches and acts of aggression. Section 2 deals with war reparations and their consideration as corresponding to a special type of rule linked with serious instances of uses of force. Sections 3 and 4 analyse respectively other possible special consequences of the use of force observed in practice and suggested by the doctrine which comprise possible reactions of the victim State or the international community as a whole against the wrongdoer State not involving or involving the use of armed force.⁵⁶⁴ Some conclusions are drawn in section 5.

⁵⁶³ Commentaries to Article 41, para 14.

⁵⁶⁴ The division between legal consequences making use or not of armed force presented in the chapter was inspired by the division made by Special Rapporteur Arangio-Ruiz regarding ‘substantive consequences’ of wrongful acts, which would include the obligations of cessation, reparation, and guarantees of non-repetition and ‘instrumental consequences’ which would include measures involving the use of force. As a result, some of the measures analysed aim to deal with situations in which the State responsible for a violation of the prohibition of the use of force does not comply with its obligations created as the reason of the commission of the wrongful act (what would be a case of violation of secondary rules and not properly enforcement measures). Therefore, by the understanding currently adopted by the ARSIWA they are not properly consequences of a wrongful act but measures of implementation. As the purpose of part one is to analyse possible rights and obligations resulting from the commission of a specific type of wrongful act, those measures are also analysed and a certain extent of flexibility was adopted. On the other hand, measures of ‘self-help’ such as countermeasures, forced countermeasures, and measures of self-defence are analysed in chapter 4 (Implementation) since they are considered by the ARSIWA as measures of implementation even if they could be listed in the present chapter.

2. War Reparations

Reparation is one of the basic principles of the law of State responsibility⁵⁶⁵ and although it is a legal consequence of any violation of international law, some specific rules of reparation may be observed regarding substantial violations of the prohibition on the use of force characterized by intensity, duration, and mainly by the damage caused. Such rules are applied in particular as a result of armed conflicts and can be considered as part of the regime of the *jus ad bellum* generally known as ‘war reparations’. The objective of this section is to verify the existence of specific rules regarding war reparations that complement or derogate from the general rules of State responsibility. To this effect, it will analyse the regime of war reparations to understand its main rules and pertinency in contemporary international law (section 2.1), the relation between this set of rules and the law of State responsibility (section 2.2), and the main features of the regime that can be considered as derogatory (section 2.3).

2.1. Modern Regime of War Reparations

War reparations started to be legally justified on account of war expenses and damage caused by the enemy only in the nineteenth century, although the punitive nature of the measures prevailed and not rarely did the amounts requested exceed the actual costs of the conflict or damages incurred.⁵⁶⁶ Rules relating to war reparations have not been codified by international law unlike other areas of *jus ad bellum* partly because its regulation was essentially contractual.⁵⁶⁷ Nonetheless, some trends observed in State practice justify the analysis of the matter as a regime that presents some basic principles, especially the basic assertion of the obligation to make reparations for war damages.⁵⁶⁸

⁵⁶⁵ The principle was considered by the PCIJ as a ‘general conception of law’. *Factory at Chorzów* (n 488) 29.

⁵⁶⁶ C Phillipson, *Termination of War and Treaties of Peace* (Dutton 1916) 272; G Fitzmaurice, ‘The Juridical Clauses of the Peace Treaties’ (1948) 73 *RCADI* 255, 324; A Gattini, *La riparazione di guerra nel diritto internazionale* (CEDAM 2003) 25.

⁵⁶⁷ Traditionally the main way to end a conflict is through a peace treaty, which also establishes the general rules for the relationship between the belligerent States after the conflict. In this sense, the regulation of war reparations is usually determined between belligerents in light of the particularities of the conflict and the relations of power established in its aftermath. Although more common in peace treaties, provisions regarding reparations are also found in armistices. Y Dinstein, ‘The Initiation, Suspension, and Termination of War’ in M N Schmitt (ed), *International Law Across the Spectrum of Conflict* (Naval War College 2000) 131, 134-146.

⁵⁶⁸ A set of rules can acquire the status of customary international law when is recognized in several treaties. Conclusion 11, paragraph 2 of the Draft conclusions on the identification of customary international law of the ILC establishes that ‘the fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law’. ILC, Report of the ILC on the work of its seventieth session’ (30 April – 1 June and 2 July – 10 August 2018) UN Doc A/73/10, 121.

Even if most of the rules of the regime of war reparations were consolidated in treaties signed after the First⁵⁶⁹ and Second World Wars,⁵⁷⁰ the practice is still frequent, as shown in the imposition of war reparations against Iraq for the invasion of Kuwait in August 1990,⁵⁷¹ the creation of the Eritrea-Ethiopia Claims Commission in 2000,⁵⁷² and the forthcoming judgment of the reparations in the *Armed Activities* case by the ICJ.⁵⁷³ The practice of States regarding war reparations can also be seen in the recent trend in diplomatic practice and decisions of domestic courts related to reparation for violations

⁵⁶⁹ The Treaty of Versailles is one of the most evident and comprehensive examples of treaties that influenced the regime of war reparations in international law. Its Article 231 established the ‘responsibility of Germany and her allies to all the loss and damage’ suffered by the Allied as a consequence of the First World War (*Treaty of Peace with Germany* (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188 (Treaty of Versailles)). Similar provisions were reproduced in the peace treaties with Austria (Article 177), Hungary (Article 161), Bulgaria (Article 121) and the Ottoman Empire (Article 231).

⁵⁷⁰ The peace treaties signed after the Second World War also provide for the obligation of war reparations, although presenting a greater variety and specificities in relation to previous treaties. The 1947 Treaty of Peace with Italy, for example, established specific war reparations in relation to countries that were occupied by Italy. Similar provisions are found in the peace treaties signed with Romania (Articles 22 and 23), Hungary (Articles 23 and 25), Bulgaria (Articles 21 and 22), and Finland (Articles 23 and 24). The Treaty of Peace with Japan of 1951 adopted a less centralized approach regarding war reparations, recognizing that ‘Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war’ but stipulating that Tokyo should negotiate on a bilateral basis the compensation due for the damage caused in States occupied by it (Article 14), what was done with Burma, Indonesia, the Philippines, and Vietnam (*Treaty of Peace with Japan* (adopted 8 September 1951, entered into force 28 April 1952) 136 UNTS 45). See in general P d’Argent, ‘Reparations after World War II’ (May 2009) in R Wolfrum (ed), *MPEPIL* (online edn) paras 25-33.

⁵⁷¹ This occasion was the first (and the only one, so far) in which war reparations were not only recognized but also determined and enforced outside the scope of a peace agreement. By Res 686 (2 March 1991), the UN Security Council demanded the recognition by Iraq of its ‘liability under international law’ for the invasion of Kuwait (para 2(b)) and by Res 687 (3 April 1991), the Security Council established a fund feed with on a percentage of the value of exports by Iraqi petroleum or other products, to be used for compensating the damages resulted from the invasion and occupation of Kuwait and also established a commission (the United Nations Compensation Commission, or UNCC) to administer it (paras 16 to 19). The practice divided the opinion of the doctrine. For instance, Gattini sustains that UNCC provided a highly institutionalized framework to substitute the ‘loose pattern of cooperation’ between States that existed before (A Gattini, ‘The UN Compensation Commission: Old Rules, New Procedures on War Reparations’ (2002) 13 *EJIL* 161, 164). Graefrath, on the other hand, criticised the exclusion of Iraq from the procedures of the Compensation Commission and the ultra vires nature of its creation regarding the UN Charter, arguing that the Security Council can determine the obligation of an aggressor to make reparation but not established a procedure for implementing these obligations (B Graefrath, ‘Iraqi Reparations and the Security Council’ (1995) 55 *ZaöRV* 1, 59-60). See also G Arangio-Ruiz, ‘On the Security Council’s “Law Making”’ (2000) 83 *RDI* 609, 715-719; U Villani, *L’ONU e la crisi del Golfo* (3rd edn, Cacucci 2005) 111.

⁵⁷² The EECC was established by the Algiers Agreement of 2000 in the aftermath of the war between both countries that had started in 1998. The Commission was competent to decide claims for loss, damage, or injury from both States and their nationals related to the conflict, violations of international humanitarian law, and other violations of international law (*Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries* (adopted and entered into force 12 December 2000) 2138 UNTS 93, Article 5(1)).

⁵⁷³ In the judgment of the reparations owed by the Parties several questions related to reparations for violations committed during the Second Congo War were raised by the DRC and Uganda (A Mampuya, ‘Responsabilité et réparations dans le conflit des Grands-Lacs au Congo-Zaïre’ (2004) 108 *RGDIP* 679-708). The judgment on the question of reparations was announced to be delivered by February 9, 2022.

of human rights and rules of humanitarian law committed in past conflicts, especially during the Second World War.⁵⁷⁴

Due to the diversity of rules and the influence of political factors, at first, it seems difficult to see the regulation of war reparations forming a single and coherent regime.⁵⁷⁵ Even without a unified regime, the existence of the obligation by a State to make reparation for acts committed in the context of armed conflicts is clear. As will be seen in the next section, this conclusion is a consequence of the recognition that the rules of State responsibility also apply to acts committed in armed conflicts.

2.2. War Reparations and State Responsibility

Even though the application of war reparations can sometimes be heavily influenced by political issues, such as in the manner in which they are claimed or the possibility of its waiver for strategic reasons, this practice is regulated by international law, and therefore the rules of State responsibility apply to it. The modern regime of war reparations also follows the principle according to which every internationally wrongful act entails the obligation to make reparation for the injury caused. As a consequence, the obligation of reparation of a belligerent State is based on its responsibility for wrongful conduct and not on its defeat, as observed in the past.⁵⁷⁶

War reparations can be the consequence of the violation of the rules of *jus in bello* and the rules of *jus ad bellum*. In the first case, the State is responsible for the violation of obligations under the laws and customs of war. This general obligation can be found in Article 3 of the Hague Convention IV respecting the Laws and Customs of War on Land of 1907:

⁵⁷⁴ This is well represented by the claim of compensation made by Greece for damages caused by Germany during the First and Second World Wars (C Richter, 'Germany rejects formal Greek war reparations claims' (*German Practice in International Law*, 28 January 2021)). Similarly, members of the Iranian government had requested around US\$100 billion of indemnities from Iraq for the war fought between the countries between 1980 and 1988 ('Iraq Must Pay War Reparations to Iran' *Tehran Times* (Tehran, 15 April 2003); 'Iran 'owed billions' from Iraq for 1980s war' *The Irish Times* (Dublin, 18 December 2003)). The obligation of reparation for violations of human rights and rules of humanitarian law committed during the Second World War was also discussed recently by domestic courts in Brazil (See A T Saliba and L C Lima, 'The Law of State Immunity before the Brazilian Supreme Court: what is at stake with the "Changri-La" case?' (2021) 18 *Revista de Direito Internacional* 53-58), Greece (*Germany v Prefecture of Voiotia* ILDC 287 (GR 2000)), Italy (See A Gianelli, 'Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza Ferrini' (2004) 87 *RDI* 643-684; C Focarelli, 'Diniego dell'immunità alla Germania per crimini internazionali' (2009) 92 *RDI* 363-410), Poland (*Natoniewski v Germany* (2010) 30 *PYIL* 299), South Korea (C Sang-Hun, 'South Korean Court Sides With Japan in Wartime Sexual Slavery Case' *The New York Times* (New York, 21 April 2021)), and the United States (*Prinz v Federal Republic of Germany* [1994] US Court of Appeals 26 F.3d 1166 (DC Cir 1994)). Such cases were brought before domestic even though the jurisdictional immunity of States prevents such decisions, as confirmed by the ICJ in the *Jurisdictional Immunities* case of 2012.

⁵⁷⁵ Gattini, *La riparazione di guerra* (n 566) 494.

⁵⁷⁶ G Tunkin, *Theory of International Law* (W Butler tr, Harvard University Press 1974) 408-411. Another consequence of this fact is that war reparations are based in general international law and are not obligations that arise in peace treaties, although treaty provisions can define how they are fulfilled or establish the waiving of the claims. Phillipson (n 566) 269; G Christenson, 'State Responsibility and the UN Compensation Commission: Compensating Victims of Crimes of States' in R B Lillich (ed), *The United Nations Compensation Commission* (Transnational Publishers 1995) 311, 322. Contra see M Miele, *Principi di diritto internazionale* (2nd edn, CEDAM 1960) 249.

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁵⁷⁷

The provision confirms the rule according to which belligerents are not responsible for damages sustained from legitimate military operations in time of war, but only for violations of pre-existing rules.⁵⁷⁸ In this sense, the obligation of reparation for violations of the rules of *jus in bello* concerns mostly damages to civilians caused by acts of wars, such as loss of lives and property, damages caused by acts of the occupant Power in occupied territory, and economic measures taken against the enemy or neutral property. In all cases, the injuries are related to violations of the rules of the law of war and limited to the effects of acts of war, not including indirect effects of the conflict.⁵⁷⁹ The provision was reproduced in Article 91 of the Additional Protocol I to the Geneva Conventions of 1949 and is considered to be part of ‘the general principles of law on international responsibility’.⁵⁸⁰

The second main justification for the duty to provide war reparations relates to violations of the rules of *jus ad bellum*, or the regulation or prohibition of the use of force. In this case, the obligation of reparation is a consequence of the breach of the peace made by a State. The justification was imposed for the first time by the Treaty of Versailles, which in its Article 231 determined that:

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war *imposed upon them by the aggression of Germany and her allies*.⁵⁸¹

The provision established the responsibility of Germany to make reparation mainly as a consequence of the ‘aggression of Germany and her allies’ and not only for violations of

⁵⁷⁷ *Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907* (n 97). Despite its apparently simple character, the principle expressed by the first phrase of Article 3 is the express recognition of a general rule of international law that establishes the obligation to make reparation, something that was previously only evidenced through specific peace treaties. One of the most evident examples of such a principle is found in Article 14 of the Treaty of Triple Alliance between Argentina, Brazil, and Uruguay, which recognized during the Paraguayan War the obligation of the defeated country to compensate ‘damages and injuries to their public and private properties and to the people of their fellow citizens (...) and damages and injuries subsequently committed in violation of the principles which govern the law of war’ (Article XIV) (emphasis added). A similar provision was established by the Peace Treaty between Chile and Bolivia of 1884 (Article III). For the rule of attribution which may be established by the second part of Article 3, see chapter 1, part two.

⁵⁷⁸ Freeman (n 145) 293; P d’Argent, *Les réparations de guerre en droit international public* (Bruylant Brussels 2002) 442-443. On the other hand, as observed by Gattini, Article 3 should not be read in the sense of a formal consecration of the legality of war reparations, since its preparatory works demonstrate that the objective of the article was to provide the possibility of compensation for acts of individuals belonging to armed forces and for the benefit of civilians, which in fact can be inferred from the joint reading of the two parts of the article. Gattini, *La riparazione di guerra* (n 566) 37-38.

⁵⁷⁹ *Ibid*, 531.

⁵⁸⁰ ‘A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’. *Additional Protocol I to the Geneva Conventions of 1949* (n 137) Article 91. See also Zimmermann (n 138) 1053-1054.

⁵⁸¹ *Treaty of Versailles* (n 569) Article 231 (emphasis added).

the rules of the law of war by the Second Reich.⁵⁸² As a consequence, the damages claimed in the Treaty are not limited to losses of nationals of the affected States, but also to damages against States themselves, which in principle included war expenses.⁵⁸³ The obligation of reparation for all damages caused by the aggressor State was recognized by the 1924 Geneva Protocol for the Pacific Settlement of International Disputes⁵⁸⁴ and by peace treaties signed after the Second World War.⁵⁸⁵ The obligation of full reparation for all damages can also be seen concerning the responsibility of Iraq for the invasion of Kuwait in 1990. By UNSC Res 686 (2 March 1991), the Security Council requested to Iraq to recognize its 'liability under international law for any loss, damage or injury arising regard to Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq'.⁵⁸⁶ In its decision relating to the

⁵⁸² Article 231 of the Treaty of Versailles established a new precedent for the obligation to make war reparation, although not very a strong one and not based on international practice. Probably the mention of 'aggression' was added in the text as the result of a compromise between the Allied, since the right to request indemnities for damages was well-recognized by international law while the imposition of such consequence was not linked to the violation of a rule prohibiting war. Nevertheless, it establishes the recognition of the existence of additional consequences resulting from Germany's destructive behaviour and can be seen 'not only as the price for the return to peace but also, for the first time in history, as the price of the war'. D'Argent, *Les réparations de guerre* (n 578) 825. See also Brownlie, *International Law and the Use of Force by States* (n 20) 138.

⁵⁸³ The provision did not generate practical legal effects since Article 232 of the Treaty limited the duty of reparation to the damage suffered by civilians due to the lack of capacity of Germany 'to make complete reparation for all such loss and damage'. Only the payment of pensions to Allied military personnel and their families and expenses with war prisoners, which are considered war expenses, were claimed (*Treaty of Versailles* (n 569) Article 244, Annex I, paras 4, 5, 6, and 7). Most of the international criticism of the Treaty of Versailles was aimed not at the legal bases for the responsibility of Germany to make reparations but at its capacity to pay them and in the alleged exaggeration of the claims made. From a strictly legal point of view, except for military pensions, the reparations claimed by the Allied against Germany were in conformity with the international practice of the time. For a connection between the use of the term 'aggression' and this specific head of compensation, see Gattini, *La riparazione di guerra* (n 566) 176-177.

⁵⁸⁴ According to the Geneva Protocol, 'the signatory States agree that (...) reparation for all losses suffered by individuals, whether civilians or combatants, and for all material damage caused by the operations of both sides, shall be borne by the aggressor State up to the extreme limit of its capacity' ('Protocol for the Pacific Settlement of International Disputes' (1925) 5 *Yearbook of the League of Nations* 609-619 (emphasis added)). See also Resolution X proposed by the *Institut de droit international* according to which 'La responsabilité de l'agresseur pour les conséquences de son agression au point de vue de la réparation financière reste entière, même s'il s'est conformé aux droits des belligérants quant à la façon dont il a fait la guerre'. J P A François, 'L'égalité d'application des règles du droit de la guerre aux parties à un conflit armé' (1963) 50 *Annuaire de l'Institut de Droit International* 5-127, 19.

⁵⁸⁵ The Treaty of Peace with Italy of 1947, for example, established that Italy 'undertook a war of aggression and thereby provoked a state of war with all the Allied and Associated Powers and with other United Nations, and bears her share of responsibility for the war' (*Treaty of Peace with Italy* (adopted 10 February 1947, entered into force 15 September 1947) 49 UNTS 3 preambular paragraph 1). This can be seen in the Treaty of Peace with Japan. Although the treaty does not mention any imputation of aggression, it established that Japan 'should pay reparations to the Allied Powers for the damage and suffering caused by it during the war', not limiting in any way the obligation of compensation for the damages suffered (*Treaty of Peace with Japan* (n 570) Article 14).

⁵⁸⁶ UNSC Res 686 (2 March 1991) para 2(b) (emphasis added). The obligation of compensation includes also acts that are lawful from the point of view of international humanitarian law, such as measures taken by an occupying State. See, for instance, compensation for the departure from Iraq or Kuwait or economic losses because of the conflict (Claims A and E), and damages to a Naval Base of Kuwait (UN Doc S/AC.26/2001/7, 78). Also compensation for damages caused by acts not regulated by the international humanitarian law was also claimed, such as environmental damages (Claims F4). On environmental damage being a violation of international humanitarian law or an international crime of States, see A Gattini, 'La riparazione dei danni di guerra causati dall'Iraq' (1993) 76 *RDI* 1000, 1032-1036. On State

Jus ad Bellum, the Eritrea-Ethiopia Claims Commission decided that ‘Eritrea violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force (...) and is liable to compensate Ethiopia for the damages caused by that violation of international law’.⁵⁸⁷

It is possible to say that the duty to make reparation as a consequence of an act of aggression includes the whole damage caused by the conflict, whether suffered by civilians or by the victim State itself.⁵⁸⁸ Therefore, certain violations of *jus ad bellum* obligations entail a kind of ‘full responsibility’ regime for the aggressor States for damages related to its use of force.⁵⁸⁹ The duty of reparation of the aggressor State also includes damages caused by acts not considered to be violations of the *jus in bello* that otherwise would not create the duty of reparation.⁵⁹⁰ Nevertheless, this particularity of the regime of war reparations does not constitute a special rule of State responsibility, as it is based on the damages caused by the use of force.⁵⁹¹

responsibility for environmental damages or the protection of the environment, see T Scovazzi, ‘Some Remarks on International Responsibility in the Field of Environmental Protection’ in M Ragazzi (ed), *International Responsibility Today* (Martinus Nijhoff 2005) 209-222; L C Lima, ‘The Protection of the Environment before the Inter-American Court of Human Rights: Recent Developments’ (2020) *Rivista Giuridica dell’Ambiente* 495-522. It should be noted that the term ‘liability’ seems to be adopted by Res 686 (1991) in a non-technical way and based on the common law concept of ‘civil liability’ to designate the obligation of Iraq to repair the damage done.

⁵⁸⁷ EECC, *Jus Ad Bellum Ethiopia’s Claims 1-8*, 2005, 5 (para 16) (footnotes omitted).

⁵⁸⁸ Graefrath, ‘Responsibility and Damages Caused’ (n 489) 91-92; Gattini, ‘The UN Compensation Commission’ (n 571) 173.

⁵⁸⁹ As observed by Gattini, ‘Trattandosi della commissione di un illecito di eccezionale gravità, la prassi affermata dopo il primo conflitto mondiale e consolidata dopo il secondo ammette tuttavia un forte aggravio dell’obbligo di riparazione, imponendo all’aggressore l’obbligo di risarcire anche i danni arrecati in conformità alle norme dello *jus in bello*, nonché quelli causati dallo Stato aggredito e suoi alleati. Pur se criticata da una parte della dottrina, non vi sono dubbi sulla legittimità di tale prassi’. Gattini, *La riparazione di guerra* (n 566) 533 (footnotes omitted). See also Fitzmaurice, ‘The Juridical Clauses of the Peace Treaties’ (n 566) 325; D’Argent, *Les réparations de guerre* (n 578) 492.

⁵⁹⁰ This is the case of losses caused by the evacuation of civilians during the conflict, as in the case of the compensation awarded by the UNCC for death, personal injury or other direct loss to individuals or businesses as a result of the 1990 invasion of Kuwait by Iraq (UNCC ‘Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of Claims for Departure from Iraq and Kuwait (Category “A” Claims)’ (1994) UN Doc S/AC.26/1994/2). This is also the case of civilian casualties or damage to civilian property caused collaterally by artillery or the bombing of a military target. See for instance the decision of the EECC related to the aerial bombardment of Mekele and its airport (EECC *Central Front Ethiopia’s Claim 2*, 2004, 26 (para 108)).

⁵⁹¹ It should be noted that although the responsibility for violations of the *jus ad bellum* includes all damages, it does not comprise *all costs* of the conflict. In general, war reparations do not include compensation for the military expenditure by the claiming State, with the exception of costs of military occupation and the costs with the maintenance of prisoners of war. The UNCC, for example, considered that the damage caused by the attacks of the Coalition Armed Forces against Iraq forces had to be repaired by Baghdad, although expressly excluding compensation for military expenditures of the members of the Coalition (UNCC ‘Decision 11, Eligibility for Compensation of Members of the Allied Coalition Armed Forces’ (1992) UN Doc S/AC.26/1992/11; UNCC ‘Decision 19, Military Costs’ (1994) UN Doc S/AC.26/Dec.19). Excluded from these exceptions are damages expressly permissible under other criteria, damages suffered by prisoners of war, and loss or injury resulted from mistreatment in violation of international humanitarian law. Claims arising from the cost of military operations or the use of force were also excluded from the competence of the Eritrea-Ethiopia Claims Commission by the Algiers Agreement of 2000 (Article 5(1)). For the origins of this characteristic of war reparations, see Fauchille, *Traité de droit international public* (n 51) 1042-1043 (para 1705).

2.3. Limits to War Reparations considering the Wrongdoer's Economic Capacity

Due to the amount of damage caused during an armed conflict, the obligation of war reparation on the part of the aggressor State may severely affect its population. In this sense, it is possible to consider that war reparations may be limited to considerations regarding the economic capacity of the wrongdoer State. This limitation would be incompatible with the 'full reparation' principle⁵⁹² adopted by Article 31 of the ARSIWA, according to which the responsible State is under an obligation to re-establish the *status quo ante* and to eliminate as far as possible the consequences of the wrongful act.⁵⁹³

Special Rapporteur Arangio-Ruiz proposed the inclusion of a limitation to the obligation of restitution in kind as a consequence of an international crime of State in cases in which the measure 'would jeopardize the existence of the wrongdoing State as an independent member of the international community, its territorial integrity or the vital needs of its people'.⁵⁹⁴ The provision was approved with several adaptations and divergences by ARSIWA's First Reading in 1996 in the form of Draft Article 42(3) [1996], applicable to all types of wrongful acts and according to which 'in no case shall reparation result in depriving the population of a State of its own means of subsistence'.⁵⁹⁵ Special Rapporteur Crawford proposed to drop the provision by arguing that extreme cases are sufficiently addressed by circumstances precluding wrongfulness such as necessity or force majeure and by 'methods for aggregating and rescheduling sovereign debts' of international financial institutions.⁵⁹⁶ The existence of limitations to the principle of full reparation concerning war reparations is also rejected by part of the doctrine, which

⁵⁹² As expressed by the PCIJ in the *Factory at Chorzów* case, 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'. *Factory at Chorzów* (n 488) 47.

⁵⁹³ D Shelton, 'Reparations' (August 2015) in R Wolfrum (ed), *MPEPIL* (online edn) para 8.

⁵⁹⁴ Arangio-Ruiz, Seventh Report (n 504) 9-10 (paras 19-27) and 29-30 (para 140, Article 16(2)). In other words, measures affecting the economic stability or the 'freedom of organization' of the wrongdoer State would be admitted in cases of international crimes, limited only to the safeguard of vital needs of its population and its sovereignty. This would be a less rigid application of the rule according to which restitution in kind is limited in cases in which the measure represents a burden out of proportion with the injury caused by the act or seriously jeopardizes the political, economic or social system of the wrongdoing State. Arangio-Ruiz, Preliminary Report (n 477) 42-43 (para 132, Article 7).

⁵⁹⁵ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 277. Some members of the Commission criticised Arangio-Ruiz's proposal for not being expressly applicable to compensation and for being too severe. According to Tomuschat, for instance, in cases of serious violations of the prohibition of the use of force such as 'major disasters like the Second World War and even the aggression by Iraq' it would be 'generally impossible for full compensation to be paid for all of the harm done' (2392nd meeting (31 May 1995), ILC Yearbook 1995, Vol I, 92 (para 37)). See also the critics of Mr Lukashuk (2392nd meeting (31 May 1995), ILC Yearbook 1995, Vol I, 91 (paras 31-32)). The Special Rapporteur replied arguing that to consider that the same limitations are applied to the obligation of reparation for international crimes and for international offences indistinctly 'seems to imply that States responsible for a disaster of such terrible gravity should be treated less severely than a State responsible for a minor breach of a commercial treaty'. G Arangio-Ruiz, Eight Report on State Responsibility, ILC Yearbook 1996, Vol II(1) 3 (para 15). For divergences in the adoption of Draft Article 42(3) [1996], see the debates of the 2454th meeting of the Commission (5 July 1996), ILC Yearbook 1996, Vol I.

⁵⁹⁶ According to the Special Rapporteur, Draft Article 43(3) [1996] 'seems to confuse questions of the *quantum due* (a matter by definition related to the losses actually resulting from the wrongful act in question) and questions of the mode of payment'. Crawford, Third Report (n 528) 20-21 (paras 41-42).

considers it ‘outside the sphere of legal consideration’,⁵⁹⁷ or the mere result of a ‘mixture of obligations, sense of opportunity and reasonableness’.⁵⁹⁸

State practice points to the fact that the wrongdoer’s economic capacity is generally considered to be a limitation on its obligation of making full reparation, rather than in the mode of payment. This is evident in the texts of some peace treaties, in which the principle of full reparation is first asserted and subsequently the limitation regarding the capacity of payment of the defeated State is imposed.⁵⁹⁹ The practice was also applied, although less evidently, by the UNCC⁶⁰⁰ and by the Eritrea-Ethiopia Claims Commission.⁶⁰¹

In a broader perspective, the requirement of full reparation in cases of armed conflicts that resulted in great destruction and loss of lives can place an extreme burden on the population of the wrongdoer State and be considered as a form of collective

⁵⁹⁷ H Lauterpacht, ‘The Limits of the Operation of the Law of War’ (1953) 30 *BYIL* 206, 236. See also Espada (n 593) 39-40.

⁵⁹⁸ Gattini, ‘The UN Compensation Commission’ (n 571) 164.

⁵⁹⁹ The *Treaty of Versailles* (n 569), generally criticized for imposing exorbitant reparations on Germany, recognized in its Article 232 that ‘the resources of Germany are not adequate (...) to make complete reparation for all such loss and damage’ and limited the amount due to damages done to the civilian population, even if Article 231 affirmed the responsibility of the country for ‘all the loss and damage’ resulted from the conflict. The mode of reparation is established separately by Article 232, which in turn determined that the Reparation Commission created by it should consider the ‘resources and capacity of Germany’ from time to time, being able to modify the date or form of payments, what was effectively done a few times (Article 234). Regarding the payment of the total amount due by Germany see D Fleck, ‘Dawes Plan (1924) and Young Plan (1930)’ (March 2015) in R Wolfrum (ed), *MPEPIL* (online edn). The practice was also adopted after the Second World War. The *Potsdam Agreement* (n 599) of 1945 determined that ‘payment of Reparations should leave enough resources to enable the German people to subsist without external assistance’. The *Treaty of Peace with Japan* (n 570) of 1951 recognized that ‘Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations’ (Article 14(a)).

⁶⁰⁰ Res 687 (3 April 1991) of the Security Council considered that the level of contribution of Iraq to the Compensation Fund should be based on a percentage of its exports of petroleum and petroleum products ‘taking into account the requirements of the people of Iraq, Iraq’s payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy’ (para 19). This percentage was initially fixed at 30% of the annual value of Iraq’s exports of petroleum and petroleum products by Res 705 (15 August 1991, para 2) and later reduced to 25% in 2000 and 5% in 2003 due to the humanitarian crisis experienced by the country. It is possible to argue that the limitation of the principle of full reparation was carried out in the case of Iraq in relation to the mode of reparation and not to the obligation of reparation itself, as Crawford pointed out, since it was the way how compensation would be paid over the years and not the total amount of compensation due that took into account Iraq’s payment capacity. However, it should be observed that this is one of the most criticized aspects of the regime imposed on Iraq. See for instance Graefrath, ‘Iraqi Reparations’ (n 571) 60-64; E J Garmise, ‘The Iraqi Claims Process and the Ghost of Versailles’ (1992) 67 *New York University Law Review* 840, 842.

