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Jonathan I. Charney
Vanderbilt University

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THIRD STATE REMEDIES IN INTERNATIONAL LAW

Jonathan I. Charney*

I. INTRODUCTION

Recent events have brought to the fore the role of third state remedies under international law. In its *Judgment on the Merits in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice ("ICJ") considered whether the United States had the unilateral right to use force in response to Nicaragua's actions against other Central American States.¹ The Court held that the United States had no such unilateral right.² The ICJ, however, allowed that third states may have the right to take countermeasures under some circumstances.³

In the Persian Gulf, the war between Iran and Iraq threatened the safety of neutral shipping. United Nations assistance was sought in response,⁴ and some neutral states deployed armed forces to protect their flag vessels from illegal attacks by the belligerents. Initially these forces were not authorized to protect other states' vessels. Nevertheless, the policy objectives of these neutral states included the protection of the freedoms of navigation for vessels of all flags.⁵ When the

* Professor of Law, Vanderbilt University. The research for this article was supported by a grant from the Vanderbilt University School of Law. Research assistance was provided by Ms. Theresa Doyle, J.D. Vanderbilt University 1987.

This article is dedicated to Professor William W. Bishop, Jr. As a leading international law scholar, Professor Bishop had a deep interest in the promotion of effective international law. His casebook on international law provided many law students, including this author, with their first full exposure to the international legal system. The book continues to serve as an accessible repository of important information on international law. As a professional colleague, I appreciated his interest in my work in the field.

1. *Military & Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, at 106-11, 119-21, 127 [hereinafter *Nicaragua Case, Merits*].

2. *Id.* at 146-49.

3. *Id.* at 127. See *id.*, Dissent of Judge Schwebel, at 361-62; see *infra* notes 88-94 and accompanying text.

4. S.C.O.R. Res. 598, 41 U.N. S.C.O.R. (2750th mtg, U.N. Doc S/INF/41 (1987)). For renewed efforts, see *U.N. Chief Making New Gulf Effort*, N.Y. Times, May 25, 1988 at A12, col. 6.

5. President Reagan stated the following at his news conference of October 22, 1987: "We're there to protect neutral-nation shipping in international waters that under international law are [sic] supposed to be open to all traffic." *Reagan's News Conference on Domestic and Foreign Matters*, N.Y. Times, Oct. 23, 1987 at A8, col. 1. See also, *British Shut Down Iran Arms Office*, N.Y. Times, Sept. 24, 1987, at A13, col. 1; *French Navy Helps a Foreign Tanker in Gulf*, N.Y. Times, Jan. 21, 1988, at A7, col. 1 (National Ed.); SENATE FOREIGN RELATIONS COMMITTEE, U.S. POLICY IN THE PERSIAN GULF AND KUWAITI REFLAGGING, reprinted in U.S. DEPT.

United Nations efforts produced no relief, the neutral states expanded their mission beyond the protection of flag vessels. Merchant vessels were encouraged to sail close to the naval vessels of other flags, which protected them from hostile actions. Furthermore, threats to flag vessels were construed broadly to permit challenges to vessels suspected of intending to damage flag vessels even by indirect means.

For example, an Iranian vessel found laying mines in the Gulf was ordered by a United States naval vessel to cease mining. When the Iranian vessel refused to do so, it was attacked, captured, and sunk.⁶ These actions took place although no United States vessel had been damaged by the mines laid by that vessel. Nor were United States vessels immediately at risk. Subsequently, a French naval vessel came to the aid of a Liberian tanker that was under attack by an Iranian vessel. Consistent with the French rules of engagement, the French vessel threatened to fire at the attackers if they failed to desist.⁷ As a result of these developments, the United States adopted new rules of engagement which authorized its naval vessels in the Gulf to defend neutral ships of any nation under attack by a Persian Gulf belligerent outside of declared war exclusion zones.⁸

The neutral nations that sent armed forces into the Gulf were reluctant to assume the role of international policemen enforcing international law against all violators. Nevertheless, they found that limitations on their roles were not viable. No objection was made by other non-belligerents to this broader role which may very well be consistent with contemporary international law.