⁶⁰¹ Although the Algiers Agreement also does not establish express limitations to the principle of full reparation, the EECC determined in the *Final Awards - Ethiopia’s Damages Claims* of 2009 that the assessment of the damage claims should consider the situation of the parties, since ‘the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparation’ (7 (para 21)). Significantly, the Commission found it necessary to justify the legal basis for its decision in limiting the obligation of reparation by arguing that the Algiers Agreement directs in its Article 5 (13) that the Commission should apply ‘relevant rules of international law’ in considering claims, what would include rules of human rights law applicable as between both States. According to it, ‘the Commission could not disregard the possibility that large damages awards might exceed the capacity of the responsible State to pay or result in serious injury to its population if such damages were paid’ (7 (para 22)).

punishment.⁶⁰² It should be observed that the main function of reparation in modern international law is to re-establish the *status quo*, not to sanction or infringe punishments.⁶⁰³ As expressed by the Eritrea-Ethiopia Claims Commission:

Chorzów Factory teaches that compensation has a limited function. Its role is to restore an injured party, in so far as possible, to the position it would have occupied but for the injury. This function is remedial, not punitive. Accordingly, (...) compensation must be assessed in light of the actual social and economic circumstances of the injured individuals in respect of whom the State is claiming. The difficult economic conditions found in the affected areas of Ethiopia and Eritrea must be taken into account in assessing compensation there. Compensation determined in accordance with international law cannot remedy the world's economic disparities.⁶⁰⁴

It can be concluded that State practice confirms the existence of limits to the principle of total reparation in cases of war reparations.⁶⁰⁵ This limitation also relates to the purpose of peacebuilding adopted in international relations and the construction of a sustainable 'positive peace'. In this sense, as observed by Graefrath, the claim of reparation for aggression 'is embedded in a peace concept and affected by the goal of establishing and constructing durable peaceful relations after the conclusion of a war'.⁶⁰⁶

3. Legal Consequences Not Involving the Use of Armed Force

Other legal consequences can be created by serious violations of the prohibition of the use of force besides the obligation of reparation by the wrongdoer State, such as the imposition of further obligations upon it. Such consequences have as main characteristic the imposition of significant limitations on the exercise of sovereign rights by the wrongdoer State and may constitute an exception to the prohibition of non-interference justified by the gravity of the wrongful act committed.⁶⁰⁷ It is possible to list among the consequences not involving the use of force the imposition of punitive damages to the wrongdoer State (section 3.1) or limitations on its armed forces or arsenal (section 3.2), the demilitarization of its territory (section 3.3), the establishment of fact-finding or observers' missions to investigate the wrongful conduct (section 3.4), the imposition of penal consequences on the State organs responsible for the conduct (section 3.5) and the forcible change of regime and other political measures (section 3.6).

3.1. Punitive Damages

The concept of punitive damages was developed by common law courts to designate measures awarded to punish the wrongdoer and to operate as a deterrence against the

⁶⁰² In this sense, the measures of reparation can be considered punitive not intentionally or as a measure of satisfaction, but by being so burdensome as to violating the principle of self-determination of peoples or having intergenerational effects. Graefrath, 'Responsibility and Damages Caused' (n 489) 92; Gattini, 'La riparazione dei danni di guerra causati dall'Iraq' (n 586) 1016; C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century General Course on Public International Law' (1999) 281 *RCADI* 9, 293; Gattini, *La riparazione di guerra* (n 566) 554.

⁶⁰³ Shelton (n 593) para 11.

⁶⁰⁴ EECC, *Final Award – Ethiopia's Damages Claims*, 2009, 8 (para 26).

⁶⁰⁵ Brownlie, *International Law and the Use of Force by States* (n 20) 147; Shelton (n 593) para 5.

⁶⁰⁶ For instance, Graefrath, 'Iraqi Reparations' (n 571) 61.

⁶⁰⁷ Graefrath and Mohr (n 516) 128.

repetition of the wrongful conduct in cases in which the wrongdoer acts with recklessness, malice, or deceit.⁶⁰⁸ In international law, its existence is a source of controversy due to the notion of punishment of States in an international legal order characterized by the principle of their sovereign equality.⁶⁰⁹ Nevertheless, part of the doctrine admits the existence of punitive damages in international law by not denying their compensatory function and linking them to the reparation of moral damages or damages caused by the violation of a right of a State.⁶¹⁰ In any case, the existence of the obligation of reparation is always associated with the existence of an injury, either material, moral or legal.

The concept of punitive damages has not been treated uniformly by the ILC in its works on State responsibility. The concept was introduced by Special Rapporteur Francisco García-Amador and considered admissible by Special Rapporteur Arangio-Ruiz in cases of international crimes of States as a form of satisfaction having an afflictive nature.⁶¹¹ The notion was replaced by the similar concept of ‘aggravated damages’ in the First Reading of the ARSIWA in 1996 as a special form of compensatory damages without punitive function, applicable in cases in which the damages awarded are increased due to the reprehensible conduct of the wrongdoer.⁶¹² Ultimately any mention of punitive or aggravated damages was excluded in the final version of the provision establishing particular consequences of serious breaches of obligations arising under peremptory norms of general international law (future Article 41 [2001]).⁶¹³ The ARSIWA, however, do not prevent the recognition of punitive damages in cases of serious violations, since Article 41(3) states that the provision ‘is without prejudice to the other consequences

⁶⁰⁸ B Garner (ed), *Black’s Law Dictionary* (9th edn, Thomson West 2009) 448; S Wittich, ‘Punitive Damages’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 667, 667.

⁶⁰⁹ In addition, the punitive character of such damages would approach them more to the notion of criminal responsibility of States than to the exclusively compensatory character of reparation. F V García-Amador, Report on International Responsibility, ILC Yearbook 1956, Vol II, 183 (para 49); R Jennings and A Watts, *Oppenheim’s International Law* (Vol 1, 9th edn, Longman 1992) 533; T Treves, *Diritto internazionale* (Giuffrè 2005) 548-549; Wittich (n 608) 671; Fasoli (n 489) 138.

⁶¹⁰ C Eagleton, ‘Measure of Damages in International Law’ (1929) 39 *Yale Law Journal* 52, 62; G Carella, ‘I punitive damages e la riparazione del danno morale in Diritto internazionale’ (1984) 67 *RDI* 751, 761; Arangio-Ruiz, Second Report (n 497) 41 (para 143).

⁶¹¹ García-Amador, Report on International Responsibility (609) 183 (para 49) and 211-213 (paras 201-209); F V García-Amador, Sixth Report on International Responsibility, ILC Yearbook 1961, Vol II, 35-37 (paras 140-145); Arangio-Ruiz, Second Report (n 497) 40 (para 136); G Arangio-Ruiz, Fifth Report on State Responsibility, ILC Yearbook 1993, Vol II(1) 44 (para 181). As observed by Arangio-Ruiz, satisfaction as a form of reparation has a punitive or afflictive component, as proposed by the concept of punitive damages. See also Morelli, *Nozioni di Diritto Internazionale* (n 93) 358.

⁶¹² Wittich (n 608) 667. According to paragraph 2(c) of Draft Article 45 [1996], ‘in cases of gross infringement of the rights of the injured State, [satisfaction can take the form of] damages reflecting the gravity of the infringement’ (ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 296 (Article 45, para 2(c)). Special Rapporteur Crawford was favourable in excluding the concept of punitive damages from the Draft Articles and replacing it for the possibility of nominal sums to be paid in the case of non-pecuniary injury, although not limited to cases of ‘gross infringement’, which was rejected by the Commission. Crawford maintained the provision according to which serious breaches of obligations ‘may involve, for the responsible State, damages reflecting the gravity of the breach’ (Crawford, Third Report (n 528) 56 (para 191) and 100-101 (paras 380-385). ILC, Report of the ILC on the work of its fifty-second session’ (1 May - 9 June and 10 July - 18 August 2000) UN Doc A/55/10, 69 (Article 42 [51, 53])).

⁶¹³ The provision was rejected by the United States, Austria and Korea. Crawford, Fourth Report (n 545) 25.

referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law’.

Although not incorporated into the final version of the ARSIWA, the concept of punitive damages proposed by Special Rapporteur Arangio-Ruiz explains some measures adopted as consequences of serious violations of the prohibition of the use of force observed in State practice and which may not be properly considered as regular measures of reparation. This is especially relevant if one considers the concept of punitive damages as measures of satisfaction in a broad sense, not limited to payments or having a purely compensatory character but as measures affecting the principle of sovereignty equality of States justified only in case of serious violations of international law.⁶¹⁴ The elimination of totalitarian regimes, territorial changes, demarcation of the border, and the limitation of the arsenal of a State are further examples of such measures,⁶¹⁵ considered separately in the following sections.

3.2. *Limitation on Armed Forces and Weapons*

Measures of limitation or dismantling of the armaments and armed forces of the wrongdoer State are frequently adopted as a consequence of serious violations of the prohibition of the use of force. Such measures can be encompassed in the broader concept of ‘demilitarization’ and are intended to prevent the renewal of aggressive police by a ‘rogue’ State menacing international peace and security, according to an established practice of international relations which is aimed to ensure that defeated States are prevented from continuing hostilities in the future.⁶¹⁶ According to Graefrath and Mohr:

[A] specific legal consequence in case of international crimes are the possible limitations of the exercise of sovereign rights to ensure non-repetition of the crime. After the Second World War these limitations took the form of provisions on demilitarisation, establishment of demilitarized zones, prohibitions of certain weapons, in particular weapons of mass destruction, and certain types of missiles.⁶¹⁷

There are several examples in peace treaties of provisions limiting the size of armed forces or the arsenal of the vanquished State,⁶¹⁸ including the dismantling of military

⁶¹⁴ Arangio-Ruiz, Second Report (n 497) 41 (para 140). Also Graefrath, ‘Responsibility and Damages Caused’ (n 489) 101.

⁶¹⁵ Among the measures presented by the Special Rapporteur as punitive damages, there is the indemnity paid by the Federal Republic of Germany to Israel for the Nazi persecution of Jews, the obligation of the elimination of totalitarian regimes, and ‘territorial imputations’ of Germany and Italy after the Second World War and the measures imposed on Iraq in 1991 related to the limitation of its arsenal and demarcation of the borders with Kuwait. Arangio-Ruiz, Fifth Report (n 611) 44 (para 181).

⁶¹⁶ D J Bederman, ‘Collective Security, Demilitarization and ‘Pariah’ States’ (2002) 13 *EJIL* 121, 123; M Kamto, *L’agression en droit international* (Pedone 2010) 240-241.

⁶¹⁷ Graefrath and Mohr (n 516) 127 (footnotes omitted). See also Arangio-Ruiz, Fifth Report (n 611) 44 (para 182).

⁶¹⁸ The *Treaty of Versailles* (n 569) provided for the demobilization and reduction of German military forces, establishing in detail the number of military personnel, weapons, ammunition, and warships authorized. In special, it limited the size of the German armed forces to 100,000 troops, prohibited the production of tanks and chemical weapons, and the existence of a German air force (Articles 160, 171, and 198). Specific limits on the arsenal and armed forces of Germany after the Second World War were only established in the Treaty on the Final Settlement with Respect to Germany of 1990, in which a unified Germany agreed to limit its military forces to 370,000 men and to renounce to the production of possession of nuclear, biological and chemical weapons (Article 3). The *Treaty of Peace with Italy* (n 585) of 1947

industry⁶¹⁹ and the creation of mechanisms of supervision.⁶²⁰ A recent application of such consequence was observed by the establishment of a comprehensive regime of disarmament for Iraq after the invasion of Kuwait in 1990.⁶²¹

The establishment of measures of restriction of armed forces and weapons seeks to prevent the repetition of acts of aggression by limiting the means available for the recurrence of the conduct. At first glance, such a measure could be seen as a consequence of the violation of the prohibition of the use of force. However, international practice demonstrates that such measures are generally adopted with the formal agreement of the aggressor State. Even if the free consent of the aggressor State is often doubtful, this formal requirement disqualifies the measure as an automatic consequence of the aggression imposed upon the wrongdoer. This can be seen in the case of Iraq, which was 'invited' by UNSC Res 687 (8 April 1991) to express its acceptance of the measures imposed on it and to reaffirm its existing international obligations.

3.3. *Demilitarization of Territory*

Demilitarization of a territory is understood as the establishment of an area that cannot be occupied by the aggressor State or used by it for military purposes and may require the evacuation not only of the military personnel but also of weapons, installations, or any kind of military infrastructure. The purpose of the measure is to create a security zone or buffer zone, especially in a frontier region.⁶²² Often demilitarized zones are established during armed conflicts and are regulated by Article 60 of the Additional Protocol I to the Geneva Conventions of 1949, which determines its establishment by an express agreement between the Parties to a conflict for the evacuation of combatants and military

prohibited the possession of atomic weapons, as well as missiles and torpedoes, air bombers, and weapons originating from Germany or Japan. The Treaty also restricted the possession of war materials and limited its armed forces to a total of 350,000 men (Articles 55 to 66).

⁶¹⁹ The *Potsdam Agreement* (n 599) of 1945 established the objective of 'complete disarmament and demilitarization of Germany and the elimination or control of all German industry that could be used for military production' by the confiscation or destruction of all arms, ammunition, implements of war, and facilities for their production.

⁶²⁰ The *Treaty of Versailles* (n 569) established Inter-Allied Commissions of Control responsible for the supervision of the fulfilment of the measures (Articles 203-210). See also Gattini, *La riparazione di guerra* (n 566) 193.

⁶²¹ By Res 687 (8 April 1991), the Security Council imposed on Iraq the obligation of the destruction of its chemical and biological weapons, research and manufacturing facilities as well as all ballistic missiles with a range greater than 150 kilometres. It also 'invited' Iraq to 'reaffirm unconditionally' its obligations under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol of 1925, of which Iraq has been a part since 1931) and to ratify the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 1972, what was done three months later. In addition, the Council maintained the arms embargo imposed on Iraq by Res 661 (6 August 1990) in the early days of the invasion, aiming to affect Iraq's military capability not only by imposing the reduction of weapons but also by disabling the country to acquire them (paras 7, 8 and 24). The implementation of the obligations of disarmament would be supervised by a commission established for that end and founded by Iraq, the UN Special Commission (UNSCOM), which would also be responsible for on-site inspections of Iraq's nuclear capabilities. See also Conforti, 'Non-Coercive Sanctions in the United Nations Charter' (n 487); Bederman (n 616) 129.

⁶²² Demilitarization should not be confused with neutrality, which refers to a temporary or permanent legal position of a State concerning an armed conflict or conflicts in general. As observed by Bailey, besides the reduction of tensions, demilitarized zones are also established to provide sanctuary during armed conflicts for persons entitled to be immune from direct attacks, to facilitate negotiations of the cessation of hostilities, and to contend claims regarding sovereignty. Bailey, *How Wars End I* (n 310) 230-255.

equipment of the region as well as the end of any activity linked to the military effort in the zone.⁶²³ Demilitarized zones were established after the First and Second World Wars⁶²⁴ and its creation in the years following the establishment of the United Nations was frequently accompanied by the deployment of observation or peacekeeping missions,⁶²⁵ both regarding those zones established by the UN Security Council, as in the case of the one between Iraq and Kuwait in 1991,⁶²⁶ and those autonomously established by States.⁶²⁷

The creation of demilitarized zones is a measure similar to the reduction of armed forces and weapons that seeks to prevent the repetition of the wrongful conduct of a wrongdoer

⁶²³ *Additional Protocol I to the Geneva Conventions of 1949* (n 137) Article 60(2) and (3). Military operations are prohibited in demilitarized zones by Additional Protocol I (Article 60(1)) and considered a war crime by the Draft Code of Crimes Against the Peace and Security of Mankind of 1996 (UN Doc A/51/10, 53 (Article 20(e)(iii))). It should be observed that demilitarized zones are not always established during armed conflict, being also established after the end of hostilities.

⁶²⁴ The *Treaty of Versailles* (n 569) determined the demilitarization of the left bank of the Rhine, prohibiting the presence of any fortifications up to 50 kilometres to the East of the river, as well as the maintenance and assembly of armed forces and military manoeuvres in the region. According to Article 44, the violation of such conditions by Germany would be considered as a hostile act against the Allied and ‘as calculated to disturb the peace of the world’ (Articles 42, 43, 44, and 180). The *Treaty of Peace with Italy* (n 585) of 1947 determined the destruction or removal of the fortifications and military installations from any point of the frontier of Italy with France and Yugoslavia to a distance of 20 kilometres and severely limited the construction of new installations, establishing also limitations regarding the islands of Sicily and Sardinia and the demilitarization of several other islands (Articles 47 to 50).

⁶²⁵ The first operation of the kind was the United Nations Emergency Force (UNEF) established in 1956 following the Suez Crisis to supervise the withdrawal of troops from the 1949 Armistice line (‘Green line’) between Israel and Egypt. Other operations are the United Nations Peacekeeping Force in Cyprus, which since 1974 is responsible to monitor the buffer zone established after the Turkish intervention in the island (also known as ‘Green Line’), the United Nations Disengagement Observer Force established in the same year to monitor the buffer zone established between Israel and Syria in the Golan Heights (‘Purple Line’) and the United Nations Interim Force in Lebanon established in 1978 to ensure the withdrawal of Israeli forces from Lebanon’s border demarcation (‘Blue Line’). The United Nations also established missions in Croatia to monitor the demilitarization of the Prevlaka Peninsula from 1992 to 2002 following the withdrawal of troops from the Federal Republic of Yugoslavia from the region and of the territories of Eastern Slavonia, Baranja, and Western Sirmium from 1996 to 1998. K Kingma and N Schrijver, ‘Demilitarization’ (October 2015) in R Wolfrum (ed), *MPEPIL* (online edn) para 7. For a detailed study of the first two examples, see S D Bailey, *How Wars End*, Vol II (Clarendon 1982) 535-643 and 667-702.

⁶²⁶ The zone was established by Res 687 and Res 689 (8 and 9 April 1991) extending ten kilometres into Iraq and five kilometres into Kuwait from the boundary. An observer unit of the United Nations was also deployed to survey the demilitarized zone and to monitor violations of it. In response to the redeployment of troops by Iraq in the direction of the border with Kuwait in October 1994, the Council approved Res 949 (15 October 1994) based on Chapter VII of the UN Charter, demanding the withdrawal of Iraqi military units from southern Iraq and prohibiting ‘any other action to enhance its military capacity in southern Iraq’, even if within the limits of the demilitarized zone (paras 1, 2 and 4).

⁶²⁷ In 2011 Sudan and South Sudan agreed to establish a Safe Demilitarized Border Zone (SDBZ) between both countries in the context of the creation of a border monitoring mechanism and requested assistance from the United Nations. In the same year, the Security Council adopted Res 2024 (14 December 2011) and determined the amplification of the mandate of the UN Interim Security Force for Abyei (UNISFA) to assist both parties in the observance of their obligations regarding the SDBZ (para 1), despite recurrent violations of demilitarization of the region by them. The mission was renovated again in 2021. On 19 June 2000, Eritrea and Ethiopia established a ‘temporary security zone’ of 25 kilometres from the de facto border existent before the conflict separating both armed forces and the Security Council established by Res 1320 (15 September 2000) the United Nations Mission in Ethiopia and Eritrea to monitor the cessation of hostilities in the zone (para 2).

State by reducing its strategic advantage.⁶²⁸ But like the reduction of armed forces, demilitarization measures cannot be considered legal consequences of the use of force as they are established in common agreement between the aggressor State and the victim State or other international actors. This is confirmed by the concept adopted by Article 60 of the Additional Protocol I to the Geneva Conventions of 1949 and by international practice. Even when such measures are established by the UN Security Council, as was the case of Iraq in 1991, the aggressor State is consulted.

3.4. *Establishment of Fact-Finding Operations*

Another possible consequence of a serious violation of the prohibition of the use of force could be the establishment of fact-finding operations or observer missions to assess the circumstances of the wrongful conduct. ‘Fact-finding’ and ‘inquiry’ methods are used in international relations to elucidate facts through impartial investigation and have several purposes, among which providing a basis for the peaceful settlement of disputes and supervising the execution of international obligations.⁶²⁹ There are several cases in State practice of fact-finding missions established after wrongful acts involving the use of force.⁶³⁰ Such missions are also commonly created by the United Nations to investigate episodes of use of armed force by States⁶³¹ and are considered a strategic instrument in the maintenance of international peace and security by the Organization.⁶³²

Special Rapporteur Arangio-Ruiz considered that the acceptance of observation teams could be imposed on the wrongdoer State as a guarantee of non-repetition in cases of

⁶²⁸ By enlarging the physical distance from a possible victim State, the measure makes it more difficult for the wrongdoer State to carry out an armed attack and prevents skirmishes or border accidents that can aggravate a situation of tension.

⁶²⁹ K J Partsch, ‘Fact-Finding and Inquiry’ in R Bernhardt (ed), *Encyclopedia of Public International Law I* (1981) 61-62.

⁶³⁰ Following the *Dogger Bank* incident of 1904, a Commission of Inquiry was established under the rules of the 1899 Hague Convention for the Pacific Settlement of International Disputes following an agreement between the United Kingdom and Russia. Similar measures were adopted in incidents involving the use of force against foreign vessels, such as the incidents involving the *Tavignano*, the *Canounca*, and the *Galois* during the Turkish-Italo War of 1911, the sinking of the steamers *Tubantia* and *Tiger* by Germany during the First World War and the *Red Crusader* incident of 1961 (J B Scott, *Hague Court Reports Comprising the Awards* (OUP 1916) 413-421; J B Scott, *Hague Court Reports Comprising the Awards (Second Series)* (OUP 1932) 212-220; P Hamilton and others, *The Permanent Court of Arbitration* (Kluwer Law 1999) 307-314; T H Irmscher, ‘Dogger Bank Incident (1904)’ (December 2006) in R Wolfrum (ed), *MPEPIL* (online edn) paras 1-5).

⁶³¹ As a result of incursions by South Vietnamese troops into the territory of Cambodia in 1964, UNSC Res 189 (4 June 1964) requested ‘just and fair compensation’ for the country and decided to send a mission to the border ‘in order to consider such measures as may prevent any recurrence of such incidents’ (para 5). In 1981 the Council determined by Res 496 (15 December 1981) the establishment of a commission of inquiry ‘in order to investigate the origin, background and financing of the mercenary aggression’ against Seychelles that took place in January of that year (para 3). The intention of the creation of ‘an impartial body with inquiring into responsibility’ for the Iran-Iraq war was expressed by the Council in Res 598 (20 July 1987, para 6), although this measure was never adopted. Fact-finding missions were also established by the Secretariat, as done in the case of the Gaza Flotilla Incident of 2010.

⁶³² In 1991 the General Assembly adopted by Res 46/59 (9 December 1991) the Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, which considered that the ‘full knowledge of all relevant facts’ was desired by the UN Organs in performing their functions related to the maintenance of international peace and security. The Declaration establishes principles regarding fact-finding activities, among which the possibility of the institution of such missions by the main organs of the United Nations and the necessity of the consent of the State in which territory the activity is being developed.

infringements of *erga omnes* obligations, proposing a provision in the ARSIWA establishing that ‘the State which has committed or is committing an international crime shall not oppose fact-finding operations or observer missions in its territory for the verification of compliance with its obligations of cessation or reparation’.⁶³³ The provision was not included in the version of the ARSIWA approved in First Reading of 1996, although the fact-finding function has been maintained in the mechanisms of settlement of disputes in that version.⁶³⁴

Fact-finding operations can be established as a measure aimed at the non-repetition of wrongful conduct or possibly even as a measure of satisfaction. However, international practice does not seem to consider such measures as a special consequence of the violation of the prohibition of the use of force.⁶³⁵ The creation of fact-finding operations does not appear to be an obligation or a consequence of a wrongful act, being determined by the consent of the wrongdoer State through agreements between it and the victim State or by virtue of international treaties.⁶³⁶

3.5. Arrest and Penal Consequences for Organs of the State

Another consequence envisaged in the case of serious violations of the prohibition of the use of force is the establishment of the criminal responsibility of organs or agents of the wrongdoer State for the wrongful acts committed by them. Such a measure could have multiple functions, such as preventing the repetition of the illegal conduct by punishing authorities supportive to aggressive policies or serving as a substitute for the collective punishment of the population. Although the measure was envisaged after the First World War,⁶³⁷ the most significant example of judgment and punishment of State organs for international crimes was established by the International Military Tribunals of

⁶³³ Arangio-Ruiz, Seventh Report (n 504) 12 (para 36) and 30 (Article 18(2)).

⁶³⁴ The function was of competence of the Conciliation Commission and the Arbitral Tribunal, as proposed by Arangio-Ruiz in his Fifth Report. ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 357 and 364 (Articles 57(2) and 59(2)).

⁶³⁵ The creation of fact-finding missions or inquiry commissions in State practice and by the United Nations are not adopted exclusively regarding violations of the prohibition of the use of force, being applied mainly concerning atrocities and widespread violation of human rights and war crimes. A Jachec-Neale, ‘Fact-Finding’ (March 2011) in R Wolfrum (ed), *MPEPIL* (online edn) paras 15-18.

⁶³⁶ C J Tams, ‘Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?’ (2002) 13 *EJIL* 1161, 1179.

⁶³⁷ Article 227 of the *Treaty of Versailles* (n 569) provided for the establishment of a ‘special tribunal’ to try Kaiser William II ‘for a supreme offence against international morality and the sanctity of treaties’ and established that Germany recognized the right of the Allied Powers to bring into military tribunals and to punish ‘persons accused of having committed acts in violation of the laws and customs of war’. The Treaty also established the obligation of Germany to extradite such individuals and to furnish documents and information necessary for the trials (Articles 228 and 230). The application of such provisions, as is well-known, was unsuccessful. Gattini, *La riparazione di guerra* (n 566) 195-196.

Nuremberg⁶³⁸ and for the Far East.⁶³⁹ On the other hand, the measure was not applied concerning Iraq in 1990.⁶⁴⁰

The punishment of a State organ as a consequence of an internationally wrongful act was discussed in the ILC since the introduction of the notion of international crimes. Special Rapporteur Ago pointed out that the principle of individual criminal responsibility of organs for breaches of international obligations was evidence of the development of an international conscience regarding the existence of a category of exceptionally serious wrongful acts.⁶⁴¹ In this sense, both the regime of aggravated State responsibility and the criminal responsibility of individuals have the same origin in serious violations of obligations owed to the international community as a whole.⁶⁴² Nonetheless, as observed by Ago, the punishment of the individuals responsible for the commission of international

⁶³⁸ In the case of Germany, the Moscow Declaration of 1943 already established their intention to prosecute 'those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in (...) atrocities, massacres and executions', as well as major criminals. The Nuremberg Tribunal was established by the London Agreement of August 1945 for the 'trial of war criminals whose offenses have no particular geographical location' (Article 1). Its Charter annexed to the London Agreement provided for the trial of persons accused of 'crimes against peace', understood as 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing' (Article 6(a)). In addition to crimes against peace, the Tribunal was competent to judge war crimes and crimes against humanity (UN Doc A/CN.4/5, 87-88). The intention was confirmed by the Potsdam Agreement of 1945.

⁶³⁹ In the *Potsdam Agreement* (n 599), which claimed the surrender of Japan, the Allied established that they did 'not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners'. The Tribunal of Tokyo was established in 1946 by an executive order issued by the Supreme Commander for the Allied Powers in Allied-occupied Japan, maintaining the same characteristics of the Nuremberg Tribunal. Article 11 of the *Treaty of Peace with Japan* (n 570) of 1951 determined that the country accepted the decisions of the International Military Tribunal for the Far East and other courts and would carry out the sentences imposed, limiting the possibility of the reduction of sentences or granting of clemency or parole for the convicted (Gattini, *La riparazione di guerra* (n 566) 385). Although an international tribunal was not created to judge individuals from Italy for crimes committed during the war, Article 45 of the Treaty of Peace of 1947 established the obligation of the country to take necessary steps to apprehend and surrender for the trial of persons accused of having committed war crimes and crimes against peace or humanity and nationals from the Allied accused of treason or collaboration with the enemy during the war.

⁶⁴⁰ In the case of the Gulf War, although some resolutions of the Security Council had denounced violations of international humanitarian law and other rules of international law by Iraq (including the forced departure of Kuwaiti nationals, the mistreatment of individuals and property, the take of hostages, the destruction of Kuwaiti demographic records, the relocation of the population in Kuwait and the unlawful seizure and destruction of public and private property) and despite pressures from several States, the Council made no mention regarding the punishment of those responsible for the invasion of Kuwait in 1990. The matter was also not dealt with by the Iraqi Special Tribunal established by the occupying Powers in 2003 to judge Iraqi nationals or residents accused of genocide, crimes against humanity, war crimes, and other violations of domestic law committed between 1968 and 2003. Possibly the crime of aggression was not included in the Statute of the Tribunal for the inadequacy of the judgment of the international crime of aggression by a domestic court and the very form of occupation of the country in 2003. Graefrath and Mohr (n 516) 129; C Kress, 'The Iraqi Special Tribunal and the Crime of Aggression' (2004) 2 *Journal of International Criminal Justice* 347, 351; M A Newton, 'Iraqi Special Tribunal' (June 2010) in R Wolfrum (ed), *MPEPIL* (online edn) paras 34-36.

⁶⁴¹ Ago, Fifth Report (n 514) 31 (para 98).

⁶⁴² Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (n 210) 23.

crimes would not affect the responsibility of the State, one of the reasons why the Commission decided to consider matters separately.⁶⁴³

The prosecution by injured States of individual perpetrators of international crimes was considered by Special Rapporteur Arangio-Ruiz an exceptional measure of satisfaction affecting the independence, sovereignty, or domestic jurisdiction of the wrongdoer State. Arangio-Ruiz proposed the inclusion of a provision in the Draft Articles establishing the obligation for the wrongdoer State of ‘fully implement the *aut dedere aut judicare* principle’.⁶⁴⁴ The proposal was not entirely accepted by the Commission and the version of the ARSIWA approved in First Reading in 1996 established that ‘in cases where the internationally wrongful act arose from the serious misconduct of officials or the criminal conduct of officials or private parties, (satisfaction can take the form of) disciplinary action against, or punishment of, those responsible’.⁶⁴⁵ The provision establishing disciplinary action or punishment of agents was deleted from the final version of ARSIWA due to controversies within the Commission and Article 58 [2001] established a ‘without prejudice’ clause regarding ‘any question of the individual responsibility under international law of any person acting on behalf of a State’.⁶⁴⁶

A possible explanation for the choice of the Commission not to analyse any aspect of the relationship between the law of State responsibility and international criminal law is the ongoing development of such relationship regarding serious violations of obligations owed to the international community as a whole, comprising acts of aggression. There are several manners to explain the relationship between individual criminal responsibility and State responsibility. It is possible to consider international criminal law as a regime completely separated from the law of State responsibility, based on its own crimes and distinct secondary rules. It is also possible to understand it as part of the law of State responsibility, being either a special sanction applied by the victim State for the violation of a fundamental international obligation against a wrongdoer State for the violation of a fundamental international obligation or as a special consequence for the commission of

⁶⁴³ Ago, Fifth Report (n 514) 33 (para 101); Spinedi (n 514) 91.

⁶⁴⁴ Arangio-Ruiz, Fifth Report (n 611) 51-52 (paras 233 and 234). The obligation for the wrongdoer State would concern ‘any individuals accused of crimes against the peace and security of mankind the commission of which has brought about the international crime of the State or contributed thereto’. Arangio-Ruiz, Seventh Report (n 504) 29-30 (Article 18(e)).

⁶⁴⁵ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 296, Article 45, para 2(d). Special Rapporteur Crawford agreed to the maintenance of such provision, arguing the existence in the practice of cases of disciplinary or penal action against individuals but questioning whether this consequence would not be the performance of a primary obligation, probably a reference to the principle to extradite or prosecute (*aut dedere aut judicare*). (Crawford, Third Report (n 528) 56 (para 192)). According to the principle, States should cooperate in combating impunity and bringing to justice perpetrators of crimes such as genocide, war crimes, crimes against humanity, and violations of international humanitarian law. The recognition of the customary nature of the principle is controversial (Z Galicki, Fourth report on the obligation to extradite or prosecute (*aut dedere aut judicare*), ILC Yearbook 2011, Vol II(1) 22 (para 87); ILC, Report of the ILC on the work of its sixty-sixth session’ (5 May - 6 June and 7 July - 8 August 2014) A/CN.4/SER.A/2014/Add.1 (Part 2), 103 (para 51)).

⁶⁴⁶ This was the official justification offered by the Chairman of the Drafting Committee, Mr Gaja, who personally considered the obligation of penal action decided by a Tribunal contrary to the notion of measure of satisfaction ‘offered’ by the wrongdoer State (2662nd meeting (17 August 2000), ILC Yearbook 2000, Vol I, 203 (para 17) and 391 (para 33)). See also the discussions during the 2639th and 2940th meetings of the ILC on 13 and 14 July 2000 (ILC Yearbook 2000, Vol I, 211-220).

international crimes, being a decentralized sanction applicable by any member of the international community.⁶⁴⁷

As observed by Bonafè, the conception most consistent with international practice is the one that considers international criminal law and State responsibility as complementary to international crimes, or a ‘dual responsibility’. In this sense, both regimes have common primary rules determining materially the wrongful conduct both for States and individuals, although having different sets of secondary rules.⁶⁴⁸ Such dual responsibility is especially evident concerning the crime of aggression, as observed by Bonafè:

[T]he overlap between aggravated state responsibility and individual criminal liability is due to the fact that, under international law, acts of aggression always entail a dual responsibility. As concerns the material element, only acts involving the use of armed force by states amount to aggression and give rise to state and individual responsibility under international law. As concerns the subjective element, the crime of aggression entails both the responsibility of the author state, and the criminal liability of the political and military leaders of the state who have planned, prepared, initiated, or waged a war of aggression.⁶⁴⁹

The criminal responsibility of a State organ for an internationally wrongful act cannot be considered as a ‘sanction’ or reprisal against the wrongdoer State since both responsibilities arise independently from each other, although in a complementary manner. The punishment of individuals does not arise as a consequence of serious violations of international law by the State but by a wrongful act committed by the individual himself. This difference is even more difficult to be seen in the case of aggression since the wrongful conduct arises from a State act by definition.⁶⁵⁰ In any event, in the case of aggravated responsibility, the punishment of State organs can hardly be considered as a form of satisfaction.⁶⁵¹

⁶⁴⁷ Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (n 210) 45-63. Picone, for example, considered that the exercise of international criminal jurisdiction for individuals can be considered as a sanction imposed against a State for the violation of an obligation *erga omnes*, what would explain the ‘new powers’ granted to the Security Council by the international community for the protection of *erga omnes* obligation through the constitution of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (P Picone, ‘Sul fondamento giuridico del Tribunale penale per la ex-Iugoslavia’ (1996) 51 *Comunità Internazionale* 3-24). An opposite aspect of the problem is whether the Security Council may intervene in the work of the international criminal tribunals and affect international criminal law (M Arcari, ‘Tribunali penali ad hoc, Corte Penale Internazionale e Consiglio di Sicurezza delle Nazioni Unite’ in G Calvetti and T Scovazzi (eds), *Dal Tribunale per l'ex-Iugoslavia alla Corte Penale Internazionale* (Giuffrè 2004) 3-28). In the same line as Picone, Maison believes that the prosecution of individuals can be seen as a measure to guarantee the non-repetition of wrongful conduct by States not only for the punishment of the responsible for the violation but also for supporting a new regime established after the action of the international community (R Maison, ‘Les poursuites pénales internationales comme modalité de réparation du crime d’Etat’ in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004) 807, 814).

⁶⁴⁸ It is precisely because of the division at the level of secondary rules that criminal responsibility cannot replace the responsibility of States for unlawful conduct. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (n 210) 248-249.

⁶⁴⁹ *Ibid.*, 27 (footnotes omitted).

⁶⁵⁰ *Ibid.*, 223.

⁶⁵¹ However, as explained by Bonafè, in some situations of ‘ordinary’ State responsibility this may be possible. In this case, ‘rather than a secondary obligation properly speaking, satisfaction may be better understood as a possibility offered to the author state to dissociate itself from the responsible organ and

The punishment of individuals for internationally wrongful acts is affected by the application of the principle of jurisdictional immunity, an aspect of the sovereignty of the wrongdoer State which operates at the inter-State level.⁶⁵² In this case, one can argue that certain wrongful acts would not entail the obligation of the wrongdoer State to prosecute its organs but could justify an exception to the State immunity protecting them from criminal procedures abroad. According to Graefrath and Mohr:

The non-applicability of the claim of sovereignty or immunity with regard to individual penal responsibility for committing war crimes and crimes against peace and humanity, is an essential and typical legal consequence of the international crime of aggression. A link can thereby be found between international responsibility on the inter-State-level and international penal responsibility on the level of acting individuals, enabling their punishment as war criminals by all other States in line with the principle of universal criminal jurisdiction, even though they may have acted as State representatives or on behalf of the State.⁶⁵³

In principle, the derogation of the principle of State immunity seems to be a consequence of the wrongful act in cases of serious violations of rules protecting collective values of the international community, such as war crimes, crimes against humanity, and aggression. Indeed, often States deny the immunity of foreign diplomatic agents as a countermeasure, even for minor offences.⁶⁵⁴ Nevertheless, it seems unlikely that the derogation of the principle of State immunity can be considered as a direct consequence for an internationally wrongful act of a State.⁶⁵⁵ The ICJ seemed also to disconnect the derogation from State immunity and the consequences for the State of serious violations of international law in the case regarding *Jurisdictional Immunities of the State* of 2012. According to the Court:

[R]ecognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.⁶⁵⁶

If the derogation of the rule of State immunity is to be considered a consequence of serious breaches of *jus cogens* rules as those provided for by Article 41, every State would have the obligation to adopt it since its maintenance would be the same as render aid or assistance in maintaining the situation. In conclusion, it can be stated that the

avoid other consequences provided for under the law of ordinary state responsibility. In this sense, the punishment of state organs for isolated crimes by the author state can have a twofold effect under international criminal law and under ordinary state responsibility, and be regarded as a significant point of contact between these two regimes because individual liability can exhaust ordinary state responsibility'. Ibid, 236.

⁶⁵² Arangio-Ruiz, Fifth Report (n 611) 51 (para 233).

⁶⁵³ Graefrath and Mohr (n 516) 130 (footnotes omitted).

⁶⁵⁴ C Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994) 97-110.

⁶⁵⁵ B Bonafè, 'Imputazione all'individuo di crimini internazionali e immunità dell'organo' (2004) 87 *RDI* 393, 417-425. In the same line, see P de Sena, 'Immunità dell'individuo-organo dalla giurisdizione e responsabilità dello Stato: rapporti e problemi di coordinamento' in M Spinedi, A Gianelli and M L Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (Giuffrè 2006) 467-499.

⁶⁵⁶ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, 140 (para 93).

establishment of criminal responsibility for the State organ involved in the commission of an internationally wrongful act cannot be considered a consequence of the regime of aggravated responsibility or a derogation of the principle of jurisdictional immunity of the wrongdoer State.

3.6. *Forcible Change of Regime and Political Measures*

It is possible to consider that serious acts of aggression may justify the imposition of measures such as the change of regime or of aspects of the domestic life of the wrongdoer State functional to preventing the repetition of the conduct. Since a government adopting a persistent aggressive behaviour represents a permanent threat to international law and security, its removal can be seen as a measure of collective security intended to avoid the recurrence of aggression. Measures adopted to change a specific regime after an episode of illegal use of force were applied in State practice concerning Germany,⁶⁵⁷ Italy,⁶⁵⁸ Japan,⁶⁵⁹ and Iraq.⁶⁶⁰

The legal bases for measures of forcible regime change are controversial. Some authors consider that such action can be a lawful measure of self-defence on some occasions,⁶⁶¹ while other authors consider it as a consequence of wrongful conduct of the aggravated regime of State responsibility. According to Special Rapporteur Arangio-Ruiz, for instance, ‘a strong demand for a change of political regime might well prove to be an essential requirement not only as a matter of reparation but also as a guarantee of non-repetition’.⁶⁶² For Drost, measures of political, demographic, cultural, social, educational, and ‘ideological’ natures may be adopted to prevent or suppress threats to the peace,

⁶⁵⁷ The *Potsdam Agreement* (n 599) in 1945 determined a broad range of measures with the finality of ‘completely and finally abolished in such manner as permanently to prevent the revival or reorganization of German militarism and Nazism’. Among those measures of ‘denazification’ there was the dissolution of the National Socialist Party and its affiliated organizations, the dissolution of other military and semi-military organizations, clubs and associations ‘which serve to keep alive the military tradition in Germany’, the derogation of all Nazi discriminatory legislation, the complete elimination of Nazi doctrine in German educational system and the removal of active members of the Nazi Party from public office or even from some private companies.

⁶⁵⁸ The *Treaty of Peace with Italy* (n 585) of 1947 determined the dissolution of the Fascist organizations in Italy and prohibited the employment of fascists as officers of the Italian armed forces (Articles 17 and 55).

⁶⁵⁹ International directives from the Supreme Commander for the Allied Powers promoted the ‘psychological disarmament’ of the country with the abrogation of laws of militaristic and discriminatory nature, which culminated with the promulgation of a new Constitution in 1946. Supreme Commander for Allied Powers, *Political Reorientation of Japan, September 1945 to September 1948: Report* (United States Government Printing Office 1949) 186-188. See also Gattini, *La riparazione di guerra* (n 566) 385.

⁶⁶⁰ The Provisional Authority which assumed control of Iraq after its invasion in 2003 established measures of ‘de-Ba’athification’ of the country, including the disestablishment of the Party and the investigation and prosecution of its members. G H Fox, ‘The Occupation of Iraq’ (2005) 36 *Georgetown Journal of International Law* 195, 208-209; S Wheatley, ‘The Security Council, Democratic Legitimacy and Regime Change in Iraq’ (2006) 17 *EJIL* 531-551.

⁶⁶¹ Gattini, *La riparazione di guerra* (n 566) 575; W M Reisman, ‘Why Regime Change Is (Almost Always) a Bad Idea’ (2004) 98 *AJIL* 516, 524; Dinstein, *War, Aggression and Self-Defence* (n 159) 266; G H Fox, ‘Regime Change’ (January 2013) in R Wolfrum (ed), *MPEPIL* (online edn) paras 34-36. As Judge Schwebel expressed in his dissenting opinion in the *Nicaragua* case of 1986, ‘[i]n some, indeed most, instances, overthrow of the aggressor government might be an unnecessary and disproportionate act of self-defence, but in others it may be necessary and proportionate. It depends on the facts (if they can be found)’. *Military and Paramilitary Activities in and against Nicaragua* (n 14) 299-300 (para 85)).

⁶⁶² Arangio-Ruiz, Eight Report (n 595) 3 (para 12).

breaches of the peace, and acts of aggression and at the same time avoid the collective punishment of the population. In this sense:

These political measures, twice collective in being collectively determined and enjoined as well as collectively borne and endured, take on all sorts of forms, ways and means. Territorial transfer; military occupation; dismantling of industries; migration of inhabitants; reparation payments in money, goods or services; sequestration and confiscation of assets; armaments control; demilitarization; governmental supervision; together with many other international measures may be imposed upon the 'criminal' State.⁶⁶³

A regime change may also be considered as a *jus post bellum* measure in the broader context of post-conflict reconstruction.⁶⁶⁴ In principle, the measure may be applied as a collective action by the United Nations based on Chapter VII of the Charter against a specific regime pursuing a policy of aggression and considered to be a threat to the peace.⁶⁶⁵

Nevertheless, there are several reasons not to consider such measures as consequences of internationally wrongful acts. The existence of a dictatorial or militaristic form of government does not violate any rule of general international law and the adherence of a specific political regime is not *per se* a violation of international law.⁶⁶⁶ Besides, the imposition of a regime change is a measure that affects the obligation of non-intervention and the right of self-determination of the State, and the use of force to overthrow a government is generally considered illegal under international law.⁶⁶⁷ In addition, forcible measures of regime change are not uniformly applied in State practice, in special due to considerations related to the principle of self-determination of peoples. Even if it is possible to conceive that the forcible change of a regime may be imposed by the UN Security Council to deal with threats or breaches to the peace, they probably are not consequences of serious violations of international law.

⁶⁶³ P N Drost, *The Crime of State* (A W Sythoff 1959) Book I – Humanicide, 296-297. As observed by Arangio-Ruiz, some of the measures considered by Drost inevitably directly affect the population of the wrongdoer State, the reason why the purpose of the distinction is somehow frustrated. Arangio-Ruiz, Fifth Report (n 611) 57 (para 266).

⁶⁶⁴ E De Brabandere, 'The Concept of Jus Post Bellum in International Law: A Normative Critique' in C Stahn, J S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 123-141. On the other hand, political changes violate the principle of the law of belligerent occupation according to which the occupying Power has no general authority to make permanent changes in the legal and political systems of the occupied territory. See in general Fox, 'The Occupation of Iraq' (n 660).

⁶⁶⁵ Bowett, *Self-Defence in International Law* (n 195) 51-52; M J Matheson, 'United Nations Governance of Postconflict Societies' (2001) 95 *AJIL* 76-85.

⁶⁶⁶ In the *Nicaragua* case (1986), the ICJ considered that '[h]owever the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State'. *Military and Paramilitary Activities in and against Nicaragua* (n 14) 133 (para 263).

⁶⁶⁷ Gattini, *La riparazione di guerra* (n 566) 572-573; Gray, *International Law and the Use of Force* (n 226) 118-119.

4. Legal Consequences Involving the Use of Armed Force

Measures involving the use of force are allowed under international law not only in the exercise of self-defence but also for purposes of maintaining international peace and security. It is possible to consider that an armed reaction may also be justified regarding other wrongful acts, in particular those affecting the collective interests of the international community.⁶⁶⁸ Considering this possibility, this section aims to analyse possible consequences involving the use of force as a reaction to a violation of the prohibition of the use of force, a faculty otherwise limited by international law. They are the imposition of blockades (section 4.1) and no-fly zones (section 4.2), and the occupation or cession of a territory (section 4.3). It should be noted that forcible countermeasures and measures of self-defence could also be characterized as legal consequences involving the use of force, but for methodological purposes, they are analysed in chapter 4.⁶⁶⁹

4.1. Imposition of Blockades

The establishment of a naval blockade is a measure of economic warfare aimed to prevent any type of naval traffic between States and implemented through military action.⁶⁷⁰ It is not clear whether a blockade can be adopted by the victim State to force the wrongdoer State to comply with its obligations or generally as a consequence of the violation of the prohibition of the use of force. Originally the basic purpose of a blockade is not to force the belligerent State to comply with its obligations or to cease the wrongful conduct but to weaken it economically and to harm its war effort. Instead, the instruments traditionally recognized for the enforcement of international rules during armed conflicts are reprisals.⁶⁷¹

State practice points out that among the maritime blockades that have been imposed in recent decades during armed conflicts, none of them had a direct relationship with specific prior wrongful conducts.⁶⁷² Even so, it is possible to consider the use of a collective blockade to make a wrongdoer State comply with its obligations and to force the cessation of the wrongful act, especially when this is decided in an institutionalized context. This hypothesis is expressly envisaged by Article 42 of the UN Charter, which establishes the power of the Security Council to adopt coercive measures involving the use of armed force ‘by air, sea, or land forces as may be necessary to maintain or restore international peace and security’, which ‘may include demonstrations, blockade, and other operations by air, sea, or land forces’. Blockades are generally imposed by the UN Security Council not to force a State to comply with its obligations but to enforce sanctions and arms embargoes.⁶⁷³ Nevertheless, such measures find their legality in the UN Charter and

⁶⁶⁸ Graefrath and Mohr (n 516) 111.

⁶⁶⁹ See section 2, part two of chapter 4.

⁶⁷⁰ Brownlie, *International Law and the Use of Force by States* (n 20) 365-366; Jennings and Watts (n 609) 511-512; Heinegg (n 314).

⁶⁷¹ Pallieri (n 309) 357; Bailey, *How Wars End I* (n 310) 291. For the legality of belligerent reprisals, see F Kalshoven, ‘Belligerent Reprisals’ (1973) 12 *Military Law and Law of War Review* 265-280.

⁶⁷² Heinegg (n 314) paras 15-22.

⁶⁷³ By Res 665 (25 August 1990, para 1) and Res 670 (25 September 1990, para 8), the Security Council called upon Member States deploying maritime forces to the Gulf to ‘halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations’ and to ‘detain any ships of Iraqi

cannot be considered as a direct consequence of the violation of the prohibition of the use of force.⁶⁷⁴

4.2. Imposition of No-Fly Zones

A no-fly zone is a type of designated area or security zone in which the movement of aircraft is limited for security purposes, a ‘*de facto* aerial occupation of sovereign airspace’ in which only the aircraft of the forces implementing the no-fly zone can enter.⁶⁷⁵ As a relatively recent practice, the concept and legal regulation of no-fly zones are not entirely clear. At any rate, no-fly zones are similar to blockades for making potential use of armed force and have a clear impact on the domestic jurisdiction of the target State. Special Rapporteur Arangio-Ruiz considered the adoption of no-fly zones as a possible consequence of the violation of the prohibition of the use of force.⁶⁷⁶

State practice concerning the imposition of no-fly zones is incipient and not consistent. No-fly zones are imposed unilaterally by States in regions of conflict or sensible areas with multiple justifications⁶⁷⁷ or as a collective measure in response to attacks by a State against its population, although such measure has never been applied as a result of acts of aggression by States. No-fly zones were established in Iraq between 1991 and 2003 with the main purpose of preventing the country from attacking parts of its population but were not expressly authorized by the UN Security Council and their legality is questionable.⁶⁷⁸ On the other hand, it is not excluded that such measure could be applied to situations of use of external force by States, since it seeks to prevent the use of air force by States regardless of its purpose.

4.3. Occupation and Cession of Territory

The total or partial occupation of the territory of an aggressor State is an international practice admitted and regulated by the *jus in bello*. As mentioned in chapter 1, a territory is considered occupied when it is placed under the authority of another belligerent State and this situation generates obligations for the occupying Power, regardless of the

registry which enter their ports’ to ensure the application of the sanctions imposed on Iraq by Res 661 (1990). Similar measures of enforcement of sanctions were authorized by the Security Council based on Chapter VII by Res 787 (16 November 1992) against the Federal Republic of Yugoslavia (paras 9-13), Res 875 (16 October 1993) against Haiti (para 1), Res 2216 (14 April 2015) against Yemen (paras 14 and 15), and Res 2292 (14 June 2016) against Libya (paras 3 and 4). Despite being connected with the imposition of non-coercive measures, such measures are the application of military force to enforce embargoes. O Schachter, ‘United Nations Law in the Gulf Conflict’ (1991) 85 *AJIL* 452, 454; Graefrath and Mohr (n 516) 115.

⁶⁷⁴ The use of the measures of Article 42 of the UN Charter by the Security Council to enforce obligations created as a consequence of the commission of a wrongful act is criticised by some authors. P Daillier, ‘Article 42’ in J P Cot, A Pellet and M Forteau (eds), *La Charte des Nations Unies* (Vol I, 3rd edn, Economica 2005) 1243, 1255.

⁶⁷⁵ M N Schmitt, ‘Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement’ (1998) 72 *International Law Studies Series* 239, 240; A McDonald and H Brollowski, ‘Security Zones’ (April 2011) in R Wolfrum (ed), *MPEPIL* (online edn) para 7.

⁶⁷⁶ Arangio-Ruiz, Fifth Report (n 611) 44 (para 182).

⁶⁷⁷ See the no-fly zone established by the Libyan National Army over part of the country (UN Doc S/2018/13, para 10), by Sudan (S/2021/199, para 7), and by Ethiopia over the Grand Ethiopian Renaissance Dam in 2020 and the Tigray region in 2021.

⁶⁷⁸ M Wood, ‘Iraq, No-Fly Zones’ (June 2010) in R Wolfrum (ed), *MPEPIL* (online edn) paras 7-8. No-fly zones were also implemented by the Security Council for the protection of civilians in Bosnia and Herzegovina in 1993 and in Libya in 2011.

legitimacy or cause of the occupation.⁶⁷⁹ As a consequence of an act of aggression, the military occupation may have the function of cessation of the wrongful conduct by overpowering the enemy forces, to guarantee the non-repetition of the conduct by the imposition of political measures and demilitarization or to guarantee the fulfilment of the obligation of reparation by the wrongdoer State.⁶⁸⁰

The occupation of Germany in 1945 is an example of a multipurpose measure with the main objective of securing the cessation of the conflict by the military defeat of the country.⁶⁸¹ It also illustrates the question of whether the definitive cession of a territory can be considered as a legitimate consequence of an act of aggression, since after the Second World War several territories were annexed by the Allies, in particular by the Soviet Union.⁶⁸² The annexations were justified by Moscow either based on the consent of the Axis powers expressed in armistices or peace treaties or as a consequence of the aggression committed by them. According to Tunkin, for instance, rather than the ‘right of the victor’, the annexations:

[W]ere based above all on the principle of international legal state responsibility for the aggression which it committed. (...) Here is found the application and confirmation of a new progressive principle directed toward the maintenance of international peace – the principle of responsibility for aggression.⁶⁸³

This justification does not seem to be supported by international law existing at that time, since the acquisition of territory by force was already considered illegal and the belligerent occupation always intended to be a temporary measure.⁶⁸⁴ On the other hand, the legitimacy of such transfers may also be based on the State consent expressed in

⁶⁷⁹ *Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907* (n 97) Article 42.

⁶⁸⁰ Pallieri (n 309) 300.

⁶⁸¹ According to the *Potsdam Agreement* (n 599), the purposes of the occupation of the territory were four: the complete disarmament and demilitarization of Germany; ‘to convince the German people that they have suffered a total military defeat and that they cannot escape responsibility for what they have brought upon themselves’; to destroy the National Socialist Party and Nazi institutions; and to prepare the ‘eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation’ (D’Argent, ‘Reparations after World War II’ (n 570) para 2). There is some controversy over the consideration of the situation as one of *debellatio* rather than of a typical military occupation, that is, a situation in which the State disappears as a result of the total e complete defeat of its armed forces. In this extreme situation, the armed forces of the defeated State are annihilated, and the public institutions ceased to exist, what in several aspects seems to be the situation of Germany between the unconditional surrender of May 1945 and the creation of the two Germanies in 1949. For this controversy, see H Kelsen, ‘The Legal Status of Germany According to the Declaration of Berlin’ (1945) 39 *AJIL* 518-526; Brownlie, *International Law and the Use of Force by States* (n 20) 408; C Stahn, *The Law and Practice of International Territorial Administration* (CUP 2008) 126; M N Schmitt, ‘Debellatio’ (October 2009) in R Wolfrum (ed), *MPEPIL* (online edn) paras 6-7.

⁶⁸² Among the territories annexed by the Soviet Union the cases of Königsberg (nowadays Kaliningrad) from Germany, of the territory of Petsamo and part of the territories of the Karelia and Salla from Finland, of part of Bukovina and the territory of Bessarabia from Romania and of the Kurils Islands from Japan. See also Kamto, *L’agression en droit international* (n 616) 242. In the past, the cessation of territory was justified also in the situations in which the loser State could not pay the reparations required, but the legal basis of such practice was soon challenged after the First World War. Fauchille, *Traité de droit international public* (n 51) 1041 (para 1705).

⁶⁸³ Tunkin (n 576) 414-415.

⁶⁸⁴ Migliazza (n 100) 4-5; Pallieri (n 309) 304; Kamto, *L’agression en droit international* (n 616) 245.

treaties, since consent can justify the occupation or even the cession of a territory by the wrongdoer State.⁶⁸⁵

Although common in the past, the practice of military occupations in the aftermath of a conflict or as a result of an act of aggression has been limited in recent decades and replaced by the establishment of international territorial administrations. In this type of administration, an international organization or international entity exercises provisional authority over a territory, either directly or indirectly.⁶⁸⁶ Nevertheless, the creation of international territorial administrations has the predominant function of serving as an auxiliary mechanism contributing to the peaceful settlement between parties, not as a necessary consequence of the use of force.

5. Conclusion

It is not possible to classify in a single category all the reactions to violations of the prohibition of the use of force analysed in the present chapter. Although there is a direct causal link between most of them and the wrongful use of force by States, they may not be qualified properly as legal consequences of the wrongful act and the existence of a broad and uniform regime of consequences of violations of the prohibition of the use of force must be rejected. The measures analysed in the present chapter can be catalogued in three different groups according to their function.

The first group contains measures not connected specifically with violations of the prohibition of the use of force. This is the case of measures establishing fact-finding missions and implementation of penal consequences for organs of the wrongdoer State. State practice points to the fact that such measures are usually applied in contexts other than the occurrence of violations of the prohibition of the use of force, being mostly associated with serious violations of human rights. It is doubtful whether both measures are even consequences of wrongful acts since fact-finding missions are established almost exclusively with the consent of the wrongdoer State and individual criminal responsibility complements but is independent of State responsibility. It is also possible to include in this group the concept of punitive damages, whose admissibility in international law is not clear but that, in any case, would not be limited to violations of the prohibition of the use of force.

The second group is composed of measures clearly connected to the illegal use of force by States but which cannot be considered special consequences of it. Those are the institution of blockades, the imposition of no-fly zones, and the occupation of the territory of the wrongdoer State, that although applied in situations of armed conflicts or use of

⁶⁸⁵ The authorization of occupation by an armistice or other kind of agreement is a practice known as 'pacific occupation' and a classic example of it was the occupation of the Ruhr Valley by France and Belgium in 1923 to guarantee the payment of war reparations. The occupation was justified based on Article 18 of Annex II to the Part VIII of the Treaty of Versailles, which did not expressly provide for the measure. E Benvenisti, 'Occupation, Pacific' (June 2009) in R Wolfrum (ed), *MPEPIL* (online edn).

⁶⁸⁶ An earlier example of territory temporarily administered by an international entity in connection with the use of force is the city of Leticia during the conflict between Colombia and Peru in order to facilitate a peaceful settlement of the dispute, as proposed by the Council of the League of Nations in 1933. In this case and others such as Danzig and Trieste, the international territorial administration was aimed at the 'neutralisation' of a disputed territory, isolating it from conflicting actors. For an overview of the matter, see Stahn (n 681).

armed force by States cannot be considered as necessary legal consequences of those acts. Such measures can eventually be applied against an aggressor State to obtain the cessation or the non-repetition of the wrongful act in specific contexts, but they are not properly a consequence of the use of force. Furthermore, international practice demonstrates that they are usually adopted collectively, generally by the United Nations based on Chapter VII of the Charter. The permanent cession of territory, on the other hand, is possibly a violation of international law, in particular a violation of the principle of self-determination of peoples.

A third and last group contemplates measures connected to the violation of the prohibition of the use of force usually applied in State practice. Such measures in principle could be identified as legal consequences of the wrongful act but are better understood as specific means of application of general consequences recognized by the law of State responsibility. Thus, measures of reduction of armed forces and weapons, measures of demilitarization, the forcible regime change, and some aspects of the regime of war reparations are specific forms of cessation or to guarantee the non-repetition of aggressive conduct of a State. In this sense, they are not special rules derogating from the general rules of State responsibility and do not exclude the application of other similar measures which may replace them.

A possible exception to this group is the existence of limits to war reparations considering the economic capacity of the wrongdoer State. As observed in section 2.3, the State responsible for serious violations of the prohibition of the use of force and acts of aggression is under the obligation to make full reparation for all damages caused during the wrongful conduct, a principle that is recognized as a general rule by the law of State responsibility. However, in the case of acts of aggression, the application of the principle of full reparation is affected by domestic considerations of the aggressor State which may limit the amount of reparation due. It is not clear whether such an exception can be properly considered as a legal consequence of aggression, a form of implementation of the responsibility of the aggressor, the operation of the principle of self-determination of peoples, or even the application of the circumstance of necessity. In any case, this exception does not seem sufficient to assert the existence of specific legal consequences for violations of the prohibition of the use of force in international law.

CHAPTER 4 – THE USE OF FORCE AND THE IMPLEMENTATION OF STATE RESPONSIBILITY

The rules on the implementation of State responsibility determine how the legal consequences of internationally wrongful acts will be applied, ensuring the effectiveness of the legal relationship arising from the breach of an international obligation. Part Three of the ARSIWA is dedicated to such rules, establishing how a State may invoke the responsibility of another one for an internationally wrongful act and regulating the recourse to countermeasures intended to ensure the implementation of international responsibility. The present chapter aims to analyse how the rules related to the prohibition of the use of force may have influenced the general rules of implementation of State responsibility (part one) and how they may derogate from such same rules (part two).

Part I – Contribution of the Prohibition of the Use of Force to the General Rules of Implementation of State Responsibility

1. Introduction

The notion of implementation of State responsibility is related to the *mise en oeuvre* or application of the rules of State responsibility, in which ‘tertiary rules’⁶⁸⁷ operate aiming to ensure the effectiveness of secondary rules. Norms on effectiveness are also an important part of the law of the use of force, which provided concepts such as reprisals, self-defence in repelling an armed attack to ensure the sovereignty and territorial integrity of a State or collective action aiming at the preservation of international peace and security. In this regard, one may question whether (and subsequently how) the rules on the implementation of State responsibility were influenced by the rules of the law of the use of force developed several decades ago to meet the protection of basic needs of States and the international community.

Part one of chapter 4 intends to analyse how the rule of the law of the use of force may have influenced the rules of the law of State responsibility regarding the implementation of responsibility, considering the division made by Part Three of the ARSIWA.⁶⁸⁸ For this purpose, section 2 analyses how the rules of invocation of State responsibility were influenced by some characteristics of violations of the prohibition of the use of force and how this is applied in State practice. The notion of the victim State in cases of aggression, for instance, was an important point of departure in the development of rules regarding other serious violations of international law. Section 3 is dedicated to the regime of countermeasures and its connections with self-defence, considering particularly how the concept of collective countermeasures was inspired by some of the characteristics of the exercise of collective self-defence, and how this relation is manifested by the application of the same requirements for both cases. Still taking as a reference the regime of collective

⁶⁸⁷ Riphagen, Fourth Report (n 518) 8 (para 33).

⁶⁸⁸ Part Three of the ARSIWA divides the rules regarding implementation of State responsibility in invocation of the responsibility of a State (Articles 42 to 48) and countermeasures (Articles 49 to 54). Although this division is sometimes considered artificial and controversial due to its adoption at a later stage of the works of the ILC on State responsibility, it can be useful to analyse the subject.

self-defence, section 4 will analyse the possibility of considering the prior request by the injured State as a requirement for the adoption of collective countermeasures. Some conclusions are made in section 5.

2. Invocation of the Responsibility of a State

The rules regarding implementation of State responsibility are essentially based on the definition of the legal relationships existing between the wrongdoer State and the injured State, which is entitled to invoke the implementation of the secondary obligations burdening on the wrongdoer State. As a consequence, the first and most obvious candidate to be considered as having the right to invoke the responsibility of the wrongdoer State is the victim State. For this reason, the rules regarding the invocation of State responsibility were codified by the ILC starting from the basic concept of the ‘injured State’. Some particularities of specific violations of the prohibition of the use of force may have been considered by the Commission in codifying the rules of invocation of State responsibility by States directly injured (section 2.1) and those States which are not directly injured but have a legal interest in the matter (section 2.2).