Additionally, the international community is concerned with rules applicable to the world's common spaces. Current interest has focused upon the management of the Antarctic Continent. It is considered by many to be outside of the territory of any state. Customary and conventional law apply to activities in that area. They protect the Antarctic's fragile environment, maintain its demilitarized status, and facilitate the freedom of scientific research.⁹ It is not clear which states have standing to enforce these norms. Since violations may not

OF STATE, BUREAU OF PUBLIC AFFAIRS, CURRENT POLICY NO. 978 (1987)(Statement of Michael H. Armacost, Under Secretary for Political Affairs).

6. *U. S. Reports Firing on Iranian Vessel Seen Laying Mines*, N.Y. Times, Sept. 22, 1987, at A1, col. 6; *26 Iranian Seized Aboard Mine Ship; More U.S. Shooting*, N.Y. Times, Sept. 23, 1987, at A1, col. 6 (National Ed.); *United States Blows Up Captured Iranian Vessel*, N.Y. Times, Sept. 26, 1987, at A4, col. 1.

7. *French Navy Helps a Foreign Tanker in Gulf*, *supra* note 5.

8. *Reagan Orders Broader Protection of Commercial Shipping in Gulf*, N.Y. Times, April 30, 1988, at A6, cols. 1-4.

9. See Bilder, *The Present Legal and Political Situation in Antarctica*, in *THE NEW NATIONALISM AND THE USE OF COMMON SPACES* 167 (J. Charney ed. 1982); and Charney, *Future*

directly injure any particular state, enforcement might only be undertaken by non-injured states or special groups of states.¹⁰

Most assume that remedies under international law may be pursued by injured states only. It is far from clear, however, that this assumption is correct. There is a growing consensus that in some situations any state, regardless of whether or not it has been injured in fact by a state's illegal behavior, may have a right to seek remedies under international law. Third states also may have duties to cooperate with remedial actions taken by others.

This article explores issues arising from third state enforcement of international law. Support for third state remedies may be found in law, practice, and the literature. It is not, however, definitively established. Third state remedies may appear at first glance to serve only the desirable goal of promoting rules of international law, but they may also produce negative side effects. The challenge to the international community is to design an effective third state enforcement regime that minimizes undesirable side effects.

Before proceeding, it is important to make clear that this article takes a broad approach to the subject. A variety of remedies are available in response to a violation of international law. The remedies might be obligatory or discretionary. They include the following:

1. a right to take non-forceful defensive action to protect the state's self interest;
2. a right to issue communications calling attention to the illegal behavior (*droit de regard*);
3. a right to issue diplomatic protests;
4. a right to bring the matter to a third party for dispute settlement (*locus standi*) with the consent of the alleged violator;
5. a right to engage in non-neutral counter-measures alone or in cooperation with other states' enforcement actions;
6. a right to engage in retortion;
7. a right to reparations;
8. a right to engage in non-forceful reprisals; and
9. a right to engage in forceful reprisals and/or self-defense.

All of these actions must be considered to comprise the regime of remedies for violations of international law. While any examination of third state remedies ought to take account of the entire range of remedies that may be available to third states, primary focus here will be on the actions that clearly are governed by international law. Reprisals,

Strategies For an Antarctic Mineral Resource Regime — Can the Environment Be Protected?, in *id.* at 206.

10. See Charney, *The Antarctic System and Customary International Law*, in INTERNATIONAL LAW FOR ANTARCTICA 55 (F. Francioni and T. Scovazzi, eds. 1987) [hereinafter Charney, *The Antarctic System*].

self-defense, third party dispute settlement, counter-measures, and reparations are clearly governed by rules of international law. Diplomatic protests, retortion, non-neutral behavior, and *droit de regard* taken in response to violations of the law play a particularly important role in correcting violations of international law and promoting obedience to the law. While this latter group of actions may not be governed by international law in many respects, these actions are limited by rules of international law. Thus, rules govern the neutrality of states, states are prohibited from intervening in the domestic affairs of other states, and the law appears to place limits both on the purposes that may justify such actions and on their severity.¹¹ International law might prohibit the fourth through ninth actions in the absence of legal injury to the state taking such measures.