2.1. Invocation of the Responsibility by an Injured State

The concept of ‘injured State’ is central to the invocation of responsibility, although the main problem is the identification of such State in some violations of international law. It is a basic rule of State responsibility that the State allowed to invoke the responsibility of another for the breach of an international obligation is the one which is the direct victim of the injury and suffers all the negative consequences arising therefrom.⁶⁸⁹ The application of the rule becomes more problematic with the introduction of the concept of obligations *erga omnes* in international law, i.e., those owned ‘towards the international community as a whole’ and which ‘all States can be held to have a legal interest in their protection’.⁶⁹⁰ As shown in this section, the identification of the injured State in this case and the differentiation between categories of States affected by a wrongful act seems to have been influenced by the case of the violation of the prohibition of the use of force and the different levels of disturbance caused by it.

Initially, the Commission considered that in cases of international crimes all States were considered as injured, even if the possibility of the request of cessation and reparation for them was not entirely clear.⁶⁹¹ As a replacement to the rejection of the concept of

⁶⁸⁹ In the Advisory Opinion relating to *Reparation for Injuries* of 1949 the ICJ recognized as a principle that ‘only the party to whom an international obligation is due can bring a claim in respect of its breach’. *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 181-182.

⁶⁹⁰ *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (New Application: 1962) (Second Phase) [1970] ICJ Rep 3, 32 (para 33).

⁶⁹¹ Special Rapporteur Riphagen proposed a very broad definition of injured State encompassing not only the State whose right has been infringed by the breach of an obligation in a bilateral treaty or customary rule but also all States in the case of an international, which was accepted by the Commission and included as Draft Article 40 [1996]. W Riphagen, Fifth Report on State Responsibility, ILC Yearbook 1984, Vol II(1) 3 (Articles 5 and 9); ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 271-272 and 274 (para 26). For the classification of the States able to invoke responsibility, see also G Arangio-Ruiz, Third Report on State Responsibility, ILC Yearbook 1991, Vol II(1) 28 (para 93); L A Sicilianos, ‘The Classification of

international crimes of States, Special Rapporteur Crawford proposed the division of the rules of invocation between injured State and State having a ‘legal interest in the performance of an international obligation’ in cases of *erga omnes* obligations and obligations protecting collective interests of a group of States.⁶⁹² The concept of ‘legal interest’ was not adopted by the Commission, although the division between States considering their rights was maintained in the final version of the ARSIWA with the establishment of two categories of States that may invoke international responsibility: an ‘injured State’ (Article 42) and a ‘State other than the injured State’ (Article 48, which will be analysed in the next section). Article 42 establishes that:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) that State individually; or

(b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

The concept of injured State adopted by Article 42 is based on the rationale of bilateral relationships, since either the obligation belongs to a single State as presented by the hypothesis of Article 42(a), or belongs to several States or the international community as a whole such as integral obligations (Article 42(b)(ii)) and multilateral or *erga omnes* obligations (Article 42(b)(i)). In this latter case, despite the multilateral character of the obligation it is possible to identify a specially injured State, which in practice ‘bilateralizes’ the relation.⁶⁹³

If by one hand it is difficult to consider the difference between ‘injured’ and ‘specially affected States’ in practice and from the examples provided by the Commission,⁶⁹⁴ on the other hand, the case of serious violations of the prohibition of the use of force seems to be the only one that explains in legal terms how a State can be ‘specially affected’ by the breach of an obligation that belongs to the international community as a whole. In other words, the example which better illustrates the hypothesis of an obligation that belongs

Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 *EJIL* 1127, 1138.

⁶⁹² Crawford, Third Report (n 528) 39 (Article 40 bis (2)).

⁶⁹³ G Gaja, ‘The Concept of an Injured State’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 941, 944-947.

⁶⁹⁴ The Commission presented, as examples of collective obligations protecting interests of the international community the breach of which could generate an injured State able to invoke the responsibility of the wrongdoer State, those concerning the prohibition of the use of force and the protection of the marine environment, also referring in the latter case to Article 194 of the UNCLOS. It is doubtful whether the example presented by the Commission has the status of an *erga omnes* obligation, but even in this case it is possible that such violation occurs without an injured State identified. G Gaja, ‘States having an Interest in Compliance with the Obligation Breached’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 957, 961; Y Shigeta, ‘Obligations to Protect the Environment in the ICJ’s Practice: To What Extent Erga Omnes?’ (2012) 55 *Japanese Yearbook of International Law* 176-207.

to the international community as a whole but the violation of which at the same time specially affects some determined States is that of serious violations of the prohibition of the use of force.⁶⁹⁵

According to the Commission, the concept of ‘specially affected’ States refers to cases in which ‘the wrongful act may have particular adverse effects on one State or on a small number of States’.⁶⁹⁶ Such ‘particular adverse effects’ clearly refer to legal impacts of the wrongful act as to be characterized as a proper ‘injury’ by international law, since effects that are otherwise ‘adverse’ but not wrongful or affecting the legal interests of a State would not be sufficient to characterize it as ‘injured’. The ‘particular adverse effects’ are translated in more clear terms regarding the State target of an armed attack since the conduct affects more concretely its rights to territorial integrity and political independence.⁶⁹⁷ In this sense, serious violations of the prohibition of the use of force are particularly fit to the distinction between ‘injured’ and ‘non-injured’ State due to the bilateral and collective character of the wrongful conduct, which infringes simultaneously the individual right of a State, such as the rights to territorial sovereignty and integrity,⁶⁹⁸ and the collective rights of all States, such as the maintenance of international peace and security.⁶⁹⁹

There are several examples of cases before international courts and tribunals in which States have invoked individually an unlawful use of force against themselves,⁷⁰⁰ although in neither case did the State need to demonstrate that it was ‘specifically affected’ to claim cessation or reparation for the conduct, despite issues such as the attribution of conduct to the State or the jurisdiction of the tribunal to resolve the dispute were present. There are also several examples in diplomatic practice⁷⁰¹ in which a State alleged the violation

⁶⁹⁵ Arangio-Ruiz, Fourth Report (n 379) 45 (para 136, footnote 306). As observed by Arangio-Ruiz, other positions between the two dichotomous positions can also be observed, as in the case of States that are part of a collective security system together with the victim States or its neighbours.

⁶⁹⁶ Commentaries to Article 42, para 12. According to the Commission, the concept of ‘specially affected’ was inspired by Article 60 (2)(b) of the VCLT, although the convention does not define the concept. Gaja, ‘The Concept of an Injured State’ (n 693) 946; T Giegerich, ‘Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach’ in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2018) 1095, 1114.

⁶⁹⁷ Gaja, ‘The Concept of an Injured State’ (n 693) 947; Crawford, *State Responsibility* (n 10) 546.

⁶⁹⁸ In terms of individual rights of the victim State, there is a necessary connection between the obligation to respect such rights and the prohibition of the use of force, reason why the violation of the latter would inevitably affect the violation of some of such rights. As expressed by the ICJ in the *Nicaragua* case (1986), the principles of territorial sovereignty, prohibition of the use of force, and non-intervention overlap and the violation of one of them may imply the violation of others (ICJ Rep 128, para 251). See also the terms of Article 2(4) of the UN Charter and the concept of aggression adopted by Article 1 of UNGA Res 3314 (XXIX) (1974).

⁶⁹⁹ K Kawasaki, ‘The ‘Injured State’ in the International Law of State Responsibility’ (2000) 28 *Hitotsubashi Journal of Law and Politics* 17, 23-24.

⁷⁰⁰ This may be observed by the claims in the made in the ICJ by the United Kingdom against Albania in the *Corfu Channel* case (1949), by Nicaragua against Costa Rica, the United States, and Honduras concerning the activities of the *contras* in the *Nicaragua* case (1984 and 1986), by Iran against the United States in the *Oil Platforms* case (2003), by Yugoslavia against ten NATO members for the bombardment of the country in *Legality of Use of Force* cases (1999) and by the DRC against Burundi and Rwanda in the *Armed Activities* cases (1999).

⁷⁰¹ The ILC adopts the position according to which for the purposes of the ARSIWA a diplomatic protest is not considered as an invocation of responsibility. This position is contrary to the recognition by the Commission that ‘there is in general no requirement that a State which wishes to protest against a breach

of its sovereignty or territorial integrity by the illegal use of armed force by another State.⁷⁰²

The effect of recognizing that there is a ‘specially affected’ State in the case of a violation of an obligation ‘owed to the international community as a whole’ is that such State has a ‘full range of rights and powers consequent on the wrongful act’. The State is then entitled to claim the cessation, assurances or guarantees of non-repetition, and the reparation of the injury, as well as to resort to means of redress, including the adoption of countermeasures against the wrongdoer State.⁷⁰³ However, the violation of the prohibition of the use of force has also a collective character that justifies the invocation of the wrongdoer’s responsibility by other States.

2.2. *Invocation of the Responsibility by a State other than an Injured State*

Beyond the State directly affected by the wrongful conduct, the law of State responsibility admits that other States can invoke the responsibility of the wrongdoer State concerning some specific violations. The idea of the existence of obligations to the international community as a whole took shape after the Second World War and was developed in international law by the ICJ with its famous *obiter dictum* in the *Barcelona Traction* case.⁷⁰⁴

As mentioned above, after the rejection of the concept of international crimes of States by the Commission, with the attached qualification of all States as injured States, Special Rapporteur Crawford proposed the differentiation of the possibility of invocation of responsibility between injured States and States other than the injured States, which according to him would have a legal interest in the performance of the obligation breached.⁷⁰⁵ This possibility was adopted by Article 48, which in its paragraph 1 determines that:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

of international law by another State’ (Commentaries to Article 42, para 2). Although in principle the examples selected in the present work cannot be considered as examples of invocation of responsibility according to the Commission’s criteria, all of them contain the identification of a wrongful conduct attributed to a State and usually the request for the adoption of measures or the cessation of the conduct by the State invoking the responsibility, reason why the author believes that they are useful as State practice.

⁷⁰² See for instance several allegations of acts of aggression made by Israel against Lebanon, Jordan, the United Arab Republic, and Saudi Arabia (for instance, UN Doc S/9590; S/7586; S/7926; S/3835; A/58/836 - S/2004/463) and vice-versa (UN Doc S/9879; S/9634; S/3462). The invasion of Cypriot airspace by Turkish military aircraft in 1964 was classified by Nicosia as an act of aggression against its sovereignty and independence and a contravention of international law and the UN Charter, which would justify the application of sanctions by the United Nations and measures to prevent the repetition of the acts (UN Doc S/5705). In 2008 Chad considered the armed attack carried out by Sudanese soldiers in its territory as an act of aggression and requested to the Security Council the condemnation of the actions (UN Doc S/2008/398). In 2014 Ukraine stated that the occupation and annexation of Crimea by Russia was an act of aggression that could be qualified as such according to several definitions provided for by UNGA Res 3314 (XXIX) (1974), reaffirming that the act constitutes a crime against international peace and gives rise to international responsibility. It also urged the Member States to stop the aggression (UN Doc S/2014/895).

⁷⁰³ Commentaries to Article 42, para 3. See also Sicilianos, ‘The Classification of Obligations’ (n 691) 1139.

⁷⁰⁴ *Barcelona Traction* (n 690) 32 (para 33).

⁷⁰⁵ Crawford, Third Report (n 528) 39 (Article 40 bis (2)).

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

According to the Commission, Article 48 refers to the possibility of a State to invoke responsibility ‘not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole’.⁷⁰⁶ The provision limits substantially the rights of a State other than an injured State, that according to paragraph 2 may only claim the cessation of the wrongful act and assurances and guarantees of non-repetition. Reparation can only be claimed ‘in the interest of the injured State or of the beneficiaries of the obligation breached’. The approach is criticised for being bilateral-minded and ‘multilateralizing injury’ by creating relationships *ut singuli* between the wrongdoer State and every other State.⁷⁰⁷ It also considers a ‘State other than an injured State’ as a sort of third State in practice, which in principle would not be entitled to invoke the responsibility for a wrongful conduct as not legally affected by it.⁷⁰⁸

Articles 42 and 48 are not mutually exclusive and can be applied to the same wrongful acts, since both Article 42(b) and 48(1b) contain provisions regarding violations of obligations belonging to the international community as a whole, the difference being in the rights and faculties attributed to States able to invoke the responsibility for such violations. Although not expressed by the Commission, the hypothesis of subparagraph 48(1b) refers to violations of obligations *erga omnes*,⁷⁰⁹ among which the prohibition of the use of force is widely recognized as an example.

As a consequence of the division between injured and non-injured States, injured States have the precedence in invoking the responsibility of the wrongdoer State. Article 48 ‘complements’ or is ‘ancillary or secondary’ to Article 42,⁷¹⁰ which means that in general the violation of *erga omnes* obligations is characterized by one or more injured States which have precedence over non-injured States. Nevertheless, possibly the logic behind the division between injured and non-injured States in the case of invocation of responsibility for violations of *erga omnes* obligations was based on the violation of the prohibition of the use of force. From the examples of *erga omnes* obligations presented by the ICJ, only the ‘outlawing of acts of aggression’ can be considered as having a clear identified injured State.⁷¹¹

⁷⁰⁶ Commentaries to Article 48, para 1.

⁷⁰⁷ B Simma, ‘Bilateralism and Community Interest in the Law of State Responsibility’ in Y Dinstein (ed), *International Law at a Time of Perplexity* (Martinus Nijhoff 1989) 821, 832 and 836.

⁷⁰⁸ Sicilianos, ‘The Classification of Obligations’ (n 691) 1138. The expression ‘third State’ was adopted originally by Special Rapporteur Crawford. Crawford, Third Report (n 528) 25-35.

⁷⁰⁹ Gaja, ‘States having an Interest in Compliance with the Obligation Breached’ (n 694) 957; Crawford, *State Responsibility* (n 10) 551.

⁷¹⁰ Commentaries to Article 48, para 1; Crawford, *State Responsibility* (n 10) 551.

⁷¹¹ In the *Barcelona Traction* case (1970) the Court identified ‘the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’ as examples of obligations *erga omnes*. *Barcelona Traction* (n 690) 32 (para 33). The same characterization was made by the Court regarding the right of peoples to self-determination in the *East Timor* case ((n 550) 102 (para 29)), the obligation to respect the

Violations of other obligations *erga omnes*, such as the right of self-determination of peoples and the prohibition of genocide generally do not present properly an ‘injured State’ in the sense of Article 42.⁷¹² Nevertheless, such violations may affect human rights or interests of groups or individuals. This fact was acknowledged by the Commission, which in paragraph 2(b) of Article 48 established that a State other than an injured State may claim the ‘performance of the obligation of reparation (...) in the interest of the injured State *or of the beneficiaries of the obligation breached*’. Through this wording, the Article avoided the problem of denying the possibility of invocation of the obligation of reparation in cases in which there is no injured State.⁷¹³

Diplomatic practice shows that the possibility of invocation of the responsibility for acts of aggression by States other than the ‘injured State’ is well-recognized, as seen in the case of the Indochina wars,⁷¹⁴ interventions made by the United States in Latin America,⁷¹⁵ and for actions taken by Israel against Arab countries.⁷¹⁶ In such cases, the invocation was limited to the request of cessation or non-repetition of the wrongful conduct. In none of them, States claimed reparation for themselves or the injured State.

right of self-determination and certain obligations of international humanitarian law in the *Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)* (n 300) 199 (para 155)), the right of self-determination in the *Chagos Advisory Opinion (Legal Consequences of the Separation of Chagos)* (n 350) 139 (para 180)), and some obligations of the Convention on the Prevention and Punishment of the Crime of Genocide in the *Croatia v Serbia* case of 2015 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (2015 ICJ Rep 46-47 (para 87))).

⁷¹² According to the ARSIWA, a State can be ‘specially affected’ by the violation of *erga omnes* obligations other than the prohibition of aggression. In this case the ‘specially affected’ State does not have the same rights as an ‘injured State’. However, the only example of a violation of an *erga omnes* obligation having a ‘specially affected’ State presented by the Commission other than an act of aggression is Article 194 of UNCLOS, whose *erga omnes* character is questionable. See n 694.

⁷¹³ Even in this case it is doubtful whether the obligation of reparation for environmental damages can be invoked when there is no injured individual, such as damages in isolated areas or the high seas. *Kawasaki* (n 699) 27.

⁷¹⁴ In 1965 the United States considered that the attacks of North Vietnam against South Vietnam were part of an ‘aggressive war of conquest’ and requested the cessation of the armed attacks (UN Doc S/6206). Posteriorly the Soviet Union labelled as acts of aggression the bombing of North Vietnam by the United States in 1971, demanding the cessation of the act and the unconditional withdrawal of its forces from Vietnam, Laos, and Cambodia (UN Doc S/10494). A few years later Bulgaria and Poland condemned the ‘aggression’ made by the People’s Republic of China against Vietnam and requested the withdrawal of its troops during the Sino-Vietnamese War, which was classified as a ‘crime against peace and international security’ and a violation of basic principles of international law (UN Doc S/13108; S/13110). In 1980 the People’s Republic of China demanded the withdrawal of Vietnamese forces from the Kampuchea and the cessation of its ‘aggression’ against the sovereignty and territorial integrity of Thailand (UN Doc A/35/308 - S/14029).

⁷¹⁵ Several members of the Eastern Bloc considered the blockade against Cuba authorized by the OAS and imposed by the United States in 1962 as an act of aggression (UN Doc S/5192; S/5194; S/5196). The same was done to the intervention of the United States in the Dominican Republic in 1965, considered by several countries as an armed aggression (UN Doc S/6341; S/6339; S/6347; S/6354).

⁷¹⁶ Bulgaria, Mauritania, and Hungary denounced the ‘armed aggression’ by Israel against the United Arab Republic in the Six-Day War of 1967, appealing for a collective action of the international community and the United Nations to stop the aggression (UN Doc S/7942; S/7937; S/7955). The attack on the atomic reactor of Osirak in Iraq in 1981 generated protests from other countries, such as India, which classified the action as a ‘highly reprehensible act of unprovoked and unjustified attack’ (UN Doc S/14523), and Czechoslovakia, which demanded the imposition of sanctions against Israel (UN Doc S/14533). In 2006 the Israeli incursions to Gaza were denounced as an ‘aggression’ and a ‘flagrant defiance of the most basic principles of international law and the fundamental provisions of the Charter of the United Nations’ by Iran and in 2008 by Cuba and Jordan (UN Doc S/14523; S/14533).

On some rare occasions, however, the UN Security Council requested a State to pay reparation to the injured State.⁷¹⁷

3. Resort to Unilateral Countermeasures

The faculty to adopt countermeasures is an important part of the implementation of State responsibility, aiming to induce the wrongdoer State to comply with its obligations of cessation and reparation resulting from the wrongful act. In principle, countermeasures can be considered as having a ‘sanctioning’ character, by ensuring the application of some aspects of international law. In the words of the Commission, countermeasures are ‘a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act’.⁷¹⁸

As a measure of self-help, the faculty to resort to countermeasures is regulated by international law to reduce the arbitrariness and to guarantee the preservation of the legal order. Such concern in limiting the freedom of States is long observed in international law regarding the unilateral use of force by States, and for this reason, one may ask what is the connection between the current regime of countermeasures and instances of the use of force by way of self-help, namely armed reprisals and measures of self-defence. As will be analysed in this section, although such measures are extensively limited or even prohibited, they have inspired the recourse to peaceful countermeasures (section 3.1), which inherited the same logic and some rules behind armed reprisals and self-defence, such as the requirements of necessity and proportionality (section 3.2).

3.1. Countermeasures as Measures Originated from Armed Reprisals

It is possible to trace the modern regime of countermeasures back from the notion of reprisals, through its common origin as measures of self-help. Measures of self-help are recognized by several legal systems as means of redress adopted unilaterally to enforce a right⁷¹⁹ and in international law, its existence is justified by the lack of centralized enforcement mechanisms. Thus, the term ‘self-help’ was classically used by doctrine to refer to unilateral reactions by States to protect or enforce their rights, either by violating

⁷¹⁷ The Council adopted Res 189 (4 June 1964) condemning the frontier incidents in which units of the South Vietnamese Army entered Cambodian territory and requested that ‘just and fair compensation should be offered to the Royal Government of Cambodia’, inviting also ‘those responsible to take all appropriate measure to prevent any further violation of the Cambodian frontier’ (paras 1 to 3). By Res 568 (21 June 1985), the Council demanded not only ‘the immediate, total and unconditional cessation of all acts of aggression by South Africa against Botswana’ but also ‘full and adequate compensation (...) for the damage to life and property resulting from such acts of aggression’ (paras 3 and 5). Similarly, by Res 577 (6 December 1985) the Council demanded the cessation of ‘all acts of aggression’ from South Africa against Angola and ‘full and adequate compensation (...) for the damage to life and property resulting from the acts of aggression’ (paras 4 and 7). In the same year, the organ adopted Res 573 (4 October 1985) classifying the Israeli attack to the PLO headquarters in Tunisia in 1985 as an ‘act of armed aggression’ and considering that Tunisia ‘has the right to appropriate reparations as a result of the loss of human life and material damage which it has suffered and for which Israel has claimed responsibility’ (paras 1 and 4).

⁷¹⁸ Commentaries to Chapter II of Part Three, para 1.

⁷¹⁹ Garner (n 608) 1482.

a rule or not (the latter case being properly classified under the category of retorsion).⁷²⁰ Since the concept did not restrict the type of measure that could be adopted, in some instances the term was used to designate unilateral measures short of war.⁷²¹

The term reprisal was also used as a general synonym of self-help, especially associated with the use of armed force.⁷²² The practice of the adoption of reprisals by States in times of peace goes back to antiquity and different conceptions and legal bases were established for them in the law of nations, although the purpose was always associated with self-help.⁷²³ An alteration in the regime of reprisals in the international law of peace parallel with the development of restrictions to the freedom of States to make recourse to armed measures led to the limitation of armed reprisals until the UN Charter.⁷²⁴ The general prohibition of the use of force by States in their international relations expressed by Article 2(4) of the Charter put into question the legality of the adoption of armed reprisals as a form of coercion short of war.⁷²⁵ The term ‘peaceful reprisals’ was progressively replaced by the concept of ‘countermeasures’, a denomination adopted by the ILC in 1979 and consolidated as a technical term in English to designate such peaceful measures.⁷²⁶

Nevertheless, the regime of armed reprisals in the international *law of war* did not change very much. This can be seen in the fact that belligerent reprisals are still admitted in the context of armed conflicts as measures constituting acts of armed force taken by a belligerent against another as a reaction to a previous action considered as a violation of

⁷²⁰ According to Morelli, measures of self-help would have the function of enforcement of rights in the absence of a centralized system of justice, since ‘la réalisation coercitive du droit est confiée à l’autotutelle, c’est-à-dire à l’action directe de l’Etat même dont le droit subjectif a été lésé, et cela même dans le cas où le droit subjectif et sa lésion ont formé l’objet d’une constatation judiciaire’. G Morelli, ‘La théorie générale du procès international’ (1937) 61 *RCADI* 253, 354. See also Morelli, *Nozioni di Diritto Internazionale* (n 93) 352; B Bryde, ‘Self-Help’ in R Bernhardt (ed), *Encyclopedia of Public International Law IV* (1981) 215-217; J P Grant and J C Barker (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009) 552.

⁷²¹ R B Lillich, ‘Forcible Self-Help under International Law’ (1980) 62 *US Naval War College International Law Studies Series* 129-138; J J McHugh, ‘Forcible Self-Help in International Law’ (1980) *US Naval War College International Law Studies Series* 139-163.

⁷²² A W Heffter, *Droit International Public de l’Europe* (J Bergson tr, E H Schroeder 1866) 209-211; De la Brière (n 373) 241-247.

⁷²³ Giovanni da Legnano, for instance, considered that reprisals were extraordinary remedies applied as reason of the absence of a superior authority among nations, being a form of just war. G da Legnano, *Tractatus De Bello, De Represaliis et De Duello* (T E Holland tr, OUP 1917) 307-308. The notion of ‘denial of justice’ to justify reprisals is present in some authors such as G de Rayneval, *Institutions du Droit de la Nature et des Gens* (Rey et Gravier 1832) 312 and E Nys, *Les origines du droit international* (Thorin & fils 1894) 62. See also E Zoller, *Peacetime Unilateral Remedies* (Transnational 1984) 37.

⁷²⁴ An earlier stage of this division can be seen in the resolution adopted by the *Institut de droit international* in 1934, which divided the categories of armed and non-armed reprisals and established that the former category would be limited not only regarding limitations of non-armed reprisals (such as the obligation of recourse to procedures of peaceful settlement of disputes and the non-violation of certain obligations) but also to the rules of the *jus ad bellum*. Institut de Droit International, Régime des représailles en temps de paix (Session of Paris, 1934), Article 4.

⁷²⁵ Brownlie, *International Law and the Use of Force by States* (n 20) 281. On the other hand, such practice is still employed by some States as a justification for the use of force, as demonstrated by chapter 2. See also Malanczuk (n 391); Daillier and others (n 262) 1047.

⁷²⁶ It should be observed that in French literature the term ‘représailles’ is still employed with frequency nowadays as synonym of countermeasure, although the term ‘contre-mesures’ is also used.

a rule of the law of armed conflict.⁷²⁷ Belligerent reprisals are considered the main instrument of international humanitarian law to sanction violations of its obligations during armed conflicts when mechanisms of peaceful settlement of disputes are usually not available.⁷²⁸ The acceptance of belligerent reprisals by modern international law is a clear vestige of classical international law, in which mechanisms of peaceful settlement of disputes or multilateral means of redress were not frequent and unilateral measures of coercion making use of force were deemed as necessary.

It is remarkable how the original regime of reprisals was altered by the prohibition of the use of force and gave origin to the modern regime of countermeasures, constituting two different branches of the same trunk. As observed by Virally in 1967:

[L]a notion de représailles fait partie des concepts classiques du droit international. Très certainement, sa portée et son contenu ont été (...) profondément modifiés par la consécration, en droit positif, du principe du non-recours à la menace ou à l'emploi de la force. Il ne semble pas, cependant, que l'introduction de ce principe doive aller jusqu'à interdire toute forme de représailles exclusive de la menace ou de l'usage de la force.⁷²⁹

As a consequence, the regime of reprisals making use of force cannot be considered as equivalent to the regime of countermeasures. In this sense, 'le régime juridique des représailles armées – dont la réglementation initiale avait fixé le régime traditionnel des représailles – ne peut plus correspondre au régime des représailles non armées'.⁷³⁰

In conclusion, it is possible to trace the origins of the modern regime of countermeasures to the concept of reprisals, which in origin was characterized also by the possibility of the use of force. The progressive limitation of the use of force by States led to the formation of a distinct regime of reprisals in times of peace, the modern-day regime of countermeasures. However, it is not only the origin of the modern regime of countermeasure which can show the influence of the concept of measures of self-help making use of force but also the rules of such regime still maintain some elements established when the use of force was still allowed as a unilateral measure of redress, as analysed in the next section.

3.2. *Countermeasures and the Requirements of Necessity and Proportionality*

As seen in the previous section, it is possible to trace the origins of the modern regime of countermeasures back from the concept of reprisals, which include the possibility of the use of force. Not only armed reprisals can be seen as the origin of countermeasures, but also their current regulation applies some concepts that are linked with the exercise of the use of force, such as the requirements of necessity and proportionality.

⁷²⁷ Although some limits on the adoption of belligerent reprisals are imposed by international humanitarian law, such as the prohibition of reprisals against prisoners of war and the civilian population, the use of force is not itself prohibited. Kalshoven, 'Belligerent Reprisals' (n 671) 266; David (n 146) 459-464.

⁷²⁸ Le Fur (n 254) 558; Pallieri (n 309) 357-358.

⁷²⁹ M Virally, 'Le principe de réciprocité dans le droit international contemporain' (1967) 122 *RCADI* 1, 57-58. See also Tomuschat, 'International Law' (n 602) 369-370; D Alland, 'The Definition of Countermeasures' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1127, 1130.

⁷³⁰ Daillier and others (n 262) 1047. See also Kolb, 'Le Droit International' (n 4) 305.

Since countermeasures were firstly analysed as a form of circumstance precluding wrongfulness, the initial focus of the Commission was to limit the exculpatory effect of the measures to the wrongdoer State, protecting the rights or the performance of obligations of other States, collective interests, or the protection of individuals.⁷³¹ Conditions such as the obligation of prior exhaustion of procedures of peaceful settlement available were developed in particular by Special Rapporteur Arangio-Ruiz, which proposed a mechanism based on several steps aimed to make the resort to countermeasures more ‘compatible with the rule of law’ in international law and to give effectivity to the regime of unilateral reactions.⁷³² Ultimately the regime of countermeasures adopted by the ARSIWA in Chapter II of Part Three did not consider the recourse to a dispute settlement procedure as a condition for the adoption of countermeasures. On the other hand, as a substitute for the use of mechanisms of peaceful settlement of disputes the Commission chose to control the adoption of countermeasures by adopting limitations already employed under international law to regulate the use of force by States in the absence of a centralized regime.

In this sense, it is possible to assert that the regime of countermeasures incorporates some aspects of the regulation of measures of self-help involving the use of armed force, such as reprisals and measures of self-defence. The first evidence of such influence can be seen in the introduction of the notion of ‘necessity’ in the concept of countermeasures. The requirement was not expressly adopted by the Commission, although Draft Article 47 [1996] included in the First Reading of the ARSIWA in 1996 provided that countermeasures may be applied against a wrongdoer State ‘as long as it has not complied with those obligations and as *necessary* in the light of its response to the demands of the injured State that it do so’.⁷³³ According to the Commission, this provision:

[R]equires that resort to countermeasures be necessary in order to induce the wrongdoing State to comply with its obligations under Articles 41 to 46 (of cessation, reparation and assurances and guarantees of non-repetition). This language is intended to limit the permissible functions or aims of countermeasures and clearly implies that there are cases where resort or continuing resort to countermeasures may not be necessary. More specifically, the term ‘as necessary’ performs a dual function. It makes it clear that countermeasures may be applied only as a last resort where other means not involving non-compliance with the injured State’s obligations have failed or would clearly be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicates that the decision of the injured State to resort to countermeasures is to be made reasonably and in good faith, and at its own risk.⁷³⁴

In this sense, necessity in the case of countermeasures would be related to its character of *ultima ratio* in cases of non-compliance with its obligations of cessation, reparation, or assurances and guarantees of non-repetition. Draft Article 47 [1996] provides that the

⁷³¹ Riphagen, Fifth Report (n 691) 3-4 (Articles 9, 10, 11 and 12).

⁷³² Arangio-Ruiz, Fifth Report (n 611) 15-22 (paras 43 to 85). See also Arangio-Ruiz, Fourth Report (n 379) 22 (Articles 11 and 12) and 35 (Articles 13 and 14).

⁷³³ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 305 (Article 47(1)).

⁷³⁴ *Ibid.*, 307 (para 4). The requirement of ‘necessity’ was not proposed by Special Rapporteur Arangio-Ruiz and added by the Commission in 1996 by suggestion of some members, among which James Crawford. 2456th meeting (10 July 1996), ILC Yearbook 1996, Vol I, 166 (para 2).

assessment of necessity involves the analysis of the reaction of the wrongdoer State to comply with its obligations resulting from the wrongful act, what was ‘intended to emphasize the desirability of, and to maximize the opportunity for, dialogue between the injured State and the wrongdoing State’, limiting the ‘latitude’ of the injured State.⁷³⁵

Concerning self-defence, the requirement of necessity conditions the use of force as the only means to repel an armed attack from a State, prioritizing other non-armed means to achieve the result of repelling the attack.⁷³⁶ This meaning is close to the one adopted regarding countermeasures, although in this case the reaction of the wrongdoer State is the main factor of analysis. It must however be noted that, while in the case of self-defence the requirement of necessity is measured against the available means and modalities to react to the armed attack, in the case of countermeasures the requirement is determined by the failure of the wrongdoer State to comply with its obligations and to remedy the effects of the wrongful conduct, since only the non-implementation of such obligations justify the adoption of countermeasures.⁷³⁷

On the procedural side, the requirement of necessity for the adoption of countermeasures materializes in the obligation for the injured State to call upon the responsible State to fulfil its obligations.⁷³⁸ The requirement of *sommation* or notification was first introduced as a general rule by Special Rapporteur Arangio-Ruiz and is expressed by Article 52(1) of the ARSIWA, which establishes the obligation of the injured State to call upon the responsible State to fulfil its obligation before the adoption of countermeasures, to notify it of any measure adopted and offer to negotiate with it.⁷³⁹ The customary nature of the obligation of notification is usually confirmed by the doctrine based on the decision of 1928 of the arbitral tribunal in the *Naulilaa incident*, which deals specifically with armed

⁷³⁵ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 307-308 (para 5).

⁷³⁶ Ago, Addendum – Eight Report (n 267) 69 (para 120).

⁷³⁷ According to Crawford, ‘the circumstance of necessity justifying countermeasures arises, not because of the breach as such but because of the subsequent failure to comply with these obligations. Obviously for this failure to be established, the responsible State must first have been called on to comply’. Crawford, Third Report (n 528) 88 (para 332); M Kamto, ‘The Time Factor in the Application of Countermeasures’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1169, 1170; Y Iwasawa and N Iwatsuki, ‘Procedural Conditions’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1149, 1152-1154.

⁷³⁸ Tucker (n 392) 592. This requirement is also observed in relation to belligerent reprisals. According to Bailey, ‘in theory (...) a reprisal should be accompanied by a complaint about the illegalities being committed by the other side and an explicit commitment to stop reprisals as soon as the other side’s illegalities have ceased’. Bailey, *How Wars End I* (n 310) 292.

⁷³⁹ The objective of the obligation of notification is to allow the contestation of the wrongful conduct by the wrongdoer State, offering ‘some opportunity to present a response’ by the wrongdoer State, allowing the dialogue between States and giving the possibility of compliance of the obligation by the wrongdoer State before the adoption of countermeasures. Commentaries to Article 52, para 4. See also Arangio-Ruiz, Fourth Report (n 379) 9-10 (paras 10-11) and 22 (Article 11); A Gianelli, *Adempimenti preventivi all’adozione di contromisure internazionali* (Giuffrè 1997) 7.

reprisals.⁷⁴⁰ The customary character is also confirmed by State practice after 1945, although with controversies regarding the nature and the extent of such obligation.⁷⁴¹

In conclusion, there are several similarities between the requirement of necessity as applicable to countermeasures and to measures of self-defence. On the other hand, although the requirements of necessity for both measures are based on the same logic of *ultima ratio* to obtain their objectives, they are not equivalent in content. For instance, international law does not require the obligation of prior notification for a State reacting against an armed attack in self-defence, which would frustrate the aim of the measure.⁷⁴²

A second possible influence of the regulation of the use of force on the regime of countermeasures is the requirement of proportionality. According to Article 51 of the ARSIWA, ‘countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’. The application of the concept of proportionality as a requirement for the exercise of countermeasures is virtually unanimously accepted by doctrine and by all Special Rapporteurs of the ILC.⁷⁴³ Due to the large academic production regarding the subject,⁷⁴⁴ the focus of the present analysis will be on the influence of the concept of proportionality regarding self-defence and similarities existing between the two regimes.

⁷⁴⁰ The tribunal considered unlawful the armed reprisals adopted by the German authorities of the Southwest Africa against frontier stations in Angola in 1914 due to the inexistence of a previous wrongful act violating international law by Portuguese authorities, but even if this was the case, ‘la représaille n’est licite que lorsqu’elle a été précédée d’une sommation restée infructueuse. L’emploi de la force ne se justifie, en effet, que par son caractère de nécessité’ (*Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne) (Portugal v Germany)* (1928) 2 RIAA 1011-1033, 1027-1028). For authors adopting the case as an example of the recognition of the obligation of notification, see Iwasawa and Iwatsuki (n 737) 1151-1152; F I Paddeu, ‘Countermeasures’ (September 2015) in Rüdiger Wolfrum (ed), *MPEPIL* (online edn) para 26.

⁷⁴¹ According to Special Rapporteur Arangio-Ruiz, State practice indicated that ‘under customary international law, an injured State could not lawfully resort to measures without previously making some form of demand for cessation and/or reparation’ (Arangio-Ruiz, Fourth Report (n 379) 10 (para 10)). After a comprehensive analysis of the State practice, Gianelli concluded that there is a rule in customary international law requiring a simple notification of the wrongdoer State about the wrongful act before the adoption of countermeasures, without specific requirements or formalities (Gianelli, *Adempimenti preventivi* (n 739) 558-559).

⁷⁴² Corten, *The Law Against War* (n 188) 483.

⁷⁴³ According to Roberto Ago, ‘even conduct - reprisals or other measures - which in certain circumstances would be admissible as a reaction to an international offence committed by another party would cease to be a legitimate form of sanction if it should cease to be commensurate with the injury suffered as a result of the offence in question’ (Ago, Eight Report (n 70) 40 (para 82); see also Riphagen, Fourth Report (n 518) 15 (para 82)). For Arangio-Ruiz, which does an extensive doctrinal review on the topic, with the exception of a few authors ‘the rest of the writers seem to be unanimous in considering proportionality as a hard and fast rule of international law’ (Arangio-Ruiz, Third Report (n 691) 20-22 (paras 63-68)). According to Crawford, proportionality as a substantive limitation on countermeasures ‘is well established as a matter of general international law’. Crawford, Second Report (n 280) 90 (para 365). See also R O’Keefe, ‘Proportionality’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1157-1168.

⁷⁴⁴ E Cannizzaro, *Il principio della proporzionalità nell’ordinamento internazionale* (Giuffrè 2000); Cannizzaro, ‘The Role of Proportionality’ (n 391); T M Franck, ‘On Proportionality of Countermeasures in International Law’ (2008) 102 *AJIL* 715-767; O’Keefe (n 743); S Rosselet, *Les contre-mesures à travers le prisme du principe de proportionnalité* (Schulthess 2021).

Preliminary it should be observed that the basic purpose of the requirement of proportionality is to establish a link between the previous breach and the reaction, avoiding abuses on the part of the injured State. This is the result of the attempt of the legal order to restrict or regulate the recourse to unilateral measures by establishing objective requirements,⁷⁴⁵ among which proportionality. This regulation was especially important concerning armed reprisals, which in the past generated several cases of abuse and were used by powerful States as instruments to justify pressures for reasons of national policy.⁷⁴⁶ This restraint is a limitation typical of the use of force by States and applies both to armed reprisals and measures of self-defence.⁷⁴⁷ In this sense, it is possible to identify a direct connection between the development of the requirement of proportionality for measures of self-help and the progressive limitation of the use of force in international law, which includes the regulation of the exercise of self-defence and its requirements.

Therefore, there is a correlation between the progressive regulation of the use of force and the development of the regime of countermeasures.⁷⁴⁸ Analysing the doctrine regarding proportionality, Arangio-Ruiz concluded that '[i]n the period following the First World War, the proportionality rule certainly acquired a more stringent and precise content: a development concomitant with the condemnation of the use of force'.⁷⁴⁹ In a further analysis, Cannizzaro explains that the equivalence between measure and injury was pursued by international law to avoid conflicts and to maintain peace, a reason why the limitation on the use of armed reprisals can be understood in the same context of the requirement of proportionality. According to him:

This requirement (of equivalence between the wrongful conduct and the response) pervaded the evolutionary process that initially brought about the prohibition of forcible reprisals against 'ordinary' illicit acts, and ultimately the absolute prohibition of use of force. (...) The international community has gradually matured into the idea that the need to avoid threats to peace and security, and maintain conflict at a manageable level, is of such a nature as to impose the banishment of the unilateral recourse to armed force. In a functional analysis, the need to maintain peace and security assumes a structural value, and may not be disposed of by individual states acting for individual purposes.⁷⁵⁰

It can be concluded that the requirements of necessity and proportionality are also applied to countermeasures as an attempt of the international legal order to regulate the faculty of States to resort to measures of self-help. Such an attempt is originated mainly to avoid the

⁷⁴⁵ Cannizzaro, 'The Role of Proportionality' (n 391) 890-891; Kolb, *The International Law of State Responsibility* (n 17) 177.

⁷⁴⁶ Brownlie, *International Law and the Use of Force by States* (n 20) 220.

⁷⁴⁷ Tucker (n 392) 591.

⁷⁴⁸ De la Brière predicted in 1928 that 'les représailles en temps de paix, du moins les mesures de coercition par la force armée, cesseront d'être tenues pour légitimes et même pour tolérables' (De la Brière (n 373) 279). In 1934 the Institut de droit international stated that 'les progrès réalisés dans l'organisation juridique de la Communauté internationale, notamment par le développement des procédures de règlement pacifique, la condamnation de la guerre comme instrument de politique nationale et la généralisation de l'idée de l'interdiction, dans tous les cas du recours à la force, impliquent des modifications profondes au régime des représailles en temps de paix' (Institut de Droit International, Régime des représailles en temps de paix (Session of Paris, 1934), preambular para 3).

⁷⁴⁹ Arangio-Ruiz, Third Report (n 691) 20 (para 63).

⁷⁵⁰ Cannizzaro, 'The Role of Proportionality' (n 391) 906 (footnotes omitted).

risks created by the freedom of States to resort to armed force as provided for under traditional international law. In this sense, the origins of the requirements of proportionality and necessity regarding self-defence, countermeasures, and armed reprisals are the same.

4. Resort to Collective Countermeasures

In the previous section, it was seen how the requirements of necessity and proportionality applicable to self-defence are also applied concerning countermeasures. Besides such requirements, another possible way in which the regime of countermeasures was influenced by the regulation of the use of force in international law relates to the additional requirements for the exercise of collective self-defence: the recognition by the victim State and its request for assistance. This section is dedicated to the analysis of whether and how the request of the injured State is considered as a condition to be fulfilled before the exercise of measures of collective self-defence (section 4.1) may also apply to collective countermeasures (section 4.2).

4.1. *The Request of the Injured State for the Exercise of Collective Self-Defence*

The exercise of collective self-defence recognized by Article 51 of the UN Charter is not limited by any additional requirement present in the Charter. Despite this fact, it is pacific in the doctrine that besides the requirements of necessity and proportionality, the request for help by the injured State victim of the armed attack is also necessary in the case of collective self-defence.⁷⁵¹ As the request by the victim State is not provided for by the Charter, the main authority used to assert the existence of such requirement is the decision of the ICJ in the *Nicaragua* case of 1986, which stated that:

[I]n customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.⁷⁵²

It is not clear whether the request of the State attacked is mandatory to assert the legality of the action together with the requirements of necessity or proportionality, or if it is an

⁷⁵¹ Sicilianos, *Les réactions décentralisées à l'illicite* (n 257) 126; C Greenwood, 'Self-Defence' (April 2011) in R Wolfrum (ed), *MPEPIL* (online edn) para 39; Ronzitti, *Diritto internazionale dei conflitti armati* (n 473) 56; M Wood, 'Self-Defence and Collective Security: Key Distinctions' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 649, 654; Gray, *International Law and the Use of Force* (n 226) 187.

⁷⁵² *Military and Paramilitary Activities in and against Nicaragua* (n 14) 105 (paras 165-166 and 199). The Court addressed the matter in analysing the justifications provided by the United States to justify its actions in Nicaragua between 1983 and 1984, in special the claim that El Salvador, Honduras, and Costa Rica 'have each sought outside assistance, principally from the United States, in their self-defence against Nicaragua's aggression' and that Washington has responded to these requests under the terms of the Inter-American Treaty of Reciprocal Assistance (TIAR), which establishes a regional mechanism of assistance among its States parties in cases of armed attack (*Military and Paramilitary Activities in and against Nicaragua* (Counter-Memorial of the United States of America of 17 August 1984) ICJ Written Proceedings 60-61 (para 220)). The Court considered that there was a lack of direct evidence of a formal request for assistance from the three Central American countries and analysed whether the lawfulness of the exercise of collective self-defence by a third State depends on the request of the attacked State.

obligation but not a condition *sine qua non*.⁷⁵³ The interpretation most consistent with the other parts of the decision and with the Court's subsequent jurisprudence confirms the mandatory character of the requirement to ascertain the legality of the measure of self-defence, despite not specifying any formality.⁷⁵⁴ Although not satisfactorily explained by the Court⁷⁵⁵ and criticised by doctrine,⁷⁵⁶ it seems that the requirement of the request of the victim State is indeed a customary one, as confirmed by State practice.⁷⁵⁷

The rationale behind the requirement of the request of the attacked State is based on the notion that the exercise of collective self-defence is not composed of individual defensive actions exercised by several States at the same time but a collective defence action aiding a State that was unlawfully attacked.⁷⁵⁸ It can be said that the aiding State is not exercising 'self' defence properly but helping a victim State to defend itself, the reason why it must conform to the position of the victim State as the original titular of the faculty to resort to measures of self-defence, including by waiving its rights and precluding the possibility of use of force by the aiding State. As explained by Ruys:

Given the link to the attacked State's individual right of self-defence, it is the victim State and not the assisting State that has the discretion to determine *a priori* whether the conditions for collective self-defence are present. In other words, collective self-defence cannot be exercised against the wishes of the victim State, implying *inter alia* that if the latter chooses to renounce the exercise of the right, for example to avoid escalation, third States cannot engage in a military response instead.⁷⁵⁹

⁷⁵³ This is the case of the obligation of Member States to immediately report to the Security Council measures taken in self-defence established by Article 51. According to the Court in its decision on the *Nicaragua* case, this obligation cannot be considered a condition of the lawfulness of the use of force in self-defence under customary international law, although 'for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence'. *Military and Paramilitary Activities in and against Nicaragua* (n 14) 105 (para 200). See also Arcari, 'Il mantenimento della pace e l'uso della forza' (n 195) 292.

⁷⁵⁴ On the other hand, the Court requested from the United States 'evidence of a formal request for assistance', what could imply the necessity of a material proof of such request.

⁷⁵⁵ According to the Court, the requirement can be found in customary international law, 'whether of a general kind or that particular to the inter-American legal system', without providing a clear basis for this assertion. It can be questioned whether the mutual assistance clause of the TIAR would be sufficient evidence to prove the existence of an international custom as done by the Court, even more considering that other subsequent treaties providing mutual defence clauses, such as the North Atlantic Treaty of 1949 (Article 5), the ANZUS Treaty of 1952 (Article IV), and the Warsaw Pact of 1955 (Article 4) did not provide for such requirement.

⁷⁵⁶ See in special the dissenting opinion of Judge Sir Robert Jennings, who classifies the requirements imposed by the Court as 'unrealistic'. *Military and Paramilitary Activities in and against Nicaragua* (n 14) 544-545. See also J N Moore, 'The Nicaragua Case and the Deterioration of World Order' (1987) 81 *AJIL* 151-159. Contra, see Randelzhofer and Nolte (n 252) 1421.

⁷⁵⁷ Sicilianos, *Les réactions décentralisées à l'illicite* (n 257) 125-127; J A Green, 'The "additional" criteria for collective self-defence: request but not declaration' (2017) 4 *Journal on the Use of Force and International Law* 4-13.

⁷⁵⁸ Brownlie, *International Law and the Use of Force by States* (n 20) 329-330; Ruys, 'Armed Attack' (n 217) 87. Bowett is one of the authors which favoured the conception of collective self-defence as the collective exercise of the right of individual self-defence, or also a defence of the aiding State (D W Bowett, 'Collective Self-Defence under the Charter of the United Nations' (1955-1956) 32 *BYIL* 130-161). Opinion also shared by Dinstein. Dinstein, *War, Aggression and Self-Defence* (n 159) 295.

⁷⁵⁹ Ruys, 'Armed Attack' (n 217) 85 (footnotes omitted).

On the other hand, in the *Nicaragua* case, the ICJ also established that the victim State must ‘declare itself’ as a victim of armed aggression as a requirement of the exercise of collective self-defence. According to the Court, ‘there is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation’, the reason why ‘it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack’.⁷⁶⁰

Having concluded that the request of the injured State is indeed a requirement for the exercise of collective self-defence, it is necessary to address the main issue of the present section and verify whether such requirements are also applied concerning collective countermeasures.

4.2. *Collective Countermeasures and the Request of the Injured State*

Unlike other aspects of State responsibility, there are no clear rules regarding collective countermeasures in international law, and the legality and regulation of such measures were one of the most controversial aspects in academic debates preceding the adoption of the ARSIWA. The term ‘collective countermeasures’ is generally used to designate countermeasures adopted by States following a violation of an *erga omnes* obligation owed to the international community as a whole.⁷⁶¹ Its singularity resides in the fact that such a measure may be adopted not only by the State which directly suffered the damage but by a ‘State other than the injured State’, as the term adopted by Article 48 of the ARSIWA. By admitting a wide range of active subjects, collective countermeasures are considered by some authors as an expression of ‘a state of vigilantism’.⁷⁶²

In the works of the ILC regarding State responsibility, the notion of collective countermeasures was connected with the conception of injured State. In this sense, in principle collective countermeasures were admitted in cases of international crimes of States in which all States were considered as injured.⁷⁶³ The First Reading of the

⁷⁶⁰ *Military and Paramilitary Activities in and against Nicaragua* (n 14) 103-104 (para 195). Contrary to the requirement of the request of the injured State, the ‘declaration as a victim’ has its customary origin questionable and can indeed be seen as ‘formalistic’, as criticised by Judge Jennings. In addition, it is not verified by State practice and the Court itself did not refer to it in subsequent mentions to the exercise of collective self-defence. Ruys, ‘*Armed Attack*’ (n 217) 89-91; Green, ‘The “additional” criteria for collective self-defence’ (n 757).

⁷⁶¹ The term adopted in this work is employed by Special Rapporteur Crawford and authors such as Carlo Focarelli, Linos-Alexandre Sicilianos, Maurizio Arcari and Robert Kolb and conveys the idea of collective action (although not necessarily coordinated) by the international community. Some authors such as Martin Dawidowicz prefer the term ‘third-party’ or ‘third States’ countermeasures to designate such measures, although it does not seem strictly correct to say that the State that applies such kind of measure is a ‘third State’ with no legal interest in holding the perpetrator responsible for a violation of an *erga omnes* obligation. The term ‘lawful measures’ adopted by the ILC in Article 54 is avoided because of its ambiguity. See Focarelli, *Le contromisure nel diritto internazionale* (n 654) 79-81; Sicilianos, ‘The Classification of Obligations’ (n 691) 1142-1143; M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 34.

⁷⁶² S C McCaffrey, ‘*Lex Lata* or the Continuum of State Responsibility’ in J H H Weiler, A Cassese and M Spinedi (eds), *International Crimes of State* (De Gruyter 1989) 242, 244.

⁷⁶³ The possibility of the adoption of collective countermeasures was linked to the concepts of ‘objective régimes’ and international crimes of States, characterized by the existence of several injured States (Riphagen, Fourth Report (n 518) 12-13 (paras 65-66) and 21-22 (paras 115-116); Riphagen, Fifth Report

ARSIWA in 1996 implicitly recognized the possibility of collective countermeasures, by admitting both that in cases of international crimes all States were to be considered as injured States and the right of any injured State to resort to countermeasures.⁷⁶⁴ Although asserting that State practice ‘seems to suggest that a right to resort to countermeasures cannot be restricted to the victims of the breach in question, but can also derive from violations of collective obligation’, Special Rapporteur Crawford concluded that it ‘does not allow clear conclusions to be drawn’ regarding the existence of such right.⁷⁶⁵ The final position of the Commission, as suggested by Crawford, was to allow the possibility of the adoption of collective countermeasures but not regulate it. As a result, Article 54 of the ARSIWA refers to ‘lawful measures’ and stipulates that:

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.⁷⁶⁶

The Commentaries to Article 54 replicated the same examples and arguments presented by Crawford and reaffirmed that the practice regarding such measures ‘is limited and rather embryonic’. The provision was justified as a ‘saving clause’ since at the time ‘there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest’, making ‘not appropriate’ to include a provision concerning collective countermeasures.⁷⁶⁷ Article 54 can be criticized for being ambivalent in using the term ‘lawful measures’ and for the fact that even in 2001 the practice regarding collective countermeasures was not considered to be ‘embryonic’.⁷⁶⁸ For the present section, the only aspect of interest regarding collective countermeasures is the requirement of the request of the injured State, as necessary concerning collective self-defence.

The requirement of the request of the injured State was first observed by Special Rapporteur Crawford:

[I]n cases involving one directly injured State (i.e. a victim State as well as other ‘interested’ third States), the victim State’s reaction seems to have been treated as legally relevant, if not decisive, for all other States (...). Where a State is the victim of a breach (and other States’ interest in the breach, if any, is of a more general character), it seems appropriate that the victim State should be in a position to decide whether and what countermeasures should be taken, within the overall limits laid

(n 691) 3 (Articles 5(e) and 9(1)). Special Rapporteur Arangio-Ruiz considered the possibility of all States to resort to countermeasures in cases of international crimes to be a consequence of the *erga omnes* character of the obligations violated, although a State could only adopt collective countermeasures if demands to cessation and reparation have not met with adequate response and after the recognition by the ICJ of the commitment of such crime, what would avoid abuses and not impair the right to take urgent interim measures when appropriate (Arangio-Ruiz, Seventh Report (n 504) 11-12 (para 35)).

⁷⁶⁴ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 272 and 305 (Articles 40(3)) and 47).

⁷⁶⁵ Crawford, Third Report (n 528) 102-105 (paras 391-397).

⁷⁶⁶ Draft Article 54. See also Crawford, Third Report (n 528) 106 (para 406).

⁷⁶⁷ Commentaries to Article 54, para 6.

⁷⁶⁸ J Charney, ‘Third State Remedies in International Law’ (1989) 10 *Michigan Journal of International Law* 57-101; Sicilianos, ‘The Classification of Obligations’ (n 691) 1142-1143; C J Tams, ‘Individual States as Guardians of Community Interests’ in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest* (OUP 2011) 379, 390; Arcari, ‘Forma o sostanza’ (n 10) 207-209.

down by the draft articles. Third States should not be able, in effect, to intervene in a dispute by taking countermeasures if the principal parties wish to resolve it by other means. There is here an analogy with collective self-defence.⁷⁶⁹

Crawford's observation was replicated in more objective terms in the Commentaries to Article 54, which established that 'it should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State'.⁷⁷⁰ Two main arguments can be identified to support the request of the injured State as a requirement for the adoption of collective countermeasures in cases in which there is a clear identifiable injured State: a parallelism between collective countermeasures and collective self-defence, and State practice.

The first argument advanced to support the necessity of the request of the injured State is an analogy between the requirements of collective self-defence and collective countermeasures in international law based on the decision of the ICJ in the *Nicaragua* case. According to Special Rapporteur Crawford, the reasoning of the Court could be applied directly to the case of collective countermeasures since 'the analogy seems a reasonable, if not a compelling, one', as:

If State A cannot act in collective self-defence of State B without State B's consent, it does not seem appropriate to hold that it could take (collective) countermeasures in cases where State B is the victim, irrespective of State B's wishes.⁷⁷¹

An analogy can only be applied in international law in case of a legal lacuna and the legal reasoning behind the rule can be applied to the situation in which there is no rule.⁷⁷² It is clear that, at least in 2001, there were no clear rules on collective countermeasures in international law, so perhaps a lacuna can be identified in this field. On the other hand, it is not so clear whether the *ratio legis* of the requirement as applicable to collective self-defence would be the same regarding collective countermeasures. Two main arguments can be made against this parallelism. Firstly, Crawford uses the *argumentum a maiore ad minus* to justify why State A should also seek the consent of State B in both cases, in the sense that the requirement established for self-defence would be applicable for an even stronger reason for countermeasures. But Crawford failed to show what would be this stronger reason since the function of the two measures is substantially different. Although both are types of self-help, self-defence and countermeasures are different in their purposes. As seen in chapters 2 and 3, the primary objective of self-defence is to repel an armed attack threatening the territorial integrity and sovereignty of a State, while countermeasures have the function to compel the wrongdoer State to comply with its obligations of cessation and reparation as the result of an internationally wrongful act. This difference is evidenced by the procedural conditions imposed before the adoption of countermeasures, which make the immediate adoption of countermeasures an exception and the prompt reaction against the armed attack of self-defence a rule.⁷⁷³

⁷⁶⁹ Crawford, Third Report (n 528) 105 (para 400).

⁷⁷⁰ Commentaries to Article 54, para 5.

⁷⁷¹ Crawford, Third Report (n 528) 105 (para 400) (footnotes omitted).

⁷⁷² S Vöneky, 'Analogy in International Law' (February 2008) in R Wolfrum (ed), *MPEPIL* (online edn) para 4; A Miron, 'Per Argumentum a Fortiori' in J Klingler, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention?* (Wolters Kluwer 2018) 197, 200.

⁷⁷³ Paddeu, 'Countermeasures' (n 740) para 29.

It is clear that the legal function of the requirement of the consent of the injured State is to prevent abuses and the risk of an anarchic reaction by multiple States, objective searched either concerning collective countermeasures or collective self-defence.⁷⁷⁴ As the use of force in self-defence, the unilateral derogation of international obligations may pose considerable risks to the international legal order, and limits are imposed on the freedom of States to avoid such risk. However, the analogy is also imperfect since the request of the injured States is not necessary for all situations in which collective countermeasures may be possible. In other words, the request of the State victim is always necessary in the case of the exercise of collective self-defence, but the same is not true concerning collective countermeasures applied in cases of violations of *erga omnes* obligations without an identified injured State, such as in the case of genocide.

In terms of progressive development, it may be desirable that the request of the injured State should also be considered as a requirement for the adoption of collective countermeasures to limit the freedom of action of States and guarantee the coherence of international action. However, there is no legal basis in the current state of international law supporting this requirement. Attempts to limit the freedom of States in assessing the existence of a wrongful act affecting *erga omnes* obligations before the adoption of countermeasures were made by the ILC without success, in particular through the establishment of institutionalized mechanisms.⁷⁷⁵ As an inevitable consequence of the rejection by the Commission of any form of institutionalization, the request of the injured State was highlighted as a possible form of control.

The prerequisite of the request by the injured State may be classified as *lex ferenda* if not supported by State practice. In this regard, the second argument advanced to support the recognition of such rule both by Special Rapporteur Crawford and the Commission is based on State practice. It is rather peculiar that the requirement is deduced from a State practice that ‘does not allow clear conclusions’ in relation to collective countermeasures. From Crawford’s observations, the nature of the request of the injured State seems to be found somewhere in between an established practice with a considerable degree of *opinio juris* (‘the victim State’s reaction seems to have been treated as legally relevant, if not

⁷⁷⁴ L A Sicilianos, ‘Countermeasures in Response to Grave Violations of Obligations Owed to the International Community’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1137, 1144.

⁷⁷⁵ See for instance the proposal of Special Rapporteur Arangio-Ruiz of a compulsory adjudication mechanism of adoption of collective countermeasures involving a prior ‘objective’ assessment of the wrongfulness of the conduct by the ICJ (Arangio-Ruiz, Seventh Report (n 504) 20 (para 88), 24 (paras 108-112) and 29-30 (Articles 17 and 19(5)); Arangio-Ruiz, Eight Report (n 595) 4 (para 18). See also F Lattanzi, ‘Sanzioni internazionali’, *Enciclopedia del Diritto XLI* (1989) 536-574, 560; S T Bernardez, ‘Problems and Issues Raised by Crimes of States: An Overview’ in J H H Weiler, A Cassese and M Spinedi (eds), *International Crimes of State* (De Gruyter 1989) 271, 278-279; B Simma, ‘International Crimes: Injury and Countermeasures. Comments on Part 2 of the ILC Work on State Responsibility’ in J H H Weiler, A Cassese and M Spinedi (eds), *International Crimes of State* (De Gruyter 1989) 283, 307). Similarly, the *Institut de droit international* established in 2007 that only a ‘widely acknowledged’ grave breach of an *erga omnes* obligation entitles a State to adopt collective countermeasures. As observed by the Rapporteur Giorgio Gaja, the requirement was an ‘additional procedural condition’ aimed to restrict abuses in the adoption of countermeasures by States that are not specially injured by the violation by attributing to the international community the assessment of the violation (Institut de Droit International, *Obligations Erga Omnes in International Law* (Session of Krakow, 2005) Article 5; G Gaja, ‘The Protection of General Interests in the International Community General Course on Public International Law’ (2011) 364 *RCADI* 15, 131-132).

decisive, for all other States’) and a mere opinion regarding progressive development (‘it seems appropriate that the victim State should be in a position to decide whether and what countermeasures should be taken’). The Special Rapporteur mentioned the Falkland Islands (Malvinas) War and the Tehran hostage crisis to support his view to affirm that ‘States other than the United Kingdom and the United States respectively only acted upon the appeal of those States as the direct victims, and only within the scope of the appeal made’.⁷⁷⁶

Despite its scarcity, State practice from 2001 points to the fact that the examples provided by Crawford were exceptions.⁷⁷⁷ In the most recent and authoritative work regarding collective countermeasures, Dawidowicz concluded, after an extensive analysis of State practice until 2017, that it did not confirm the understanding according to which the request of the injured State was a necessary precondition for the resort to collective countermeasures.⁷⁷⁸ Although desirable, in practice the request of the injured State is not

⁷⁷⁶ Crawford, Third Report (n 528) 105 (para 400). In the case of the Falkland Islands (Malvinas) War indeed the United Kingdom sought the assistance of the European Economic Community and other States such as Australia, Canada, Hong Kong, the United States, and New Zealand in applying economic and diplomatic measures against Argentina (M S Daoudi and M S Dajani, ‘Sanctions: The Falklands Episode’ (1983) 39 *The World Today* 150-160; L L Martin, ‘Institutions and Cooperation: Sanctions during the Falkland Islands Conflict’ (1992) 16 *International Security* 143-178). In the case of the Tehran hostage crisis, although several States adopted economic sanctions against Iran, the express request of the United States is not so clear (Sicilianos, *Les réactions décentralisées à l’illicite* (n 257) 159-160; Focarelli, *Le contromisure nel diritto internazionale* (n 654) 45-48).