It is also true that particular rules govern each of the remedies identified above. Since the remedies are different, rules guiding their application must vary. On the other hand, they are all guided by general rules of international remedies. Viewed from the perspective of third state remedies and the general enforcement of international law, they are linked by law and policy. It is the purpose of this article to focus upon these linkages and to explore the regime of third state remedies as a whole, while taking necessary account of the differences inherent in the variety of actions that are available and the circumstances in which third state remedies may be found to be appropriate.

II. THE INTERNATIONAL LAW OF THIRD STATE REMEDIES

A. *Pre-World War II*

The traditional view is that remedies under public international law are bilateral and available only to states that have suffered an in-

11. While retortion is defined as an unfriendly, but lawful act, it may violate international law due to its improper objective or disproportionate application. The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A.Res. 2625, 25 U.N. G.A.O.R. Supp.(No.28) at 21, U.N. Doc. A/8028 (1970) states: "No State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind." See O. Schachter, *International Law in Theory and Practice*, 178 REC. DES COURS 175, 185-87 (V-1982). The theory of abuse of rights may be relevant in this regard. See L. OPPENHEIM, 1 INTERNATIONAL LAW 345 (H. Lauterpacht 8th ed.); E. ZOLLER, PEACETIME UNILATERAL REMEDIES 5, 13 (1984) [hereinafter E. ZOLLER, PEACETIME UNILATERAL REMEDIES]. Zoller considers retortion to be in the "grey zone" between law and non-law. *Id.* at 15. Meron argues that the right to censure by third states for violations of human rights norms is established under public international law. Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 11-13 (1986) [hereinafter Meron, *On a Hierarchy*]. See Riphagen, *Fifth Report on the Content, Forms and Degrees of International Responsibility* 2 Y.B. INT'L L. COMM'N 3, 13-14 (1983) U.N.Doc. A/CN.4/380 [and Corr. 1].

jury to their legal interests.¹² This view is not necessarily correct, nor may it preclude all third state remedies. One can go back to Hugo Grotius to find support for the proposition that certain rules of law are or ought to be enforceable by any state, even in the absence of direct injuries.¹³ Early in this century Elihu Root argued that states engaging in the illegal use of force or taking other actions which constitute threats to law and order in the international community should be subject to unilateral remedies by third states.¹⁴ Throughout the history of international law, a role for third states in the enforcement of certain rules of international law has been advocated.¹⁵ Prior to World War II, some limited state practice in support of third state rights and duties may also be found.¹⁶ Situations of third state remedies have, however, been the exception to the general behavior of states, which limited the enforcement of international law by traditional means to states whose legal rights had been damaged directly by other states.¹⁷

12. South West Africa Cases, (Ethiopia v. South Africa; Liberia v. South Africa) Second Phase, 1966 I.C.J. 6, at 32-35 [hereinafter South West Africa Cases, Second Phase]; I. BROWN-LIE, *PRINCIPLES OF INTERNATIONAL LAW* 469-72 (1979). Damage does not necessarily give rise to a violation of legal interests. Barcelona Traction, Light and Power Company, Ltd. (New Application: 1962) (Belgium v. Spain) Second Phase, 1970 I.C.J. 4, at 32, 36 [hereinafter Barcelona Case]. Nor is an interest sufficient. South West Africa Cases, 1966 I.C.J., at 34.

13. H. GROTIUS, *2 DE JURE BELLI AC PACIS*, 504-06 (F. Kelsey Trans. 1925).

14. Root, *The Outlook For International Law*, 9 *PROC. AM. SOC. INT'L L.* 2, 5-10 (Dec. 28-30, 1915).

15. For a review of this history, see Report of the International Law Commission on the work of its Twenty-Eighth Session 3 May-23 July 1976, U.N. Doc. A/31/10, *reprinted in* 2 *Y.B. INT'L L. COMM'N*, pt. 2, at 111-15 (1976) [hereinafter 1976 ILC Report]; Akehurst, *Reprisals by Third States*, 44 *BRIT. Y.B. INT'L L.* 1, 2 (1970). These histories refer to writings by Vattel, Fauchille, Oppenheim, Stowell, Westlake, and others.

16. Article 114 of the Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War declared a violation of neutrality rights of one neutral State to be a violation of the neutral rights of all neutral States. The Commentary supporting this article relied upon the protests by France, Prussia, Austria, and Italy of the United States 1861 seizure of Confederate agents found on a British vessel located on the high seas. 33 *AM. J. INT'L L.* 175, 788-93 (Supp. 1939) [hereinafter Naval and Aerial War]. Third States intervened in 1900 to crush the Boxer Rebellion, but their disinterested status is not clear. See Akehurst, *supra* note 15, at 3. Pacific Blockades in the 1800s by Zanzibar, Greece, Netherlands, and Crete to enforce international law and promote humanitarian goals have also been relied upon. PAO JIN HO, *PACIFIC BLOCKADE WITH SPECIAL REFERENCE TO ITS USES AS A MEASURE OF REPRISAL* (1925).

In the aftermath of World War I, the League of Nations was designed to eliminate the use of force in international relations. Articles 11 and 16 of the Covenant of the League of Nations authorized third states unilaterally to take reprisals against states engaged in the illegal use of force. Covenant of the League of Nations, June 28, 1919, arts. 11 and 16, 1 *HUDSON INT'L LEG.* 1, 7, 11 (1931). Since the effort has been considered to have been a failure, its precedential value is questionable. See D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 17 (1982); M. DOXEY, *INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE* 24-31 (1987) [hereinafter M. DOXEY, *INTERNATIONAL SANCTIONS*]; M. DOXEY, *ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT* 42-55 (1980) [hereinafter M. DOXEY, *ECONOMIC SANCTIONS*]; E. ZOLLER, *PEACETIME UNILATERAL REMEDIES*, *supra* note 11, at 38-39; and W. HOGAN, *INTERNATIONAL VIOLENCE AND THIRD STATES SINCE THE WORLD WAR* (1941).

17. *Accord*, Akehurst, *supra* note 15, at 3, 14-15; Root, *supra* note 14, at 7-10.

The Permanent Court of International Justice ("PCIJ") addressed the question once, but did not clarify the role of third states. Reliance is often placed upon the *Wimbledon* case, in which third party members of multilateral treaties were allowed to intervene.¹⁸ Germany had refused to permit navigation in the Kiel Canal by a British vessel under Charter to a French company. The Applicants, Great Britain, France, Italy, and Japan, brought suit against Germany on the basis of a compromissory clause contained in the Treaty of Versailles. The Applicants claimed the right of navigation was protected by the Treaty. The Court gave judgment in favor of the Applicants on this basis and awarded France reparations.¹⁹ Neither Italy nor Japan alleged a pecuniary interest in the suit. The Court sustained their participation in the suit based upon their status as parties to the Treaty and the facts that they possessed fleets and merchant vessels flying their flags.²⁰ Although Poland obtained intervention in accordance with the PCIJ Statute based upon its status as a party to the Treaty without having to establish an interest of a legal nature,²¹ the vessel was destined for a Polish naval base.²² The case thus provides some support for third state rights and duties. It was based upon the theory that legal rights inure to the benefit of all parties to multilateral treaties.

B. *Post-World War II*

As will be explained further below, one can find greater support for third state rights and duties in events subsequent to World War II. The United Nations Charter provides a role within the United Nations system for third states in the enforcement of international law. In addition, the Vienna Convention on the Law of Treaties contains a limited role for third states in the law of treaties.²³ The evolving international law of human rights has promoted third state remedies, and the ICJ has given some support to the theory. Writers and state practice, however, provide uncertain support.