⁷⁷⁷ The United States adopted from 2007 targeted sanctions against persons aiming to undermine Lebanon’s elected government or democratic institutions and its sovereignty, among other reasons. The sanctions regime was broader than the one established by UNSC Res 1701 (2006) and there was no clear evidence of the request of Lebanon (Executive Order 13441 3 CFR 13441 (August 1, 2007)), which expressly request the support of the international community only to provide technical assistance in investigating and prosecuting individuals accused of terrorist attacks against authorities of the country. In 2008 the EU considered the adoption of sanctions against Russia after its intervention in Georgia in 2008, although no request by Tbilisi was mentioned at the time. The analysis by the US Congress of a bilateral agreement with Russia signed on May 2008 regarding cooperation in the field of peaceful uses of nuclear energy was paralysed in view of the ‘actions by the Government of the Russian Federation incompatible with peaceful relations with its sovereign and democratic neighbor, Georgia’. Although the action is best defined as a measure of retorsion, the absence of any mention to Georgia’s request is significant for the present analysis (White House, Message from the President Regarding a Peaceful Nuclear Agreement with Russia (10 May 2010)). In 2011 the EU approved a framework allowing for the imposition of restrictive measures against natural and legal persons which could ‘undermine the sovereignty, territorial integrity, constitutional order and international personality of Bosnia and Herzegovina’, threaten the security of the country or undermine the Dayton Peace Agreements. No mention of Sarajevo’s request or consent was made in the decision of the European Council that approved the measure (Council Decision 2011/173/CFSP [2011] OJ L 076 22.3.2011). The adoption of economic sanctions by several countries as the result of Russian’s occupation and annexation of Crimea in 2014 and other activities in Ukraine were not justified regarding the consent of that State. No mention of a request of Kyiv was made by Australia, EU, or the United States in their domestic regimes. (Autonomous Sanctions (Russia, Crimea and Sevastopol) Specification 2015 (Compilation of August 9, 2017); Executive Order 13660 79 FR 13491 (March 6, 2014); Council Decision 2014/145/CFSP [2014] OJ L 78/16). Canada provides a clear example since it has implemented economic measures (not considered as countermeasures) against individuals accused of corruption in Ukraine after the crisis of February 2014 asserting the writing request of that government, but the measures adopted following the illegal intervention in Crimea, approved a few days later, did not refer to any request. (Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations SOR/2014-44 (March 5, 2014); Special Economic Measures (Ukraine) Regulations SOR/2014-60 (March 17, 2014)).

⁷⁷⁸ Dawidowicz, *Third-Party Countermeasures* (n 761) 271.

considered by international law a requirement to be exhausted before the recourse to collective countermeasures.

5. Conclusion

In chronological terms, the general rules of State responsibility began to be systematized more recently than the rules limiting recourse to war by States. Due to this chronological precedence, there is a possibility that the rules on the implementation of the effects of the violation of rules concerning the maintenance of international peace and security, already consolidated due to the necessities of the international community, have influenced the development of the general regime of State responsibility.

As demonstrated by the previous sections, such a hypothesis may be verified by several indications. From the point of view of the invocation of State responsibility, the violation of the use of force is the prime example of a wrongful act which at the same time have a clear directly injured State (or States) and may be of interest to the international community as a whole, being the basis for the idea of a regime of aggravated responsibility. Another confirmation of the hypothesis is the limits imposed by international law on the adoption of countermeasures. Although nowadays only peaceful countermeasures are admitted by international law, there is a clear connection between the regulation of armed reprisals and the development of the regime of countermeasures. This connection is reflected in the requirements of necessity and proportionality, which are designed to limit the freedom of action of the State in interfering with the subjective rights of a wrongdoer State and are applied either in relation to reprisals and measures of self-defence and to peaceful countermeasures.

Perhaps based on this influence, it is argued that also the requirement of the injured State, as requested by the law of the use of force as a condition for the exercise of collective self-defence, could be required by a State before the adoption of collective countermeasures. Due to the relatively recent development of the rules regarding collective self-defence and the failure by the international community to better address the matter, this requirement does not seem to be imposed also to collective countermeasures. In fact, although desirable to put limits to an indiscriminate power of States to adopt countermeasures as a response to violations of *erga omnes* obligations and to prevent abuses, this requirement is not yet endorsed by State practice.

Part II – The Derogation from the General Rules on the Implementation of State Responsibility by the Rules Related to the Prohibition of the Use of Force

1. Introduction

International law provides several possible reactions to the violation of the prohibition of the use of force. From the viewpoint of the law of State responsibility, such violation may generate consequences that include the possibility of adoption of countermeasures by the victim State and depending on the degree of seriousness of the violation, also by all members of the international community. The law of the use of force admits the use of armed force individually or collectively in the exercise of self-defence as a reaction to an armed attack. Because of the position of the prohibition of the use of force as the cornerstone of the collective security system, also from its viewpoint, several reactions are possible, including the adoption of sanctions by the United Nations.

The implementation of the responsibility for the illegal use of force in international law therefore may be analysed from three different aspects. First, it may be analysed through the lens of the general rules of State responsibility, which allows for the injured State to adopt countermeasures against the wrongdoer State to force it to comply with its obligations. Due to specificities of the prohibition of the use of force, some special measures may be allowed to deal with the violation, as analysed in section 2 of the present chapter. Such possibilities include the adoption of measures of self-defence (section 2.1) and armed countermeasures (section 2.2), which presumably aim to make the aggressor State comply with its secondary obligations and therefore as special rules of implementation of State responsibility.

A second aspect regards the possibility of the subjection of the violation of the use of force to special effects and mechanisms of compliance determined by the rules of collective security. In this sense, the question analysed is whether the collective security system established by the UN Charter to maintain international peace and security may act as a mechanism of implementation of the responsibility for the violation of the prohibition of the use of force, justified by its importance and the interest of the international community in enforcing such rule and establishing sanctions to its violation. Section 3 analyses the function of the Security Council concerning the implementation of State responsibility (section 3.1), the characterization of the measures adopted by it as institutionalized reactions to a serious violation of the prohibition of the use of force (section 3.2), and what may be its role concerning the ARSIWA (section 3.3).

Third, the special character of the prohibition of the use of force may lead to the limitation to the implementation of the State responsibility for its violation by the rules of the collective security system aimed at the maintenance of international peace and security. Section 4 analyses this aspect, in special the necessity of compatibility between countermeasures adopted by States as a reaction to the use of force and the collective security system established by the UN Charter and the obligation to suspend former measures due to concerns relating to the maintenance of international peace and security.

2. Special Means of Implementation of Responsibility for Violations of the Prohibition of the Use of Force

Some rules of the law of the use of force may be interpreted through the lens of the law of State responsibility and may reveal themselves as special rules establishing means of implementation of the responsibility of a State. The exercise of self-defence, for instance, may be seen as a means of implementation of State responsibility for the specific violation of the prohibition of the use of force having its own features and limitations (section 2.1). On the other hand, it is also possible to question whether special characteristics of the values protected by the prohibition of the use of force may also allow for the adoption of countermeasures involving armed force against the aggressor State (section 2.2).

2.1. Measures of Self-Defence

In international law, the exercise of self-defence is a very specific and limited faculty directed to repel an armed attack and by a plain analysis, it may be considered a reaction against the violation of a specific rule, the prohibition of the use of force. Therefore, it is possible to question whether self-defence can be characterized as a means of implementation of State responsibility for certain types of violations of the prohibition of the use of force which amounts to an armed attack. This question may be answered through the analysis of two aspects: first, whether self-defence is intended specifically to enforce the consequences of the violation of the prohibition of the use of force and secondly, if this rule derogates or supplements the general regime of State responsibility, being characterized as a special rule.

Since some aspects of self-defence were analysed in the previous three chapters, the present section is dedicated only to the characterization of self-defence as a means of implementation of State responsibility. In any event, it is important to remember some considerations made earlier. Chapter 2 analysed the character of self-defence as a circumstance precluding wrongfulness, or how an action that otherwise would be considered as wrongful conduct has its wrongfulness precluded by the specific circumstance of being a reaction against an armed attack. The characterization of self-defence as a circumstance precluding wrongfulness does not impair the possibility of its characterization as a means of implementation. This fact can be seen concerning countermeasures, which are considered both by the ARSIWA as a means of implementation of State responsibility (Chapter II of Part Three, Articles 49 to 54) and a circumstance precluding wrongfulness (Article 22). In this case, the action is precluded exactly for being a reaction against a previous wrongful act.⁷⁷⁹ In chapter 3 it was also mentioned that self-defence as a measure of implementation would be considered in the present chapter, due to its 'instrumental' character. Although it is reasonable to say that self-defence (as well as countermeasures) is a 'consequence' of an internationally wrongful act, it is not of course an 'obligation' for the injured State.⁷⁸⁰

⁷⁷⁹ Paddeu, 'Countermeasures' (n 740) paras 12-15.

⁷⁸⁰ This observation was made in chapter 2, which asserted that self-defence was not properly a 'right' but a freedom to react against an armed attack which discharges the victim State from the duty to refrain from the use of armed force against the sovereignty and territorial integrity of a State by the occurrence of the specific circumstance of the armed attack.

The first object of analysis of this section is whether self-defence could be considered as a means of implementation of State responsibility, since it is generally considered to be a ‘consequence’ of the violation of the prohibition of the use of force, ‘the typical and most stringent legal consequence’ of aggression having a ‘law enforcing or “sanctioning” role to play’.⁷⁸¹ There is an evident legal relationship between the wrongful conduct of the violation of the prohibition of the use of force and the faculty to react in self-defence since the occurrence of an armed attack creates for the victim State the possibility of use of armed force or to request the help of other States to repel the attack.

Initially, self-defence was characterized by the ILC as a proper legal consequence of an armed attack. Article 51 of the UN Charter was considered an ‘immediate enforcement action’ by Special Rapporteur Ago, and Special Rapporteur Riphagen considered measures taken in self-defence as ‘second parameter’ consequences of an internationally wrongful act that could be adopted by the injured State.⁷⁸² For Special Rapporteur Arangio-Ruiz, self-defence could be considered a consequence not only of aggression but possibly of other international crimes.⁷⁸³ The Commission decided not to analyse in-depth the question for considering self-defence a particular reaction to the crime of aggression unsuitable to be codified as a general rule of State responsibility. The Commission’s hesitation in dealing with Article 51 of the UN Charter in the ARSIWA also contributed to the decision.⁷⁸⁴

Under the lens of State responsibility, in principle, it is possible to consider self-defence as a measure aimed at enforcing the secondary obligations of the aggressor State. To be considered as a means for the implementation of State responsibility, the measure must firstly be a reaction against a previous wrongful act. This requirement is easily satisfied by self-defence as a measure authorized by international law in reaction against an armed attack, constituting a violation of the principles of sovereignty and territorial integrity of the State.⁷⁸⁵ Although the concept of armed attack is not clearly defined in international law and does not seem to be exactly equivalent to the concept of aggression, it is safe to say that an armed attack is always a violation of international law, in special the ‘most

⁷⁸¹ Graefrath and Mohr (n 516) 116.

⁷⁸² Ago, Fifth Report (n 514) 34 (para 104); Riphagen, Third Report (n 9)35-36 (para 88) and 48 (Commentaries to Article 6, paras 4 and 5).

⁷⁸³ Arangio-Ruiz, Fifth Report (n 611) 45 (paras 189-190); 2315th meeting (1 July 1993), ILC Yearbook 1993, Vol 1, 123 (paras 9-12). For reactions to Arangio-Ruiz’s proposals, see manifestations in the 2339th to 2342nd meetings of the ILC (17 to 24 May 1994), ILC Yearbook 1994, Vol I.

⁷⁸⁴ As already observed in the debates regarding self-defence as a circumstance precluding wrongfulness, there was apprehension on the part of some members of the Commission for an undesirable correlation between the content of Article 51 and the rule of customary international law regarding self-defence, which arguably would politically limit the interpretation of the rule made by States. The Commission considered in 1980 ‘both unnecessary and inappropriate’ to the Draft Article to deal with specific issues related to self-defence, ‘which are at the very root of the “primary” rules relating to self-defence’. ILC, ‘Report of the International Law Commission on the work of its thirty-second session’ (5 May – 25 July 1980), ILC Yearbook 1980, Vol II(2) 59-60 (para 21); Arangio-Ruiz, Third Report (n 691) 9 (para 11); Arangio-Ruiz, Fifth Report (n 611) 38 (para 146).

⁷⁸⁵ Contra see Tucker (n 392) 588. According to the author, self-defence may also be allowed against acts which threatens a State’s security or independence but are not themselves violations of international law, such as the imposition of economic pressures.

grave' forms of violation of the prohibition of the use of force as stated in Article 2(4) of the UN Charter.⁷⁸⁶

A more controversial question is to define what would be the purpose of self-defence as a reaction to the wrongful act or its function in making a wrongdoer State comply with its obligations derived from the commission of the wrongful act. Countermeasures, for comparison, aim to induce the wrongdoer State to provide cessation or reparations for the injured State.⁷⁸⁷ Some hypotheses may be considered.

It could be argued that since it aims to repel an armed attack the purpose of self-defence is the *cessation* of the wrongful conduct. By 'repelling' the attack, the victim State is essentially forcing the interruption of the wrongful conduct, stopping it from reaching its objectives. The purpose of self-defence is generally identified as one of 'preventing another's (State) wrongful action from proceeding, succeeding and achieving its purpose'⁷⁸⁸ or to 'contraindre l'Etat agresseur à mettre immédiatement fin aux atteintes graves à la souveraineté de l'Etat agressé'.⁷⁸⁹ The analysis of whether self-defence is a means of implementation of the cessation of a wrongful conduct strongly depends on the characterization of the obligation of cessation. If by one hand the obligation of cessation is understood as a primary obligation, as advocated by some authors,⁷⁹⁰ self-defence would not act as a measure aimed at implementing the responsibility of the wrongdoing State since its purpose would not be the enforcement of State responsibility properly, being at most a consequence of the wrongful conduct. On the other hand, if the obligation of cessation is understood as a secondary obligation or a consequence of the breach of a primary rule, in principle self-defence may be considered as a means of implementation of the State responsibility, since it would aim to enforce a secondary obligation, similarly to the function of countermeasures.⁷⁹¹ In both cases, self-defence could be understood as a special secondary rule, but for different reasons: in the first case its 'speciality' would be linked to the commission of a specific kind of wrongful act, an armed attack; while in the second case it would be a special rule because it is not subject to the requirement of a previous *somation* by the victim State in order to invoke the responsibility of the wrongdoer State.⁷⁹²

According to the hypothesis proposed by some authors, among which Special Rapporteur Riphagen is included, self-defence may also be considered as a measure to *guarantee the*

⁷⁸⁶ Brownlie, *International Law and the Use of Force by States* (n 20) 278-279; Sicilianos, *Les réactions décentralisées à l'illicite* (n 257) 28; Ruys, 'Armed Attack' (n 217).

⁷⁸⁷ Paddeu, 'Countermeasures' (n 740) para 1.

⁷⁸⁸ Ago, Addendum – Eight Report (n 267) 54 (para 90). The characterization of self-defence as a measure to guarantee the cessation of the wrongful conduct seem also to be the opinion of Special Rapporteur Arangio-Ruiz, according to who it would be necessary for the Commission to 'establishing whether resort to force in order to obtain cessation is or is not admissible in circumstances other than those justifying self-defence'. Arangio-Ruiz, Fifth Report (n 611) 45 (para 192). See also Graefrath, 'Responsibility and Damages Caused' (n 489) 74; Spinedi (n 514) 42-43.

⁷⁸⁹ Sicilianos, *Les réactions décentralisées à l'illicite* (n 257) 63. See also Verdross, 'Règles générales du droit international de la paix' (n 254) 485.

⁷⁹⁰ Deman (n 477) 480.

⁷⁹¹ Corten, 'The Obligation of Cessation' (n 478) 546.

⁷⁹² See, for instance, Article 43. Recently the United States justified that an action in self-defence against non-State armed groups was made 'together with diplomatic measures' and 'after non-military options proved inadequate to address the threat', indicating the aim to fulfil procedures prior to the adoption of measures of self-defence (UN Doc S/2021/614). See chapter 2.

non-repetition of the armed attack imposed on the aggressor State.⁷⁹³ It is possible to say that at the same time that self-defence aims to react against an ongoing armed attack, it is also ‘preventive’ in not allowing the occurrence of further negative consequences by an armed attack against the sovereignty and territorial integrity of the victim State.⁷⁹⁴ This characteristic is explained by Corten:

By definition, the essential objective of self-defence is ‘repelling an attack’ and ‘preventing it from succeeding’, which presupposes *both* stemming the effects of a present and past situation *and* preventing the occurrence of a future situation which would be the pursuit of the attack. Self-defence cannot therefore be exclusively future oriented, insofar as it would be aimed only at preventing any future attack: it must involve repelling an attack which by definition is underway. But this same requirement implies that self-defence cannot be exclusively past-oriented, in the sense that it is designed only to reprimand or punish a behaviour that is no longer current.⁷⁹⁵

On some occasions, States alleged the additional purpose of preventing the recurrence of the wrongful conduct to justify the use of force in self-defence,⁷⁹⁶ especially regarding armed actions against terrorist groups.⁷⁹⁷ In general it is possible to affirm that self-defence has a preventive nature, but some observations must be made in this regard. The

⁷⁹³ Riphagen, Third Report (n 9) 35-36 (para 88, note 72). See also J Žourek, ‘La notion de légitime défense en droit international’ (1975) 56 *Annuaire de l’Institut de Droit International* 1, 60; Graefrath, ‘Responsibility and Damages Caused’ (n 489) 88. This is not the same meaning of a ‘guarantee of non-repetition’ adopted by Article 30(b), which according to the Commission should be offered by the wrongdoer State ‘if circumstances so require’ aiming the ‘restoration of confidence in a continuing relationship’ (Commentaries to Article 30, para 9). In the present case such measures are not given by the injured State.

⁷⁹⁴ Waldock (n 248) 464; Bowett, ‘Reprisals Involving Recourse to Armed Force’ (n 381) 3.

⁷⁹⁵ Corten, *The Law Against War* (n 188) 485 (emphasis from the original).

⁷⁹⁶ For instance, in 1964 the United Kingdom justified military action in Yemen as a ‘defensive measure’ to ‘prevent a recurrence of the Yemeni attacks’ against the South Arabian Federation (1109th meeting (7 April 1964) S/PV.1109, 4 (para 14)). Although the representative of the United Kingdom denied the characterization of the action as a reprisal, the Council considered the measure as such in Res 188 (1964) (See also Bowett, ‘Reprisals Involving Recourse to Armed Force’ (n 381) 8). Likewise, in 1972 the United States justified the mining of the ports of North Vietnam as measures of collective self-defence aiming to prevent the delivery of supplies to Hanoi and to halt armed attacks from the country against South Vietnam (UN Doc S/10631).

⁷⁹⁷ In 1998 and 2001 the United States justified its actions in self-defence against Al-Qaeda in Sudan and Afghanistan as ‘designed to prevent and deter further attacks’ by the organization after the bombings of the US embassies in Nairobi and Dar Es Salaam and the 9/11, respectively (UN Doc S/1998/780; S/2001/946). The capture of Ahmed Abu Khattalah, who would have been responsible for the attack on the US Military Facility in Benghazi and killing of the US Ambassador to Libya in 2012, was also justified as a measure of self-defence with the aim of preventing further attacks the (UN Doc S/2014/417). A similar justification was adopted by Iran to justify the bombing of training camps of non-State actors in Iraq in 1999 (UN Doc S/1999/781). Likewise, in 2015 some States justified armed action against the Islamic State in Syria based on self-defence ‘in order to end the continuing attacks’ by the group (UN Doc S/2014/695; S/2015/221; S/2015/693), although in this case also the consent of Iraq was used as justification for the use of force. More recently, the United States justified the attacks carried out against non-State actors in the territory of Syria on Abu Kamal on February 2021 as measures taken in the exercise of self-defence after attacks on US personnel in Iraq, indicating that the purpose of the act was also to ‘defend United States personnel and to deter further attacks’ (UN Doc S/2021/202, White House, Letter to the Speaker of the House and President pro tempore of the Senate Consistent with the War Powers Resolution (27 February 2021)). The country justified strikes on facilities a few months after as an exercise of self-defence aiming, among others, to ‘deter the Islamic Republic of Iran and Iran-backed militia groups from conducting or supporting further attacks’ (UN Doc S/2021/614).

main objective of self-defence is not to prevent the occurrence of a new armed attack but to repel one which is occurring. In this sense, the requirement of necessity imposes that the armed measures would only be justified by the exercise of self-defence when necessary to respond to an armed attack. The preventive function, therefore, is incidental, linked with the cessation of the armed attack.⁷⁹⁸ It must be observed that the preventive nature of self-defence should not be confused with the so-called preventive or pre-emptive self-defence, which is controversial in the current state of international law.⁷⁹⁹

In conclusion, the preventive character of self-defence to prevent further attacks is not properly an objective since it is incidental, connected with the results of the force used to halt the first armed attack. Measures of self-defence aimed to halt an armed attack may impair the capacity of the aggressor State to make a new attack, but the main purpose of self-defence is to impair the original use of force. In this sense, ‘as long as its actions visibly and credibly preserve a primary repelling character it is immaterial whether a State acting in self-defence simultaneously harbours additional, but subordinate, deterrent, retributive, or even punitive motives when conducting them’.⁸⁰⁰

The third characterization of self-defence could be its recognition as a measure aimed at the *reparation* of wrongful conduct. At first glance, this hypothesis seems to be easily refuted. Given the immediacy and the inexistence of specific time to calculate the damages suffered, an armed counterattack would hardly have the purpose of demanding the reparation for the injuries caused by the armed attack perpetrated by the wrongdoer State.⁸⁰¹ Nevertheless, reparation is understood broadly in the law of State responsibility and also comprises the restitution of illegally occupied territory, which may be invaded as the result of an armed attack.⁸⁰² In this particular sense, in principle, it is possible to consider that self-defence may have a role regarding the reparation for the wrongful conduct, even if a very limited one.

As analysed in chapter 1, a decades-long occupation through force is a clear wrongful act and a continuing breach of the prohibition of the use of force in the sense of Article 14(2) of the ARSIWA. On the other hand, the concept of ‘armed attack’ for the purposes of the exercise of self-defence is distinct from the characterization of a continuing wrongful act in violation of the prohibition of the use of force and must be interpreted according to the requirements of immediacy, necessity, and proportionality. In this sense, self-defence

⁷⁹⁸ This difference is illustrated by the *Oil Platforms* case of 2003, in which the United States claimed that the attacks on Iranian oil platforms would be measures of self-defence at the same time as a reaction against the mining of a US warship, having as objective ‘to reduce or eliminate Iran’s ability to use its oil platforms to attack US shipping’ (*Oil Platforms* (Rejoinder submitted by the United States of America of 23 March 2001) ICJ Written Proceedings 54). In its decision of 2003, the ICJ rejected the claim, considering that the attacks were not made according to the requirement of necessity (*Oil Platforms* (n 227) 198 (para 76)).

⁷⁹⁹ By definition, a measure of self-defence must always be preceded by an armed attack, even if one of its functions is to deter new attacks. The purpose of measures of pre-emptive self-defence is to justify pre-emptive attacks, therefore before its actual occurrence. Gray, *International Law and the Use of Force* (n 226) 175; Arcari, ‘Il mantenimento della pace e l’uso della forza’ (n 195) 303-310. The classical example of this justification is the destruction of the nuclear reactor under construction in Osiraq in 1981 by the Israeli air force. The same excuse was used recently by Turkey to intervene in Northern Syria to ‘counter the imminent terrorist threat’ of the Kurdistan Workers’ Party (PKK) (UN Doc S/2019/804).

⁸⁰⁰ Randelzhofer and Nolte (n 252) 1426-1427.

⁸⁰¹ Waldock (n 248) 464; Žourek, ‘La notion de légitime défense’ (n 793) 60.

⁸⁰² Graefrath, ‘Responsibility and Damages Caused’ (n 489) 77; Arangio-Ruiz, Preliminary Report (n 477) 23 (para 72).

only justifies the recovery of occupied territory when the situation is considered as an armed attack until the stabilization of the *status quo* or when the armed attack is renewed, as demonstrated in the conflict in Nagorno-Karabakh in 2020.⁸⁰³

It is also possible to understand self-defence as a general measure of enforcement of international law, a reaction against a wrongful act with the intention to ‘enforce’ an obligation similar to a ‘sanction’ or a countermeasure.⁸⁰⁴ Although self-defence is a reaction to conduct considered to be unlawful, it is not possible to understand it as sharing the same purpose of in implementing State responsibility which is ordinarily attributed to countermeasures. As noted by Special Rapporteur Ago:

It would be quite wrong to think that self-defence can also be defined as a kind of sanction, even if it were described as a sanction applicable to a specific kind of wrong. ‘Self-defence’ and ‘sanction’ are reactions relevant to different moments and, above all, are distinct in logic.⁸⁰⁵

According to the Special Rapporteur, on the one hand:

[A]ction in a situation of self-defence is, as its name indicates, action taken by a State in order to defend its territorial integrity or its independence against violent attack; it is action whereby ‘defensive’ use of force is opposed to an ‘offensive’ use of comparable force, with the object – and this is the core of the matter – of preventing another’s wrongful action from proceeding, succeeding and achieving its purpose.⁸⁰⁶

On the other hand, the adoption of countermeasures (here still called ‘sanctions’⁸⁰⁷ by Ago):

[I]nvolves the application *ex post facto* to the State committing the international wrong of one of the possible consequences that international law attaches to the commission of an act of this nature. The peculiarity of a sanction is that its object is essentially punitive or repressive (...).⁸⁰⁸

Although self-defence is clearly a measure adopted in reaction to a conduct that is characterized by international law as wrongful, it is not properly a reaction aimed at implementing the responsibility of the wrongdoer State. It indeed aims at the cessation of the conduct, but this is the only purpose of it, which makes it unable to be properly characterized as a measure of the implementation of State responsibility. The mere fact of being a reaction against a conduct in violation of international law does not suffice to characterize a measure as a means of implementation of State responsibility, insofar as

⁸⁰³ See section 3.2, part two of chapter 1.

⁸⁰⁴ According to Kelsen, self-defence may be classified as a ‘decentralized function of the legal community acting through the individual’, a measure of enforcement of the law of the community by force. Similarly, for Bowett, self-defence would be characterized as an ‘interim measure of protection’ adopted by the State in the absence of a reaction by the international community. H Kelsen, *Collective Security under International Law* (Lawbook Exchange 2001) 27; Bowett, ‘Reprisals Involving Recourse to Armed Force’ (n 381) 3.

⁸⁰⁵ Ago, Addendum – Eight Report (n 267) 54 (para 90).

⁸⁰⁶ Ago, Addendum – Eight Report (n 267) 54 (para 90).

⁸⁰⁷ See n 374.

⁸⁰⁸ Ago, Addendum – Eight Report (n 267) 54 (para 90).

the critical purpose in this regard is to enforce a secondary rule.⁸⁰⁹ This is clearly not the case of self-defence.

2.2. Armed Countermeasures

As analysed in part one, countermeasures are instruments of implementation of State responsibility allowed by international law to compel the wrongdoer State to cease the wrongful conduct or to make reparation for the injury caused by it.⁸¹⁰ Countermeasures using armed force are usually considered to be prohibited in international law and this rule is expressed by Article 50(1)(a) of the ARSIWA, according to which ‘countermeasures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations’. Even so, some authors claim that armed countermeasures may be authorized in the international legal order as a special consequence of the violation of the prohibition of the use of force due to the character of the offence against which it reacts, and as an expression of the *vim vi repellere licet* principle.

Three main justifications are raised by the doctrine to justify the legality of armed countermeasures in international law. The first justification is that the faculty to adopt armed countermeasures are accepted to defend the rights of States in a decentralized legal order which lacks a central judicial organ. As measures of self-help would be an inherent characteristic of the international legal order, the limits on the use of force established by customary international law or treaties such as the UN Charter would not be applicable as ‘*a priori*, une action pour assurer le respect du droit ne serait pas illicite au regard de la Charte [des Nations Unies]’.⁸¹¹ According to Franck, for instance, the faculty to adopt armed countermeasures has not been ‘specifically repealed’ by the UN Charter and, accordingly, also the ARSIWA implicitly admitted the possibility of the adoption of armed countermeasures.⁸¹² This position is also reinforced by the consideration that armed reprisals were indisputably admitted as lawful by international law in the past to enforce legal rights and to deal with threats of security.⁸¹³

A second justification argues that armed countermeasures are legal as a form of self-defence. The right of self-defence would be so broad as to include what is known as armed countermeasures, especially considering the tenuous differences between both measures

⁸⁰⁹ Spinedi (n 514) 127. See also I Sinclair, ‘State Responsibility and the Concept of Crimes of States’ in J H H Weiler, A Cassese and M Spinedi (eds), *International Crimes of State* (De Gruyter 1989) 223, 224.

⁸¹⁰ In the present section the term ‘armed countermeasures’ is used to express countermeasures making use of armed force, although the term is also employed in a technical military sense to designate devices or techniques adopted with the objective of ‘impairment of the operational effectiveness of enemy activity’, such as electronic or mine countermeasures, having an aspect of a reaction against the activity of an enemy. See NATO Glossary of Terms and Definitions (NATO Standardization Agency, 2013).

⁸¹¹ Daillier and others (n 262) 1050.

⁸¹² According to Franck, Article 50(1)(a) limits the adoption of countermeasures to ‘the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations’ and consequently, recourse to measures not prohibited by the Charter would be allowed. Franck, *Recourse to Force* (n 381) 131-132.

⁸¹³ Brownlie, *International Law and the Use of Force by States* (n 20) 47-48, 281. Armed reprisals were related specifically to the denial of justice and were admitted as an extraordinary remedy taken by private individuals who had failed to obtain redress and authorized by their States against another State. Nys (n 723) 62; Alland (n 729) 1130; Paddeu, ‘Countermeasures’ (n 740) para 4.

and the broad scope of rights protected by self-defence.⁸¹⁴ This approach explains why several States apply measures that could be defined as armed countermeasures under the justification of self-defence. As analysed in chapter 2, on several occasions States claimed self-defence to justify the use of armed force in retaliation for a previous wrongful act, although without the immediacy required by the exercise of self-defence.⁸¹⁵ In all cases, armed force was justified as a punitive or deterrent measure in response to a previous wrongful act that was not dealt with by the international community.

A third justification raised by the doctrine is that even if prohibited by the UN Charter, armed countermeasures are a well-established practice in international law accepted by the international community, in special due to the inaction of the UN Security Council in dealing with threats to international peace and security.⁸¹⁶ According to Bowett, for instance, the practice regarding armed countermeasures would have evidenced a ‘credibility gap’ between the rule prohibiting armed countermeasures and its actual practice.⁸¹⁷ Cassese observed after the action of NATO regarding the Kosovo Crisis in 1999 the possibility of the ‘crystallization of a general rule of international law authorizing armed countermeasures’ to stop large-scale atrocities, even if clearly contrary to the UN Charter.⁸¹⁸

Those who defend the legality of armed countermeasures claim that such possibility is confirmed by State practice.⁸¹⁹ As mentioned above, in recent times some States employed armed force as a reaction to wrongful acts with little opposition by other States. On the other hand, in the majority of such cases, the action was justified as measures of self-defence, which rejects the thesis that armed countermeasures are ‘recognized’ as such by the international community. The non-adoption of a certain excuse by the State to

⁸¹⁴ Tucker (n 392). According to Dinstein, ‘defensive armed reprisals’ are admitted as measures of self-defence under the UN Charter and customary international law, differing from classical measures of self-defence for being applied ‘at a time and a place different from those of the original armed attack’ and not being necessarily directed against the targets which contributed to the occurrence of the armed attack (Dinstein, *War, Aggression and Self-Defence* (n 159) 244-245). Some authors assert also that the concept of self-defence adopted by the Charter is strict and does not reflect the customary right of self-defence, which in turn would allow armed countermeasures. See for instance R Falk, ‘The Beirut Raid and the International Law of Retaliation’ (1969) 63 *AJIL* 415, 430; P Klein, ‘Vers la reconnaissance progressive d’un droit à des représailles armées?’ in K Bannelier and others (eds), *Le droit international face au terrorisme* (Pedone 2002) 249, 248.

⁸¹⁵ This is the case of the attack on the Syrian airbase of Al-Shayrat in 2017 by the United States after the incident of Khan Shaykhun in order to prevent further attacks and ‘dissuade the Syrian regime from using or proliferating chemical weapons’. A similar situation was the attack carried out by Iran on the Ayn al-Asad airbase in Iraq in response to the assassination of the Major General Qasem Soleimani in 2020 by the United States, justified as ‘a measured and proportionate military response’ against the base from which the attack against Soleimani was launched. More recently, the use of force by the United States in Abu Kamal in 2021 against non-State actors was justified as retaliation against attacks against coalition forces operating in Iraq. The three cases were analysed in section 3.1 of part two of chapter 2.

⁸¹⁶ Lillich (n 721) 133; Sicilianos, *Les réactions décentralisées à l’illicite* (n 257) 413-415; Gianelli, *Adempimenti preventivi* (n 739) 312. Franck, while recognizing that the prohibition of the use of force by the UN Charter would also mean the prohibition of armed countermeasures, asserts that ‘a limited right to self-help has long been recognized in customary international law and practice’. Franck, *Recourse to Force* (n 381) 131.

⁸¹⁷ Bowett, ‘Reprisals Involving Recourse to Armed Force’ (n 381) 1.

⁸¹⁸ A Cassese, ‘Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10 *EJIL* 23, 29.

⁸¹⁹ Franck, *Recourse to Force* (n 381) 132-133.

justify a conduct demonstrates that such justification is probably not understood by the same State as admissible under international law.

Despite being justified by part of the doctrine, there is strong evidence to assert that armed countermeasures are prohibited by international law. Even if still highly decentralized, the international legal order monopolizes the use of force (or at least intends to) and regulates in a restrictive way the faculty of States to resort to armed measures. In particular, it is doubtful whether armed countermeasures are legal according to the UN Charter since this hypothesis is not provided as an exception to the prohibition of the use of force. In addition, the prohibition of armed reprisals was confirmed by several organs of the United Nations⁸²⁰ and by the majority of the doctrine.⁸²¹ The prohibition of armed countermeasures is also expressed by the above-mentioned provision placed on Article 50(1)(a), and according to the ILC, the prohibition is ‘consistent with the prevailing doctrine’ and ‘authoritative pronouncements of international judicial and other bodies’.⁸²²

The assertion that armed countermeasures can be considered as a form of self-defence is also not correct, since the functions of both measures are different. Countermeasures have a clear coercive intent and aim at inducing the wrongdoer State to comply with its obligations, while the main objective of measures of self-defence is to repel an armed attack.⁸²³ According to the ILC, while the vision according to which armed countermeasures are prohibited in international law prevails in doctrine:

The contrary trend, aimed at justifying the noted practice of circumventing the prohibition by qualifying resort to armed reprisals as self-defence, does not find any plausible legal justification and is considered unacceptable by the Commission. Indeed, armed reprisals do not present those requirements of immediacy and necessity which would only justify a plea of self-defence.⁸²⁴

Regarding State practice, it is true that several episodes of unilateral use of force were not considered by the UN Security Council as violations of the prohibition of the use of force.

⁸²⁰ Such measures are expressly prohibited by UNGA Res 2625 (XXV) (1970), which establishes that ‘States have a duty to refrain from acts of reprisal involving the use of force’ (para 1). The Security Council also asserted on several occasions that ‘actions of military reprisal cannot be tolerated’ and classified ‘reprisals as incompatible with the purposes and principles of the United Nations’ (UNSC Res 228 (25 November 1966) para 3; UNSC Res 188 (9 April 1964) para 1). The illegality of armed countermeasures was asserted by the ICJ in the *Corfu Channel* case of 1949 (*Corfu Channel Case* (n 178) 35) and in the Advisory Opinion of 1996 regarding the *Legality of the Threat or Use of Nuclear Weapons* (n 282) 246 (para 46)). See also chapter 2 regarding the illegality of armed countermeasures.

⁸²¹ Brownlie, *International Law and the Use of Force by States* (n 20) 47-48, 281; Tucker (n 392) 586; Zoller (n 723) 39; Arcari, ‘Il mantenimento della pace e l’uso della forza’ (n 195) 325.

⁸²² Commentaries to Article 50, para 5. The Commission also discussed and rejected a proposal of progressive development of international law presented by Special Rapporteur Arangio-Ruiz to recognize armed countermeasures as lawful consequences of serious violations of obligations owed to the international community as a whole other than aggression, like genocide or serious violations of the principle of self-determination of peoples. Arangio-Ruiz, Fifth Report (n 611) 45 (para 192). See also 2315th meeting (1 July 1993), ILC Yearbook 1993, Vol 1, 123 (paras 13-14).

⁸²³ This difference is acknowledged by Tucker, which argued that armed countermeasures can also have a protective function, although not by Dinstein. The concept of ‘defensive armed reprisals’ presented by the author is not truly a reprisal, since it has a defensive purpose. As admitted by the author, the concept would be a special form of self-defence rather than a form of countermeasure, only permitted in response to an armed attack. Tucker (n 392) 591; Dinstein, *War, Aggression and Self-Defence* (n 159) 250.

⁸²⁴ Report of the ILC on the work of its forty-seventh session, UN Doc A/50/10, ILC Yearbook 1995, Vol II(2) 67 (Commentaries to Article 14, para 3). (Footnotes omitted).

However, two observations must be made. First, the absence of manifestation of the Security Council does not mean that a certain practice is accepted by the international community. As already stated, the absence of contestations may be linked to political issues and the Security Council cannot represent a single authoritative source asserting the acceptance of certain conduct as lawful.⁸²⁵ Second, in recent international practice only on rare occasions States have used the specific term to express the adoption of armed measures, and self-defence is generally adopted as a legal basis to justify the use of armed forces by the acting States.⁸²⁶ On the contrary, it is possible to assert that there is an expressly general rejection of the legality of armed countermeasures.⁸²⁷

3. Special Rules on the Implementation of State Responsibility under the Charter of the United Nations

Given the place of the prohibition of the use of force as the cornerstone of the collective security system established by the UN Charter and the power of the United Nations to react against illegal forms of the use of force, one can ask whether the Organization can be seen as a mechanism of implementation of obligations resulting from the violation of the prohibition of the use of force. Thus, there is a natural parallelism between the system of the maintenance of international peace and security established by the United Nations and a mechanism for the implementation of the responsibility of an aggressor State.

The present section proposes to analyse whether the UN Charter establishes special rules of State responsibility regarding the implementation of State responsibility for the violation of the prohibition of the use of force as expressed in Article 2(4) of the Charter which could derogate from the general rules of State responsibility as codified in the ARSIWA. In particular, it analyses whether the UN Security Council can be identified as a special mechanism for the implementation of State responsibility (section 3.1), whether the measures adopted by it may be considered as institutionalized collective countermeasures, directed against violations of the prohibition of the use of force (section 3.2), and what is the relationship between the UN Charter and the general rules of State responsibility, especially as seen by Article 59 of the ARSIWA (section 3.3). Some questions analysed in the present section relate to the relationship between the functions of the Security Council and issues of State responsibility, which were the object of several investigations by the doctrine.⁸²⁸ The present analysis will focus on the function of the

⁸²⁵ Buzzini (n 406).

⁸²⁶ For instance, in 1999 South Korea expressed that ‘acts of military provocation’ from North Korea would ‘be met with appropriate countermeasures’ (UN Doc S/1999/695). In 2009 Iran threatened ‘to take appropriate countermeasures against the United States’ commercial vessels’ in the Gulf after the interference of United States in the freedom of navigation of an Iranian container (UN Doc A/64/569 - S/2009/649). It is not clear if the term refers to regular countermeasures or countermeasures using armed force. In 2020 Azerbaijan declared that in response to ‘Armenia’s provocations and ceasefire violations’ it ‘have taken the necessary countermeasures to ensure the safety of its civilian population, neutralize Armenian fire and stronghold battle positions, deter it from further acts of aggression and gain control over the situation’ (UN Doc A/74/963 - S/2020/732).

⁸²⁷ Sicilianos, *Les réactions décentralisées à l’illicite* (n 257) 420-426; Corten, *The Law Against War* (n 188) 236.

⁸²⁸ For instance, see Arangio-Ruiz, ‘On the Security Council’s “Law Making”’ (n 571); Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l’État* (n 510); V Gowlland-Debbas, ‘The Security Council and Issues of Responsibility under International Law’ (2012) 353 *RCADI* 185-443.

Security Council in the implementation of State responsibility and the special features regarding the consequences for the violation of the prohibition of the use of force.

3.1. The Security Council and the Implementation of State Responsibility for Breaches of Article 2(4) of the UN Charter

The main function of the Security Council is to identify and react against a situation negatively affecting the peaceful relations of the international community. According to Article 24 of the UN Charter, measures adopted by the Council are binding to the Member States of the Organization and may consist of coercive measures involving or not the use of armed force, as established by Articles 41 and 42, applied after the identification of 'any threat to the peace, breach of the peace, or act of aggression', as required by Article 39 of the Charter. Although not exercising a purely judicial function, arguably it is possible to identify in the procedures of the Security Council a method of identification of specific breaches of international law and adoption of measures with the purpose of enforcing consequences of the conduct. These features would make of the Security Council a special mechanism for the implementation of State responsibility, possibly derogating from the general rules of State responsibility.

Although the ARSIWA do not provide clear answers regarding the function of the Security Council in the implementation of State responsibility, this question was present in the discussions of the Commission regarding the codification of the rules on State responsibility, in special concerning serious violations of international law. The UN Charter was understood by Special Rapporteur Ago as a sort of mechanism aimed at enforcing a regime of aggravated responsibility, insofar as it provided for an 'exclusive responsibility' of the UN Security Council for deciding about the existence of a breach and the measures which should be adopted as a reaction to it.⁸²⁹ The competence of the Security Council in dealing with aggression motivated a special provision for this specific international crime, subjecting the performance of obligations related to it to the procedures of the UN Charter.⁸³⁰ The role of the Security Council in implementing the responsibility of a State was heavily criticised by Special Rapporteur Arangio-Ruiz and the ARSIWA adopted on First Reading in 1996 included a rather controversial solution on the matter.⁸³¹ In the current version of the ARSIWA, the main reference to the rules

⁸²⁹ On the other hand, by Ago the adoption of measures under Chapter VII to deal with violations other than the prohibition of the use of force, such as *apartheid* policies and the maintenance of colonial domination was explained by a trend in considering such practices as violations of principles embodied in the UN Charter, not merely due to their character as international crimes (Ago, Fifth Report (n 514) 31 (para 98), 33 (para 104), 35 (para 107) and 38-39 (para 117); Ago, Eight Report (n 70) 43 (para 91)). According to Economides, the collective security 'indisputably met all the requirements of a specific regime of responsibility applicable to States that committed serious breaches of international peace and security', especially due to the application of Chapter VII to violations other than aggression (2533rd meeting (20 May 1998), ILC Yearbook 1998, Vol I, 103 (para 44)). See also Spinedi (n 514) 33.

⁸³⁰ By suggestion of the Commission, Special Rapporteur Riphagen added Draft Article 15 [1984] dealing specifically with the legal consequences of aggression and establishing that the performance of such obligations 'is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security' (Riphagen, Fourth Report (n 518) 7 (Article 6(2)), 10-11 (paras 52-55); Riphagen, Fifth Report (n 691) 4 (Article 15)). See also Spinedi (n 514) 95-104.

⁸³¹ According to Arangio-Ruiz, the Security Council had 'neither the constitutional function nor the technical means to determine the existence, the attribution or the consequences of any wrongful act' such as the ICJ (2315th meeting (1 July 1993), ILC Yearbook 1993, Vol I, 124-125 (paras 24-28)). The Special

of the UN Charter is the general clause of Article 59, which would be analysed in section 4.3.

From a broad perspective, it may be considered that the Security Council exercises functions regarding the implementation of State responsibility. The organ's procedures are similar to the function of a judicial body in applying a sanction, insofar as they are based on the identification of a breach, its attribution to a specific subject, and the determination of the legal consequences of it. The first part of Article 39 of the UN Charter establishes that 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression', a qualification which may be identified as the determination of a breach of an international obligation by the Security Council.⁸³² The second part of Article 39 establishes that after the qualification of the situation the Council 'shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Only after the specific qualification of a situation the Council is entitled to adopt sanctions, which is a legal condition for the implementation of the responsibility of a State for wrongful acts.⁸³³

Another point supporting this view is the alleged existence of a functional link between the functions of the Security Council under Chapter VII of the UN Charter with those established by Chapter VI regarding the peaceful settlement of international disputes, attributing to the Council a 'quasi-judiciary function' in such cases. According to this interpretation, the failure of States to settle a dispute between themselves using the mechanisms provided for by Chapter VI allows the use by the Security Council of its prerogatives under Chapter VII to settle the dispute using coercive measures, so Chapter VII 'establishes another procedure for the peaceful settlement of disputes or adjustment of situations'.⁸³⁴

Several authors identify in the powers of the Security Council under Chapter VII a type of mechanism of implementation of State responsibility, although with different bases. For Kelsen, the sanctions provided for by the UN Charter are to be considered as sanctions under general international law, since coercive measures may be equated with sanctions for a conduct contrary to the content of an obligation.⁸³⁵ Combacau argues that Chapter VII gives to the Security Council a sanctioning power similar to the one attributed to police forces in situations in which the administrative authorities may have a general power to determine the existence of a violation of the law and to execute it, a 'derived normative function' (*fonction normative dérivée*) to assure the fulfilment of an obligation

Rapporteur proposed a mechanism of implementation of the responsibility of a State by combining the political role of the Security Council (and General Assembly) and the judicial role of the ICJ in order to create a procedure initiated by a sort of prosecutorial function by the political organs of the United Nations followed by the manifestation of the judicial organ on the determination of the existence and attribution of an international crime, which was rejected by the Commission. Arangio-Ruiz, Seventh Report (n 504) 22-26 (paras 100-120).

⁸³² Draft Article 2. Arangio-Ruiz, 'On the Security Council's "Law Making"' (n 571) 695.

⁸³³ J Combacau, *Le pouvoir de sanction de l'O.N.U.* (Pedone 1974) 108-110, 139-140.

⁸³⁴ Kelsen, *The Law of the United Nations* (n 255) 438. The relation between the peaceful settlement of disputes and the prohibition of the use of force is further developed by Kelsen. See also Kelsen, *Collective Security* (n 804) 15-19; For a critic to this approach, see Arangio-Ruiz, 'On the Security Council's "Law Making"' (n 571) 655-682.

⁸³⁵ Kelsen, *The Law of the United Nations* (n 255) 709.

by a State to abstain from threats to the peace, breaches of the peace, and acts of aggression.⁸³⁶ Graefrath and Mohr consider the enforcement of UN Charter obligations by the Security Council through the use of force as a law-enforcement tool, so in practice ‘there can be no distinction between “merely factual” and “truly legal” reactions in the case of an international crime’.⁸³⁷ According to Gowlland-Debbas, the Security Council acts as ‘a ‘quasi-judicial body’ by identifying breaches of international law and attributing them to States or other entities.’⁸³⁸ The role of the Security Council regarding the invasion of Kuwait by Iraq in 1990 is singled out as the clearest example of its function as a mechanism of implementation of State responsibility.⁸³⁹

Conversely, from a strict point of view, the UN Security Council does not act as a mechanism of implementation of State responsibility. The organ was not endowed with a judicial function by the UN Charter and is not guided by concerns and rules of State responsibility. Although the powers of the Council are limited by international law, its primary function is not to *apply* the law or even to settle international disputes.⁸⁴⁰ The similarities between the functions of the Security Council and the implementation of State responsibility are only apparent since despite the nexus between situations of threats to the peace, breaches of the peace, or acts of aggression and the adoption of coercive measures, the function of the organ is not to establish the consequences for internationally wrongful acts. Its action is not based or provoked by a violation of an international obligation and not every threat to the peace or breach of the peace amount to violations of international law, as demonstrated by the practice of the organ.⁸⁴¹ In other words, what justifies the action of the Security Council is not the violation of a general obligation, but a ‘threat to the peace, breach of the peace, or act of aggression’. This is what differentiates sanctions adopted by the United Nations from countermeasures.⁸⁴²

⁸³⁶ Combacau (n 833) 16.

⁸³⁷ Graefrath and Mohr (n 516) 113. See also V Gowlland-Debbas, ‘Security Council Enforcement Action and Issues of State Responsibility’ (1994) 43 *International and Comparative Law Review* 55, 57; Gattini, ‘The UN Compensation Commission’ (n 571) 166.

⁸³⁸ Gowlland-Debbas, ‘The Security Council and Issues of Responsibility’ (n 828) 257-258. See also O Schachter, ‘The Quasi-judicial Role of the Security Council and the General Assembly’ (1964) 85 *AJIL* 960-965.

⁸³⁹ The Council addressed several aspects of the responsibility of Iraq for the invasion, including the determination of the existence of a breach of international peace and security regarding the invasion of Kuwait, the attribution of the conduct to Iraq, and the request of the cessation of the conduct (Res 660 of 2 August 1990, paras 1 and 2), the adoption of measures to force the cessation of the wrongful conduct (Res 661 (6 August 1990, paras 2, 3 and 4), Res 665 (25 August 1990, para 1) and Res 670 (25 September 1990, paras 3, 4 and 5), the affirmation of the obligation of cooperation of the international community (Res 661 of 6 August 1990, para 7), the recognition that the effects of the wrongful conduct were null and void and the obligation for States and international organizations not to recognize it (Res 662 of 9 August 1990, paras 1 and 2), the reaffirmation of the responsibility of Iraq for the compensation of the injuries caused (Res 686 of 2 March 1991, para 2(b)), and the establishment of a commission to administer the fund created to compensate the damages caused (Res 687 of 3 April 1991, paras 16 to 19).

⁸⁴⁰ In comparison, the function of the ICJ is ‘to decide in accordance with international law such disputes as are submitted to it’. *Statute of the International Court of Justice*, Article 38 *caput*.

⁸⁴¹ Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l’État* (n 510) 107. Several situations classified by the Council as threats or breaches to the peace are not internationally wrongful acts, such as the outbreak of pandemics and the overthrow of democratic governments. M Arcari, ‘COVID-19 and Multilateral Governance at the United Nations Between Risk-Prevention, Procedural Adaptation and Feeble Response’ (2020) 70 *QIL Zoom out* 59-76.

⁸⁴² L A Sicilianos, ‘Sanctions institutionnelles et contre-mesures: tendances récentes’ in L Forlati and L A Sicilianos (eds), *Economic Sanctions in International Law* (Martinus Nijhoff 2004) 3, 18.

This does not mean that the action of the UN Security Council has no relation to matters of State responsibility. In most cases, the Security Council applies coercive measures in order to force the cessation of a conduct that is *also* a wrongful act, although this does not mean that the Council is reacting *because* of the wrongful character of the conduct. The conduct may at the same time be regarded as wrongful act under international law and one threatening or breaching the maintenance of international peace and security, although the actions adopted by the Council are measures intended to enforce the peace, not the law.⁸⁴³ As observed by Special Rapporteur Arangio-Ruiz, even if decisions of the Security Council may affect the rights of States and have an impact on secondary rules, the organ does not exercise a judicial function. In this sense:

No provision can be found in the Charter indicating that such a peace-enforcement power includes any competence to determine, declare or enforce international rights or obligations, or, for that matter, any competence to apply sanctions (...) for unlawful behaviour. (...) Although such measures may well perform – as they frequently do – the *practical function* of a sanction, (for the violation, for example, of obligations under Article 2(4) or Article 2(3) or other provisions of the UN Charter or of other treaty or customary rules) they cannot be regarded as sanctions in a proper, legal sense.⁸⁴⁴

Thus, from the point of view of State responsibility, coercive measures adopted by the Security Council may be seen as ‘political’ or ‘police’ measures linked with the peace-enforcement function of the Council, not a law-enforcement function that was never intended to be attributed to the organ.⁸⁴⁵

3.2. Coercive Measures and Collective Countermeasures

Whereas the coercive measures adopted by the UN Security Council may not be a proper means of implementation of State responsibility, one may ask whether such measures may be considered as collective countermeasures adopted by the international community in an organized way in reaction to violations of *erga omnes* obligations. It is accepted that countermeasures are individual reactions by injured States to force a wrongdoer State to comply with the secondary obligations created by the commission of a wrongful conduct, such as the obligations of cessation and reparation. It is less accepted but admitted by recent State practice that collective countermeasures may also be adopted by States other than the injured State as a reaction for the breach of *erga omnes* obligations with the same purposes.⁸⁴⁶ According to Article 54 of the ARSIWA:

This chapter (regarding 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

⁸⁴³ As observed by Dupuy, the Security Council ‘est conçu dans la Charte pour exercer dans le cadre du chapitre VII des pouvoirs de police internationale non de sanction quasi-judiciaire de la violation du droit’. P M Dupuy, ‘Sécurité collective et organisation de la paix’ (1993) 97 *RGDIP* 617, 624.

⁸⁴⁴ Arangio-Ruiz, ‘On the Security Council’s “Law Making”’ (n 571) 631 and 694 (footnotes omitted, emphasis from the original). See also Sinclair (n 809) 224; Arangio-Ruiz, Fifth Report (n 611) 50 (para 223); Gianelli, *Adempimenti preventivi* (n 739) 315.

⁸⁴⁵ Spinedi (n 514) 126; S Sur, ‘La résolution 687 (3 avril 1991) du Conseil de Sécurité dans l’affaire du Golfe : Problèmes de rétablissement et de garantie de la paix’ (1991) 37 *AFDI* 25, 41; Arangio-Ruiz, ‘On the Security Council’s “Law Making”’ (n 571) 695.

⁸⁴⁶ See section 4, part one of the present chapter.

reparation in the interest of the injured State or of the beneficiaries of the obligation breached.⁸⁴⁷

Thus, as collective countermeasures may be considered as collective measures of implementation of State responsibility, one may question whether the action of the Security Council in reaction to a threat to the peace, breach of the peace, or acts of aggression are not ‘institutionalized’ collective countermeasures. In this sense, the Council may act as a ‘catalyst’ of the reactions of the international community, and its role can be seen as that of coordinating more coherently the individual action of States.

This idea seemed to be the origin of the obligation to cooperate adopted by Article 41(1) of the ARSIWA, which establishes the obligation for all States to ‘bring to an end through lawful means any serious breach’. According to the Commission, this positive obligation presupposes a ‘joint and coordinated effort by all States to counteract the effects of these breaches’ which ‘could be organized in the framework of a competent international organization, in particular the United Nations’.⁸⁴⁸ If the coercive measures adopted by the UN Security Council are to be considered as collective countermeasures, it is also possible to conceive that the ‘institutionalization’ of such collective reaction may be regulated by specific rules or procedures which eventually may derogate from the general rules of State responsibility. Among the possible derogations, there is the authorization for the use of force by the Security Council, which is generally prohibited under general international law, and the dismissal of the procedural steps that are required prior to the adoption of countermeasures.⁸⁴⁹ In this case also, Chapter VII may be understood as a special regime for the implementation of collective countermeasures.

To consider the coercive measures of the Security Council as collective countermeasures also solves one of the biggest problems related to collective countermeasures, that is the risks of abuse and uncoordinated reaction by simultaneous actions taken by several indirectly affected States. Concerted action by the international community would be preferred to the cacophony of independent action by several States, even better if realized by an international organization.⁸⁵⁰ According to Special Rapporteur Ago, for instance:

It is understandable, therefore, that a community such as the international community, in seeking a more structured organization, even if only an incipient ‘institutionalization’, should have turned in another direction, namely towards a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for

⁸⁴⁷ Article 54. See also Crawford, Third Report (n 528) 106 (para 406).

⁸⁴⁸ Commentaries to Article 41, paras 2 and 3. According to Special Rapporteur Riphagen, the ‘duty to participate in collective countermeasures’, or the obligation to cooperate in order to bring to an end an unlawful situation created by an international crime, was ‘valid only within the framework of some form of international decision-making machinery’. Riphagen exemplified his point using Articles 48 to 50 of the UN Charter, which allows certain flexibility by the Security Council in determining which States may carry out the decisions adopted by it under Chapter VII. Riphagen, Fourth Report (n 518) 12 (para 62).

⁸⁴⁹ Arcari, ‘Responsabilità dello Stato per violazioni gravi di norme fondamentali e sistema di sicurezza collettiva delle Nazioni Unite’ (n 286) 321-329.

⁸⁵⁰ Simma, ‘Bilateralism and Community Interest’ (n 707) 842.

deciding what measures should be taken in response and how they should be implemented.⁸⁵¹

Arguably this conception is also supported by State practice. From the beginning of the 1990s, it is possible to verify situations in which measures of Chapter VII were adopted by the Security Council not aiming at the cessation of a situation of threat to the peace, but also to make the wrongdoer comply with its obligations of reparation, such as done by countermeasures.⁸⁵² Examples of this may be seen in the action undertaken by the Security Council concerning the obligation of Iraq to make reparation for the damages caused by the Gulf War, or for enforcing the obligations of Libya to hand over its nationals in the context of the *Lockerbie* case.⁸⁵³

On the other hand, the concept of countermeasure goes against the idea of institutionalization of sanctions in international law. By definition, countermeasures are a feature of the decentralized legal order and the idea of their adoption by a central organ is contradictory. The use of countermeasures by a centralized organ would mean that they cannot be qualified as measures of self-help, but as measures created by 'vertical' links existing between the organization and its members.⁸⁵⁴ Although mechanisms of enforcement within international organizations intend to protect the interests of the underlying legal community, often measures adopted by the organs of an international organization are not based on the previous commission of an internationally wrongful act. Measures adopted by the Security Council, in reality, may not be considered as acts adopted in reaction to previous violations by a wrongdoer State. In this sense:

C'est l'acte de sanction qui constitue le motif des mesures d'exécution et non pas la violation imputable à l'État objet de la sanction. Cette violation constitue (...) le fondement de l'acte édicté par l'organisation, point celui des mesures d'exécution. La licéité de ces mesures s'explique dès lors par leur conformité à l'acte de l'organisation et non pas par la violation de l'État cible. A la différence des contre-mesures décentralisées qui sont régies par le droit international général, les mesures d'exécution d'une sanction institutionnelle trouvent leur point d'ancrage dans le 'droit constitutionnel' de l'organisation.⁸⁵⁵

The Commentaries to Article 54 indicate that the ILC shared this position since individual measures taken by one State or a group of States such as countermeasures are distinguished from 'institutional reactions in the framework of international organizations' as the measures adopted under Chapter VII of the UN Charter, which according to the Commentary are not covered by the ARSIWA.⁸⁵⁶ Although the measures adopted by the Security Council under Chapter VII of the Charter may not be considered as collective countermeasures, collective countermeasures may be adopted in an

⁸⁵¹ Ago, Eight Report (n 70) 43 (para 91). Similar position was shared with Riphagen. See also Riphagen, Third Report (n 9) 45 (para 138).

⁸⁵² About the possibility of application of the limits imposed on countermeasures on the measures adopted by the Security Council under Chapter VII, see Arcari, 'Responsabilità dello Stato per violazioni gravi di norme fondamentali e sistema di sicurezza collettiva delle Nazioni Unite' (n 286) 302.

⁸⁵³ M Arcari, 'Le risoluzioni 731 e 748 e i poteri del Consiglio di Sicurezza in materia di mantenimento della pace' (1992) 75 *RDI* 932-965.

⁸⁵⁴ Sicilianos, 'Countermeasures' (n 774) 1140.

⁸⁵⁵ Sicilianos, 'Sanctions institutionnelles et contre-mesures' (n 842) 18. See also Ago, Eight Report (n 70) 44 (para 93).

⁸⁵⁶ Commentaries to Article 54, para 2.

institutionalized way by a community of States. On some occasions, organizations adopt measures against third States as the result of an internationally wrongful act and may find their justification only on this basis.⁸⁵⁷

3.3. Article 59 and the Speciality of the Rules regarding Collective Security

At this point, it is clear that reactions against violations of the prohibition of the use of force in international law may be regulated in different ways either under the law of State responsibility or under the provisions of the UN Charter regarding collective security. In the ARSIWA the relation between both sets of rules is regulated by Article 59, according to which ‘these articles are without prejudice to the Charter of the United Nations’. The inclusion of a provision regarding the relationship between the UN Charter and the ARSIWA raises the question of how both sets of rules are related and whether the UN Charter may contain special rules regarding State responsibility. The entanglement between the law of State responsibility and the UN Charter provisions, including those related to the regulation of force, is better understood if one considers the evolution in the approach to both systems and the substantial evolution in both theory and practice in recent decades regarding their relationship. As observed by Arcari, it is possible to divide the position of the Commission regarding the relationship between the rules of State responsibility and the law of the UN Charter into three periods.

The first period (1976 to 1985) encompasses the works of Special Rapporteurs Ago and Riphagen and is characterized by an attempt to present the collective security system of the UN Charter as a ‘normative model of reference’ for the consequences of international crimes of States. The powers of the UN Security Council under Chapter VII were seemed to be a solution for the problem of how to determine the consequences of international crimes, since the Council started to address violations other than acts of aggression, providing a reference for the general regime concerning such violations.⁸⁵⁸

A second period (1994 to 1996) is marked by a transition carried out by Special Rapporteur Arangio-Ruiz, who questioned the capacity of the collective security system to implement State responsibility for international crimes as well as the exponential increase of the practice of the Security Council regarding matters of State responsibility,

⁸⁵⁷ For instance, as a response to the occupation and annexation of Crimea in 2014, the European Union adopted measures of travel restriction and asset freezing against individuals linked to the ‘violation of Ukrainian sovereignty and territorial integrity by the Russian Federation’, including members of the legislature and commanders of the Russian armed forces (Council Decision 2014/145/CFSP [2014] OJ L 78/16). The EU also applies restrictive measures against individuals or entities accused of ‘serious human rights violations and abuses’ from China, Russia, North Korea, Libya, and Eritrea (Council Regulation (EC) 2020/1998 of 7 December 2020 [2020] OJ L 410I 7.12.2020). For more practice, see Sicilianos, ‘Sanctions institutionnelles et contre-mesures’ (n 842) 19; Dawidowicz, *Third-Party Countermeasures* (n 761).