18. The S.S. "Wimbledon," 1923 P.C.I.J. (Ser. A) No. 1.

19. *Id.* at 33. See South West Africa Cases, Second Phase, *supra* note 12, at 482, 502 (Mbanefo dissenting); BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra* note 12, at 468; P. VAN DIJK, JUDICIAL REVIEW OF GOVERNMENTAL ACTION AND THE REQUIREMENT OF AN INTEREST TO SUE 370 (1980).

20. The S.S. "Wimbledon," 1923 P.C.I.J. (Ser. A) No. 1, at 21.

21. *Id.* at 13. See C.W. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 524 (1964).

22. The S.S. "Wimbledon," 1923 P.C.I.J. (Ser. A) No. 1, at 19.

23. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N.T.S. Regis. No. 18,232, U.N. Doc. A/Conf. 39/27 (1969), *reprinted in* 63 AM. J. INT'L. L. 875 (1969) [hereinafter Vienna Convention].

1. *The United Nations System*

States may agree by treaty to permit third states to enforce rules of international law. This may be accomplished by states acting unilaterally, or by actions taken pursuant to collective decisions. The United Nations Charter established a role for third states acting collectively with regard to certain violations of international law.²⁴ In some cases the members of the Security Council may become involved when they respond collectively to threats to the peace, breaches of the peace, or acts of aggression by states.²⁵ The Charter recognizes the right of states to respond to situations which may endanger the maintenance of international peace and security by bringing them to the attention of the Security Council.²⁶ The moving state need not be a state with a direct interest in the affair.²⁷ The Charter also authorizes the Security Council to take enforcement actions when a state fails to perform its obligations arising under a Judgment of the ICJ if enforcement is requested by the prevailing state.²⁸ The measures decided upon by the Security Council may impose obligations on other states party to the Charter.²⁹

Similarly, the members of the General Assembly ("UNGA") acting collectively by resolution may make recommendations on a variety of subjects.³⁰ The UNGA has made some use of the Uniting for Peace Resolution³¹ in specific disputes. Its actions with regard to the Middle East, South Africa, Southern Rhodesia, Korea, Afghanistan, and the Congo stand as further examples of third party efforts to enforce international law.³² Such collective decisions directed towards enforcing and promoting international law are supported by the international community. Unfortunately, their record of success is qualified, at best.³³ Regional organizations may play similar roles, but neither is

24. Charter of the United Nations, June 26, 1945, 59 U.S. Stat. 1031 (1945), T.S. No. 993 [hereinafter U.N. Charter].

25. U.N. Charter, arts. 39-50.

26. U.N. Charter, art. 35, para. 1.

27. *Id.*

28. U.N. Charter, art. 94, para. 2.

29. U.N. Charter, art. 25. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 at 52-55 [hereinafter Namibia Advisory Opinion].

30. U.N. Charter, arts. 10, 11, 13, 14.

31. G.A. Res. 377A, U.N. GAOR Supp. (No. 20) at 10, U.N. DOC. A/1775 (1950).

32. These efforts are summarized in L. HENKIN, R. PUGH, O. SCHACHTER, AND H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* (2d ed. 1987), at 776-82 (1987).

33. M. DOXEY, *INTERNATIONAL SANCTIONS*, *supra* note 16, at 32-52. The most success has been in the context of opposition to apartheid and colonialism for which there is a strong international consensus. See *id.* at 142.