⁸⁵⁸ Special Rapporteur Riphagen proposed by Draft Article 5 [1982] a general clause according to which the obligations and rights entailed by the breach of an international obligation are ‘subjected to the provisions and procedures embodied in the Charter of the United Nations’. According to Riphagen, the prevalence of the UN Charter would be based on its Article 103 and would refer particularly to the obligation of States to settle their disputes through peaceful means, the ‘functions and powers of the organs’ of the Organization and the right of self-defence expressed by Article 51 of the Charter. In addition, Riphagen proposed Draft Article 15 [1984] establishing that an act of aggression would entail all the legal consequences of an international crime and also ‘rights and obligations as are provided for in or by virtue of the United Nations Charter’. Riphagen, Third Report (n 9) 47-48 (para 149, Article 5 and commentaries); Riphagen, Fifth Report (n 691) 4 (Articles 14(3) and 15).

including the establishment of consequences for the violation of international obligations and also secondary obligations. The ‘rebirth’ of the Security Council after 1990 made clear the limits of the organ in the exercise of judicial or quasi-judicial functions, consisting in the determination of the existence of a violation of international law and in the establishment of the consequences arising from it.⁸⁵⁹ Due to these difficulties, the Commission was unable to provide solutions for the problem of the institutionalization of consequences of international crimes. Notwithstanding, a general clause reflecting the previous approach adopted by the Commission stipulating that the legal consequences were ‘subject to’ the provisions and procedure of the UN Charter was maintained in the First Reading of 1996.⁸⁶⁰

The third period (1998 to 2001) is the final phase of the works of the Commission carried out under the direction of Special Rapporteur Crawford and is characterized by the abandonment of the attempt to involve the UN Security Council in a mechanism of implementation of State responsibility, doomed by difficulties regarding the acceptance of the concept of international crimes by the Commission and the ‘degradation’ of the practice of the Council from 1996. The clause establishing the relationship between the UN Charter and the ARSIWA was transferred to the part of the Draft dealing with the general provisions, to make it generally applicable to the whole of the Articles and had its redaction simplified, stating that ‘these articles are without prejudice to the Charter of the United Nations’.⁸⁶¹ Article 59 [2001] altered the position of ‘subjection’ of the law of State responsibility to the UN Charter existent in the previous first reading of the Articles, thereby enhancing the compatibility between the ARSIWA and the UN Charter.⁸⁶²

Through the legislative history of Article 59, it is possible therefore to understand the transformation of the ARSIWA from a set of rules subject to the UN Charter to a provision establishing the compatibility between both regimes. This conclusion is confirmed also by the fact that Article 59 is placed alongside Article 55 on *lex specialis*, indicating that it does not see the UN Charter as a special regime with priority over the general rules of State responsibility.⁸⁶³

⁸⁵⁹ Gianelli, *Adempimenti preventivi* (n 739) 697.

⁸⁶⁰ This was Draft Article 39 [1996], proposed as Draft Article 5 [1982] by Special Rapporteur Riphagen. The Commission was divided in the adoption of the provision, with 11 votes in favour to retain it, 11 against and 4 abstentions. As observed by Special Rapporteur Arangio-Ruiz, the provision attributed to the Security Council discretion in order to restrict, suspend or modify rights and obligations of States when taking action for the maintenance of international peace and security. 2452nd meeting (3 July 1996), ILC Yearbook 1996, Vol I, 138 (para 23).

⁸⁶¹ Regarding the proposals of deleting the Article, the Drafting Committee explained that ‘while agreeing that the provision was not strictly necessary, [the Committee] had decided to retain it so as to confirm that the draft articles were to be interpreted in conformity with the Charter: the provision was expository and just a useful reminder’. See the observation of Mr Tomka, Chairman of the Drafting Committee (2683rd meeting (31 May 2001), ILC Yearbook 2001, Vol I, 119 (para 41)).

⁸⁶² Arcari, ‘Responsabilità dello Stato per violazioni gravi di norme fondamentali e sistema di sicurezza collettiva delle Nazioni Unite’ (n 286) 317. This was also observed by Mr Kamto (2684th meeting (1 June 2001), ILC Yearbook 2001, Vol I, 121 (para 62)).

⁸⁶³ Arcari, ‘Responsabilità dello Stato per violazioni gravi di norme fondamentali e sistema di sicurezza collettiva delle Nazioni Unite’ (n 286) 317.

4. The relationship between Measures of Collective Security and Countermeasures

As analysed in section 2.2, armed countermeasures are not admitted in international law even in response to unlawful uses of force. On the other hand, the law of State responsibility does not impose impediments on the adoption of 'peaceful' unilateral or collective countermeasures against violations of the prohibition of the use of force. Even if not prevented by the law of State responsibility, the adoption of countermeasures as a reaction against unlawful uses of force may however be limited by the system of collective security established by the UN Charter, in particular considering the purpose of the maintenance of international peace and security. The present section analyses whether the collective security system may, through the action of the UN Security Council, establish restrictions to the general faculty of States to adopt reactions against the unlawful use of force, thereby derogating from the general rules of State responsibility.

From the point of view of the collective security system established by the UN Charter, there is no express mention of the adoption of unilateral measures by States other than measures of self-defence. Therefore, *a priori* there is no incompatibility between the adoption of countermeasures and the action of the United Nations in the field of maintenance of international peace and security. However, some possible limitations may be observed as a consequence of the obligations established by the UN Charter.

A first possible limitation arises from the primacy of the UN Security Council which, as the main organ responsible for dealing with situations integrating a threat to international peace, may limit the competence of States to deal with such matters individually. Since Article 24 of the UN Charter states that the Member States of the Organization 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf', their individual competence in adopting countermeasures would be limited, considering that the adoption of countermeasures could have an impact on international peace by worsening a dispute or preventing its resolution, for example.⁸⁶⁴

Some authors argue that the recourse to countermeasures, especially collective ones, must be subsidiary to the adoption of measures of the UN Security Council and are only admitted in case of 'failure' of the Council to deal with the situation.⁸⁶⁵ According to Sicilianos, for instance, the Security Council has the 'prime competence' to sanction serious violations of *erga omnes* obligations while non-directly injured States have a 'subsidiary competence' in reacting unilaterally to the violation. The reason for this is that the dispute comes out of the bilateral orbit:

À partir du moment où l'on accepte que les Nations Unies ont une compétence, certes non exclusive mais néanmoins principale pour qualifier, voire pour édicter des sanctions face à des violations éminentes du droit international, on n'est plus dans

⁸⁶⁴ An extreme example of how economic measures may lead to a state of war is the conflict between Japan and the United States in the Second World War, which had as one of its causes the embargo of oil and other commodities established by Washington against Tokyo in 1941.

⁸⁶⁵ G Gaja, 'Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial' (1993) 97 *RGDIP* 297, 309; Arcari, 'Responsabilità dello Stato per violazioni gravi di norme fondamentali e sistema di sicurezza collettiva delle Nazioni Unite' (n 286) 334; Sicilianos, 'Countermeasures' (n 774) 1141-1142.

une situation de conflit direct entre l'État auteur et les États autres que la victime du fait illicite aggravé.⁸⁶⁶

In this case, the competence of the Security Council is not exclusive but only precedent, justified by the fact that 'the imposition of sanctions is generally the outcome of intense negotiations in the Council' and the adoption of unilateral measures 'distorts the institutional balance envisioned by the Charter'.⁸⁶⁷ The observation makes sense from a logical point of view, but the legal justification for the predominance of the Security Council over the adoption of countermeasures individually by States is not clear. No provision of the UN Charter expressly provides for such prevalence, and it can hardly be said that the Security Council has a monopoly on the adoption of individual or collective economic measures, as does regarding the use of armed force.⁸⁶⁸

The law of State responsibility also does not establish clear limitations regarding countermeasures that may affect international peace and security. According to the ARSIWA, the faculty to adopt countermeasures is limited in the field of maintenance of international peace and security only regarding 'the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations' (Article 50(1)(a)). Nevertheless, this was not the position initially adopted by the Commission. The existence of an obligation to suspend countermeasures by concurrent action of the United Nations was considered by its members⁸⁶⁹ and expressed in the commentaries to Draft

⁸⁶⁶ Sicilianos, *Les réactions décentralisées à l'illicite* (n 257) 209 and 215.

⁸⁶⁷ Sicilianos, 'Countermeasures' (n 774) 1142.

⁸⁶⁸ A de Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (Giuffrè 1985) 211-220; Focarelli, *Le contromisure nel diritto internazionale* (n 654) 328. A possible provision of the UN Charter providing for some kind of prevalence is Article 103, which could be interpreted so as to give priority to States' obligations established by UNSC Resolutions over their 'faculty' to adopt countermeasures under the law of State responsibility. Nevertheless, Article 103 refers to conflicts between obligations under the Charter and 'obligations under any other international agreement', not covering customary rules such as the possibility of adopting countermeasures. This possibility, however, could be considered in the case of treaty provisions establishing an obligation for the Member States of an organization to adopt collective countermeasures (such as Article 28 of the Treaty on European Union). Article 53 of the Charter also establishes that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council', meaning that the Council would have primacy over the adoption of such actions. The meaning of the term 'enforcement action' was not clear in the first years of the United Nations but soon started to be understood by the Security Council itself as limited to actions involving the use of armed force, even if the interpretation of other parts of the Charter and its preparatory works indicated otherwise. In this sense, there is no monopoly of the Security Council over economic measures either by regional organizations or by States acting unilaterally (See for instance M Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States' (1967) 42 *BYIL* 175, 185-188; De Guttry (n 868) 213; L Boisson de Chazournes, 'Les relations entre organisations régionales et organisations universelles' (2011) 347 *RCADI* 79, 265-266). Another reason to deny the monopoly of the Security Council over the economic measures is the action of the General Assembly in recommending the adoption of such measures by States in reaction to a wrongful conduct. On several occasions the General Assembly adopted recommendations to the UN Member States to adopt economic or other kinds of non-forcible measures against wrongdoers. See Conforti and Focarelli, *Le Nazioni Unite* (n 306) 367.

⁸⁶⁹ As observed by Bowett, although not having the power to deny the right to adopt countermeasures, the Security Council would have the power to request the delay in taking the measures in situations in which 'they would tend to aggravate the situation and lead to a threat to international peace and security, and when there was a reasonable prospect of peaceful settlement' and to 'oversee the use of countermeasures', an opinion shared with other members (2277th meeting (23 June 1992), ILC Yearbook 1992, Vol I, 154 (para 25)). See also G Arangio-Ruiz, Sixth Report on State Responsibility, ILC Yearbook 1994, Vol II(1) 20 (paras 106-107).

Article 39 [1996] regarding the relationship between the legal rules establishing the consequences of wrongful acts determined by Part Two of the Draft Articles and the UN Charter (future Article 59 [2001]):

It cannot a priori be excluded that, under particular circumstances, the performance of such obligations (created as legal consequences of an internationally wrongful act) and/or the exercise of such rights might result in a situation relevant to the maintenance of international peace and security. In those particular circumstances, the provisions and procedures of the Charter of the United Nations apply and may result in measures deviating from the general provisions of part 2. In particular, the maintenance of international peace and security *may* [footnote: ‘in the opinion of the competent United Nations organ’] require that countermeasures in response to a particular internationally wrongful act are not to be taken for the time being.⁸⁷⁰

As observed in section 3.3, the approach adopted by the Commission in 1996 was predicated on the submission of the law of State responsibility to the UN Charter. Since priority was given to the obligations of the UN Charter, the general faculty of adoption of countermeasures by States might be impaired by the obligation to carry out the decisions of competent UN organs related to the maintenance of international peace and security. Even if considered to reflect the current state of international law, the commentary to Article 39 [1996] stresses that such limitation *may* be placed upon States by a decision having binding effect emanated by a competent United Nations organ and does not flow directly from the Charter. In other words, the faculty may be restricted by a decision made in concrete cases and not imposed automatically on any situation. In this sense, there is no inherent incompatibility in principle between the adoption of countermeasures and the action of the United Nations regarding a specific situation. As mentioned in the previous section, such an approach is not adopted anymore by current Article 59 [2001] and there is no explicit general precedence of the rules of the UN Charter over the general rules of State responsibility, including those relating to collective countermeasures.⁸⁷¹

Another possible limitation may be the general obligation of States to settle their international disputes by peaceful means, in special the corollary according to which a State ‘shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute’.⁸⁷² This obligation is both recognized by the UN Charter in its Article 2(3) (‘all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are

⁸⁷⁰ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts Adopted in First Reading and Commentaries, 1996 (n 15) 270 (commentary 2 of Article 39) (emphasis from the original). This position was influenced by Special Rapporteur Riphagen, according to who the general rules of State responsibility would have a residual character regarding the obligations of the UN Charter with respect to the maintenance of international peace and security, including the faculty of the international community to adopt collective countermeasures against international crimes. Riphagen, Sixth Report (n 517) 14 (Article 14, commentary 7). See also Simma, ‘International Crimes’ (n 775) 308.

⁸⁷¹ It is possible, however, to interpret Article 59 in both ways. See, for instance, Arcari, ‘Responsabilità dello Stato per violazioni gravi di norme fondamentali e sistema di sicurezza collettiva delle Nazioni Unite’ (n 286) 334; Sicilianos, ‘Countermeasures’ (n 774) 1142.

⁸⁷² UNGA Res 37/10 (15 November 1982) (Manila Declaration on the Peaceful Settlement of International Disputes) Section I, para 8; Iwasawa and Iwatsuki (n 737) 1153.

not endangered') and by Article 50(2)(a) of the ARSIWA, which establishes that a State taking countermeasures is not relieved from fulfilling its obligations 'under any dispute settlement procedure applicable between it and the responsible State'. Since the UN Security Council has functions related to the peaceful settlement of disputes under Chapter VI of the UN Charter, in principle such function could be raised as a limitation to the faculty of States to adopt countermeasures.

Nevertheless, a limitation on the faculty to take countermeasures cannot be inferred from the elements above. Article 2(3) of the UN Charter was not intended to restrict the faculty of States to adopt countermeasures and such limitation may not be derived from the Charter or the Manila Declaration.⁸⁷³ Regarding the ARSIWA, it is clear that Article 50(2)(a) refers only to binding mechanisms which stipulate obligations to its parties since the faculty to adopt countermeasure flows from the lack of compulsory judicial processes.⁸⁷⁴ Differently from those adopted under Chapter VII, resolutions adopted by the Security Council under Chapter VI of the Charter are not binding, so Member States do not have proper obligations to obey it according to the UN Charter.⁸⁷⁵

State practice confirms that there is no incompatibility between the adoption of countermeasures and the action of the United Nations in the field of maintenance of international peace and security, especially as demonstrated by episodes such as sanctions adopted by the United States in 1980 against Iran on the occasion of the seizure of the American embassy in Tehran⁸⁷⁶ and the Soviet Union for its intervention in Afghanistan in 1979.⁸⁷⁷ Stronger reactions against the compatibility of countermeasures and the action

⁸⁷³ C Tomuschat, 'Article 2(3)' in B Simma and others (eds), *The Charter of the United Nations* (3rd edn, OUP 2012) 181, 196-197.

⁸⁷⁴ A member of the Commission suggested the inclusion of the Security Council among the mechanisms referred by the provision which originated Draft Article 50(2)(a), although the general opinion of the members of the Commission was that the organ might not be considered as such (1897th meeting (10 June 1985), ILC Yearbook 1985, Vol I, 133 (paras 47-48)). This conclusion is also supported by Article 52 (3)(b), which establishes that countermeasures may not be taken or may be suspended if 'the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties'. According to the Commission, the term 'court or tribunal' is intended to make reference to any third-party dispute settlement procedure, although 'it does not, however, refer to political organs such as the Security Council', excluding the organ from its field of application. (See also Zoller (n 723) 50; Crawford, *State Responsibility* (n 10) 694; Kamto, 'The Time Factor in the Application of Countermeasures' (n 737) 1173.

⁸⁷⁵ Article 2(3) of the UN Charter establishes the obligation to all Members to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered', but this does not mean that the parties are obliged to make recourse to the Organization in order to settle their disputes.

⁸⁷⁶ After the rejection of a draft resolution in the Security Council due to the veto from the Soviet Union, the United States adopted economic measures against Iran. In the Security Council, only the Soviet Union representative criticized the action of the United States, according to which there was 'an attempt to take the law into one's own hands' (2191st meeting (11 and 13 January 1980) S/PV.2191, 16 (para 168)). Some representatives observed that the situation in Tehran did not amount to a threat to international peace and argued that the adoption of coercive measures by the United Nations was not justified in the case, but did not reject the unilateral adoption of such measures (2191st meeting (11 and 13 January 1980) S/PV.2191, 5 (para 63) and 8 (para 79)).

⁸⁷⁷ Timid reactions were observed against the adoption of measures by the United States against the Soviet Union, which included civil aviation measures, an economic embargo upon sales of products to the Soviet Union and the reduction of fisheries privileges of the country in US waters (1979 *Digest of United States Practice in International Law* (1979) 1138; 1980 *Digest of United States Practice in International Law* (1980) 29-31 and 601-602). For a more detailed analysis of state practice, see De Guttry (n 868) 51-136; Focarelli, *Le contromisure nel diritto internazionale* (n 654) 293-299;

of the UN Security Council were observed concerning measures adopted by the United Kingdom and allies against Argentina during the Falkland Islands (Malvinas) War of 1982.⁸⁷⁸ In general, this episode seems to be isolated, as demonstrated by recent State practice regarding measures adopted against Iraq in 1990,⁸⁷⁹ the Nagorno-Karabakh conflict in 1992,⁸⁸⁰ the Eritrea-Ethiopia conflict of 1998 to 2000,⁸⁸¹ the Eritrea-Djibuti border conflict of 2008,⁸⁸² and the annexation of Crimea by Russia in 2014.⁸⁸³

⁸⁷⁸ The United Kingdom and allies adopted sanctions and diplomatic measures against Argentina the day after the invasion of the islands on 2 April 1982 and the starting of the discussions in the Security Council. There were strong reactions against the economic measures adopted against Argentina and several States classified them as acts of ‘economic aggression’ (see commentaries of Ecuador, Venezuela, Cuba, Bolivia, Poland, El Salvador, the Soviet Union and Nicaragua in the 2360th, 2362nd and 2363rd meetings of the Security Council (21, 22 and 23 May 1982, S/PV.2360; S/PV.2362; S/PV.2363)). Some States expressed that the measures were adopted in violation of the UN Charter or the collective security system (see manifestations of Panama, Venezuela, Poland and the Soviet Union in the 2362nd and 2363rd meetings of the Security Council (22 and 23 May 1982), S/PV.2362; S/PV.2363)). The Meeting of Consultation of Ministers of Foreign Affairs of the OAS declared that the ‘coercive measures of an economic and political nature’ adopted against Argentina ‘constituted a serious precedent’ since not covered by resolutions adopted by the Security Council, as well as the UN Charter, the OAS Charter and the GATT (OEA/Ser F/II.20 Doc 28/82 (28 April 1982) para 6).

⁸⁷⁹ Several countries, among which Canada, France, the United States, members of the EU, and even the Soviet Union adopted measures against Iraq for the invasion of Kuwait on 2 August 1990, including the freezing of Iraqi government property, the prohibition of economic transactions and an arms embargo (Executive Order 12723 55 FR 31805 (August 3, 1990); European Foreign Policy Bulletin Doc 90/297 (4 August 1990); 2933rd meeting (6 August 1990) S/PV.2933, 21 (France), 23 (Canada), 31 (Soviet Union)). All measures were adopted before the adoption of measures under Article 41 by the UNSC Res 661, therefore without legal basis in the UN Charter. The legality of the measures was not questioned in the Security Council, although their unilateral character was mentioned as a negative feature by some members of the Council (see manifestations of Malaysia, China and Cuba in the 2933rd meeting (6 August 1990) S/PV.2933).

⁸⁸⁰ In 1992 the Organisation for Security and Co-operation in Europe (OSCE) requested to its participant States an ‘immediate embargo on all deliveries of weapons and munitions to forces engaged in combat in the Nagorno-Karabakh area’, including Armenia and Azerbaijan (OSCE, Decisions based on the Interim Report on Nagorno-Karabakh (27-28 February 1992) para 4). The measures were voluntary and adopted by States such as France and the United Kingdom. In 1993 the Security Council requested from States by Res 853 (29 July 1993) ‘to refrain from the supply of any weapons and munitions which might lead to an intensification of the conflict or the continued occupation of territory’ (para 10). There were no statements in the discussions of the Security Council against the adoption of the embargo proposed by the OSCE, which is stricter than the one applied by the Council. On the contrary, the OSCE’s efforts to achieve the solution of the conflict were endorsed by the organ by Res 853 (29 July 1993, para 6) and Res 874 (14 October 1993, paras 3 and 8).

⁸⁸¹ In March 1999 the EU adopted an arms embargo on Eritrea and Ethiopia due to the conflict between both States (Common Position of 15 March 1999 concerning Ethiopia and Eritrea [1999] OJ L 072 18.13.1999, Article 1). The Security Council, through Res 1298 (17 May 2000), consider the situation a threat to regional peace and security and adopted a similar mandatory measure under Chapter VII of the UN Charter (para 6). The legality of the measures adopted by the European Union was only contested by Ethiopia, based on the claim that it was the victim of aggression by Eritrea and therefore should not suffer such a measure (S/1999/713).

⁸⁸² The EU adopted restrictive measures against Eritrean political and military leadership in 2010 in response to the support of the country to armed groups in the region and in order to prevent obstructions to the implementation of UNSC Res 1862 (14 January 2009), which established the obligation for Eritrea to withdraw its forces after the conflict with Djibouti in Ras Doumeira and Doumeira Island and to engage in diplomatic efforts to settle the dispute through peaceful means (para 5).

⁸⁸³ Measures were adopted by several countries and generally accepted by the Members of the UN Security Council. Criticism was focused on their effectiveness as a means of resolving the dispute rather than their legality (see the manifestation of the representative of China in the 7165th meeting of the Security Council (29 April 2014) S/PV.7165, 7). For the representative of Russia, the measures were ‘pointless and

From the analysis of State practice it is possible to confirm that there is no impairment of the faculty of States to adopt unilateral or collective countermeasures due to the action of the United Nations. Although countermeasures may represent a factor that can contribute to destabilization and even hinder conflict resolution, there is no general limitation for their utilization in such situations. Arguably, this risk is reduced by the existence of several limitations under general international law, including the prohibition of the use of armed countermeasures, the principles of necessity and proportionality, and the maintenance of dispute settlement mechanisms. It is also possible that the UN Security Council may request, in the exercise of its powers and prerogatives, the suspension of countermeasures considered harmful to a specific dispute. In this case, as seen above, the limitation would be derived from the powers of the Council and not a general limitation to the adoption of countermeasures.

5. Conclusion

International law allows for several possible reactions to the illicit use of force by States, stipulating special rules and mechanisms to regulate such reactions and ensure that certain objectives are fulfilled. This multiplicity of reactions is sometimes contradictory and is explained by the importance of the values protected by the prohibition of the use of force, which affects not only the subjective rights of the State that suffers an armed attack but also those of the international community, which is interested in the maintenance of international peace and security.

From the standpoint of the law of State responsibility, all reactions to international wrongdoings tend to be seen as ways of sanctioning wrongful behaviour. Thus, it is tempting to consider that all reactions to the illegal use of force represent a form of enforcement of the aggressor's responsibility. This may be observed concerning decentralized reactions to the wrongful use of force. The exercise of self-defence, for example, is alluringly understood as a means to enforce the rights of the victim State against the wrongdoer, although aiming to allow the State to repel the attack to protect its territorial integrity and sovereignty. Institutionalized reactions limiting the use of force by States are also understood in this way by the law of State responsibility since the collective security system established by the United Nations aims to react to the use of force by States outside the limits established by the UN Charter. Nevertheless, the Charter does not provide for a mechanism of implementation of State responsibility, even if providing for occasional reactions against serious violations of the prohibition of the use of force.

In sum, international law provides for different legal reactions to the same phenomenon that may be analysed differently regarding each specific framework. In this perspective, the apparent particularities of reactions to the prohibition of the use of force may not be seen as special rules of implementation of responsibility, insofar as they do not have the purpose of implementing the responsibility of the wrongdoer State.

counterproductive', not making any reference to its legality or conflict with the UN Charter (7165th meeting (29 April 2014) S/PV.7165, 13).

CONCLUSIONS

From the research developed in the preceding chapters, it is possible to formulate some conclusive remarks regarding the relationship between the use of force by States and the law of State responsibility. It was demonstrated that several of the contributions made by the regime of the use of force to the law of State responsibility are explained by the way in which international law regulates the use of force by States. One of the main contributions can be seen in the articulation of an aggravated regime of State responsibility, characterized by a bundle of legal consequences which include obligations and faculties for third States. Such a regime was inspired by reactions of the international community against serious uses of armed force by States, presumably with the aim to contain through collective mobilization the harmful effects of armed interventions and to preserve international peace.

Another contribution of the law of the use of force is the formulation of excuses and justifications for the violation of obligations, an aspect connected with its 'apologetic' character. It is a feature of this regime to deal with exceptional relationships between States, formerly as an antithesis of the 'law of the peace' and currently providing exceptions to the general prohibition of the use of force. The consideration of self-defence as a general excuse for the violation of international obligations and the role of the law of neutrality in justifying the effect of self-defence concerning third States are examples of such effect.

The contribution of the law of the use of force to the general regime of State responsibility is also manifest in the provision of examples for the conceptual analysis of an internationally wrongful act, as in the case of the rights and duties of States during armed conflicts. Despite the diminished relevance of the law of neutrality in contemporary international law, the duties of neutral States to adopt measures to prevent the occurrence of violations of their neutrality has a significant impact on doctrine as a model for determining the responsibility of States for similar breaches in other fields, including the characterization of its content and the element of fault, as observed in Chapter 1.

A further contribution may be observed regarding the rules of implementation of State responsibility, in particular by the (now outdated) consideration of the use of force as a legitimate means of enforcement of legal rights in international law and the limitations imposed by it by the law of the use of force. The current regime of countermeasures is directly connected with the general notion of self-help or self-preservation which was formerly admitted in international law and expressed by the regime of armed reprisals. The previous notion is reflected in the application of the principles of necessity and proportionality to the regime of countermeasures, the imposition of procedural aspects, and the notion of collective countermeasures.

The significant contribution of the law of the use of force to the law of State responsibility is also explained by the similarities between both regimes, despite the different nature and character of their rules. Historically, it may be argued that the law of State responsibility replaced part of the role exercised by the laws of war in regulating the settlement of international disputes. By substantiating legal disputes and establishing clear bases for the accountability of States, the law of State responsibility facilitated the

peaceful settlement of disputes.⁸⁸⁴ It is not a coincidence that the development of the law of State responsibility as a general and independent regime is contemporary to the process of restriction of the liberty of States to resort to war and the development of methods of peaceful settlement of disputes.⁸⁸⁵

By dealing with different interests and power dynamics, the law of State responsibility, as well as the law of the use of force, has a significant political aspect. This aspect is reflected in the efforts of codification of the rules of State responsibility, as the initial attempts to codify such rules epitomize a certain balance of power by addressing specific violations of concern of dominant States, such as injuries to sovereigns and ambassadors, violations of the right of commerce of neutrals in maritime warfare and injuries to foreign nationals.⁸⁸⁶ The change in the Commission's approach towards the codification of the general rules of State responsibility in 1963 was motivated *inter alia* by the interest in codifying consequences of breaches of international obligations related to the maintenance of international peace and security, an aspect also reflected in the concept of international crimes of States adopted by the Commission for three decades.⁸⁸⁷

Conversely, it was also analysed the possible derogation from the general rules of State responsibility by the law of the use of force. The research demonstrated that most of such 'special rules' are related to specific situations of use of force by States, particularly the use of force in the context of the fight against terrorism and extraterritorial use of force. State practice relating to terrorist attacks seem to uphold the attribution of the conduct of private entities to a State in circumstances going beyond the criteria admitted by the general rules of State responsibility, which could indicate a potential special rule on the matter. As observed in Chapter 1, in such cases the responsibility of the State is based not on the attribution of conduct of private entities but on the violation of the duties of protection and prevention. The misconception regarding the existence of special rules of attribution highlights the myriad of obligations affected by the use of armed force by States which must be taken into account in the analysis of State responsibility for the use of force. In this sense, an armed attack originating from the territory of a State may not be attributed to it, but the State may be nonetheless responsible for the violation of the principle of non-intervention and breaches of its duties of protection and prevention.

There is also a tendency to justify the violation of the prohibition of the use of force by the operation of circumstances precluding wrongfulness beyond the hypothesis of the exercise of self-defence. As has been explained in Chapter 2, the existence of special justifications outside those admitted by the law of the use of force is neither accepted by international law nor supported by State practice. The speculation regarding the existence of such special rules is partly explained by the fact that the law of State responsibility is frequently called to interpret patterns of change in State practice that cannot be explained or justified under the primary rules of the law of the use of force. The law of State responsibility is therefore used in an attempt to circumvent the rejection of new

⁸⁸⁴ H P Aust, 'The Normative Environment for Peace – On the Contribution of the ILC's Articles on State Responsibility' in G Nolte (ed), *Peace through International Law* (Springer 2009) 13-46, 27.

⁸⁸⁵ Kolb, *The International Law of State Responsibility* (n 17) 8-9.

⁸⁸⁶ Anzilotti, *Teoria generale della responsabilità dello Stato* (n 3) 6-7; G Abi-Saab, 'Cours général de droit international public' (1987) 207 *RCADI* 9, 431.

⁸⁸⁷ Spinedi (n 514) 14.

exceptions to the 'primary rule' prohibiting the use of force, sometimes taking advantage of a rigid conception of the division between primary and secondary rules.

Special secondary rules of State responsibility may also arise from international reactions to violations of the prohibition of the use of force. Some measures adopted by the international community after acts of aggression or armed conflicts may be considered in principle as special consequences of serious violations of the prohibition of the use of force. As analysed in Chapter 3, such measures generally are the regular operation of the rules of State responsibility in connection with rules of collective security aiming at preventing new conflicts.

The exercise of self-defence is also pointed out as a possible special rule of implementation of State responsibility for an armed attack and *a priori* may be seen as a means of enforcing the cessation of the violation of the prohibition of the use of force. In the same logic, the aim of the rules and mechanisms of collective security established by the UN Charter may be seen as means for the enforcement of the legal consequences resulting from the violation of the prohibition of the use of force, since they provide for collective reactions against threats to the peace, breaches of the peace, or acts of aggression. Even though such rules and mechanisms may integrate reactions to conducts that generally represent violations of the prohibition of the use of force, they cannot be analysed only through the lens of State responsibility. As observed in Chapter 4, such rules cannot be charged with the legal function of implementing State responsibility that they were never intended to have.

After a long journey one is confronted by a deceiving conclusion that the law of the use of force has virtually no rules derogating from the general rules of State responsibility. Such a conclusion can be regarded as consistent from the point of view of the law of State responsibility since it safeguards the coherence and unity of such a regime. Nevertheless, the research also demonstrated the insufficiency of the law of State responsibility as the sole parameter to cope with the legal consequences of the use of force. A comprehensive conclusion for the present research is to assert that the lack of derogation of the general rules of State responsibility by the law of the use of force is not explained by the inexistence of special secondary rules by the latter, but because it is not possible to speak of a proper derogation in this relationship.

The law of State responsibility determines its relationship with rules external to the regime either following the logic of the division between primary and secondary rules or by the application of the principle of *lex specialis*, which is based on a strong presumption against normative conflicts. As have been illustrated in the present work, the binary relations of primary vs secondary rules or general vs special rules cannot explain processes of interference, influence, cross-fertilization and complementarity observed between the law of State responsibility and the regulation of the use of force. An effort towards systemic interpretation, such as the one suggested in the present work regarding certain aspects of influence and deviation of each area of relationship, can provide a viable approach for dealing with the different questions arising from the intersection between the two regimes.

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