their efficacy well established.³⁴

2. *The Vienna Convention on the Law of Treaties*

The International Law Commission ("ILC") addressed the rights of third states to remedy law violations in the context of its work on the law of treaties.³⁵ Would a party's breach of a multilateral treaty constitute a legal injury to every other party? Could any party unilaterally invoke remedies in response to the breach? Some violations might not tangibly injure all the parties, nor would they necessarily infringe upon the full enjoyment of the treaty by every party. The ILC treated the matter specifically and its approach was incorporated into the Vienna Convention on the Law of Treaties.³⁶ States that are directly injured in fact by the violation have certain unilateral rights.³⁷ When the enjoyment of a multilateral treaty by all states parties would be prejudiced by any party's breach, every party is injured and has the right to take certain unilateral remedies.³⁸ In the case of treaties concerning interests and rights that are less interdependent, those states that are not specially affected may take remedial actions through collective decisions by the non-breaching states parties.³⁹

The Vienna Convention took a conservative approach to the role of third states in response to treaty violations. Some writers have suggested that there remains an independent right under customary international law which permits unilateral reprisals by states party to a multilateral treaty in response to a violation by another party.⁴⁰ It is also maintained that under customary law a breach by any state party to an international agreement constitutes an injury to the legal rights of all parties regardless of whether they have suffered direct tangible

34. *Id.* at 53-87, 143-44.

35. See *Report of the International Law Commission on the Work of its Eighteenth Session*, (1966) 2 Y.B. INT'L L. COMM'N 172, 226-30; *Sixth Report on the Law of Treaties*, (Sir H. Waldock, Special Rapporteur) (1966) 2 Y.B. INT'L L. COMM'N 51, 69-73.

36. Vienna Convention, *supra* note 23, art. 60.2.

37. *Id.*

38. *Id.*

39. See *Id.*

40. Schachter, *supra* note 11, at 175-79; E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 92-93; Tanzi, *Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 1, 30 (M. Spinedi & B. Simma eds. 1987)[hereinafter Spinedi & Simma]; Mazzeschi, *Termination and Suspension of Treaties for Breach in the ILC Works on State Responsibility*, in Spinedi & Simma, *supra*, at 57, 81-83; and Case Concerning the Air Services Agreement of 27 March 1946 between the United States and France, Award of December 9, 1978, 18 RPTS. INT'L ARB AWARDS 417, 443-46 [hereinafter Air Services Award]. The Preamble to the Vienna Convention, *supra* note 23, at 875, preserves applicable customary law not inconsistent with the Convention. See also Report of the International Law Commission on the Work of its Eighteenth Session, *supra* note 35, at 254-55.

injuries.⁴¹ Consequently, every state party to a multilateral agreement may have the right to take reprisals for a breach by any other party. A right to take such actions under customary law does not appear to have been precluded by the Vienna Convention.

The Vienna Convention promoted another development in the law of third state remedies. The ILC made a considerable contribution to the view that there are peremptory norms of international law (*jus cogens*).⁴² Since these norms concern particularly important interests of the international community, some maintain that bilateral remedies for violations of such norms would not be sufficient. The duties to abide by *jus cogens* norms may be owed to the entire international community, *erga omnes*. As such, violations of some or all *jus cogens* norms may be enforceable by states individually or collectively even in the absence of a direct injury other than the fact that the norm has been violated.⁴³

3. Human Rights

Perhaps the principal substantive area of *jus cogens* law is the international law of human rights, which has evolved substantially since World War II. Not all human rights law is necessarily *jus cogens*, nor is that law necessarily *erga omnes*.⁴⁴ It is clear, however, that much of the international law of human rights would not be enforceable in the absence of third state remedies.⁴⁵ The traditional international law of state responsibility addresses the mistreatment of the nationals of one state by another state. Human rights law has evolved to address the mistreatment by a state of its own nationals. If third states have no remedies for such violations, no enforcement would be possible by state actors. Absent a remedy, such law may be a nullity. Fortunately, it is clear that third states do have certain rights to respond to violations of the international law of human rights. The extent of those remedies, however, is not settled. Certainly, third states do not

41. See text accompanying notes 96-110; and S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 518-20 (1985).

42. Vienna Convention, *supra* note 23, arts. 53 and 64. Peremptory norms (*jus cogens*) are fundamental legal obligations which, unlike other norms, may not be set aside by treaty. Such norms include prohibitions on genocide, slavery, and piracy. See generally Gaja, *Jus Cogens beyond the Vienna Convention*, 172 REC. DES COURS 271 (1981-III); C. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* (1976); J. SZTUKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES*, (1974).

43. The International Law Commission recognizes that there is a linkage between *jus cogens* and *erga omnes*, but that they are not necessarily tied. Not all *jus cogens* rules are *erga omnes*, nor are all *erga omnes* rules *jus cogens*. 1976 ILC Report, *supra* note 15, at 102; and Meron, *On a Hierarchy*, *supra* note 11, at 11.

44. Meron, *On a Hierarchy*, *supra* note 11, at 11-12.

45. See 1976 ILC Report, *supra* note 15, at 101-02.

violate prohibitions on the intervention in the domestic jurisdiction of states when they put pressure on alleged violators. Retortion may be taken, and in some cases limited non-forceful reprisals and humanitarian intervention.⁴⁶

This enforcement may be predicated, however, upon the multilateral treaty rule that all states have a legal interest in case of a breach since virtually all international law of human rights is found in multilateral agreements. Furthermore, there is a plethora of specialized vehicles for collective decisions to enforce human rights norms.⁴⁷ Accordingly, third state remedies in cases of violations of human rights law may not reflect the general application of third state remedies under customary law.⁴⁸

4. *The International Court of Justice*

The ICJ has not settled the question of third state remedies. In the abstract, the Court has proclaimed the existence of rules of international law owed *erga omnes*. But it has construed rather narrowly the standing and other rights of third states whenever those rights have been brought concretely to the Court.

a. *Monetary Gold Case*

The third state rights issue that arose in the Monetary Gold case was not the subject of a judgment.⁴⁹ The case does, however, provide a basis for arguments in favor of third state enforcement of international court judgments. As a result of the Corfu Channel case, the Court determined that Albania had a duty to compensate the United Kingdom for damages caused by exploding mines in the Corfu Channel.⁵⁰ Albania did not comply with the judgment. Subsequently, gold

46. See Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 332-38, 344-51 (1967); Barcelona Traction Case (Belgium v. Spain), 1970 I.C.J. 4 at 32, 47; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 703(2), and reporter's notes 3, 4, 8, 9, & 10 [hereinafter RESTATEMENT]. The case for humanitarian intervention by third states is argued strongly in Bazzyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547 (1987).

47. See T. MERON, *HUMAN RIGHTS LAW MAKING IN THE UNITED NATIONS* (1986); Weston, Lukes, and Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987).

48. Schachter, *supra* note 11, at 198. Treaties may give rise to customary international law independent of the originating treaties. See Charney, *International Agreements and the Development of International Law*, 61 WASH. L. REV. 971 (1986).

49. The Court found that it had no jurisdiction in the absence of Albania. Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Questions)(Italy v. Fr., U.K. v. Ir., U.S.), 1954 I.C.J. 19 (June 15, 1954) [hereinafter Monetary Gold Case].

50. Corfu Channel (Merits)(U.K. v. Alb.), 1949 I.C.J. 4.

apparently owned by Albania came into the possession of a post-World War II Tripartite Commission composed of France, the United Kingdom, and the United States. The Commission decided that the gold should be given to the United Kingdom as a portion of the damages owed to it by Albania. This decision would be executed unless Italy established that it had better title to the gold than Albania.

Certainly, if the gold were Albanian, the members of the Commission had a legal duty to deliver it to Albania. An exception to that duty seems to have been justified as a reprisal for the Albanian violation of its own duty established by the earlier Judgment to compensate the United Kingdom. The reprisal by the United States and France, as third states, appears to have been based upon a claimed universal right of all states to assist in the enforcement of judgments of the ICJ.⁵¹ It represents state practice in support of the right of third states to enforce ICJ judgments.⁵² This right would appear to arise if a state were to fail to abide by a judgment of an international court awarding reparations in monetary form. Third states in possession of assets of the recalcitrant state could tender those assets to the prevailing party, or tender them to the Court for its disposition.⁵³

Unfortunately, in the instant case the Court refused to find jurisdiction in the absence of Albania since it was a directly interested state. That determination stands as a serious obstacle to third state enforcement through litigation in the ICJ. This obstacle certainly exists when, as here, the absent state's rights are the very subject matter of the dispute and that state has chosen voluntarily not to join in the action.⁵⁴

b. *South West Africa Cases and Namibia Advisory Opinion*

Considerable activity was spawned by the dispute over South Africa's performance of its obligations required by the Mandate into which it and the League of Nations entered concerning the management of South West Africa (Namibia). The ICJ's involvement in the matter has added to the literature on third state enforcement. Unfor-

51. This theory appeared to underlie the argument that Sir Gerald Fitzmaurice made to the Court on behalf of the Commission. *Monetary Gold Case*, 1954 I.C.J. Pleadings, 125, at 131. See Akehurst, *supra* note 15, at 13-14.

52. Akehurst, *supra* note 15, at 13-14; Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. JOUR. INT'L L. 1 (1960). A detailed review of this matter is found at S. ROSENNE, *supra* note 41, at 142-48.

53. Schachter has argued that the case supports this theory. Schachter, *supra* note 52, at 8-12. See C.W. JENKS, *supra* note 21, at 703-06. *Accord*, "SOCOBEL" v. Greek State, 18 I.L.R. 3, 5-9 (Trib. Civ. de Bruxelles 1951).

54. S. ROSENNE, *supra* note 41, at 431; Chinkin, *Third Party Intervention Before the International Court of Justice*, 80 AM. J. INT'L L. 495, 517 (1986).

tunately, the ICJ has done little to clarify the situation. Three actions by the Court bear on the subject: the 1962 Judgment on the Preliminary Objections in the South West Africa cases;⁵⁵ the 1966 Judgment in the Second Phase in the same cases;⁵⁶ and the 1971 Advisory Opinion the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970).⁵⁷

In its 1962 Judgment, the Court found that two former members of the League, Ethiopia and Liberia, had jurisdiction to bring suit against South Africa with respect to South Africa's failure to carry out its obligations under the Mandate.⁵⁸ Neither Applicant State alleged that it had suffered a direct injury. Rather, the Applicants successfully alleged that, as former members of the League of Nations, they had rights under the Mandate to sue for performance.⁵⁹ The Court emphasized that a sacred trust was held by the Mandatory, and that the duties of the Mandatory had to be assured through judicial protection. The compromissory clause of the Mandate permitted any state that had been a member of the League to bring suit against the Mandatory to enforce the obligations of the Mandate. The Court found that the scheme of the Mandate required this conclusion since the League of Nations could not bring an action.⁶⁰

By 1966 the composition of the Court had changed and a bare majority of the Court appeared to back away from the broad recognition of the Applicant States' standing. While it did not expressly overrule the previous judgment, it held at the Merits Phase that the Applicants had no legal rights for which they had the necessary standing to obtain a judgment against South Africa. While jurisdiction existed, standing was absent for the specific cause of action put forward. In order to succeed on the merits before the ICJ, the Applicant States were required to allege that their legal rights or interests had been infringed.⁶¹ It was argued to no avail that a contrary result was required by the interest of all states in the sacred trust that the Mandatory held, and by the membership of the Applicant States in the League of Nations under which the Mandate was established. Other

55. South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, 1962 I.C.J. 319 [hereinafter South West Africa Cases, Preliminary Objections].

56. South West Africa Cases, Second Phase, *supra* note 12, at 6.

57. Namibia Advisory Opinion, *supra* note 29.

58. South West Africa Cases, Preliminary Objections, *supra* note 55.

59. *Id.* at 337-38, 347.

60. *Id.* at 336-38. See P. VAN DIJK, *supra* note 19, at 428-30.

61. South West Africa Cases, Second Phase, *supra* note 12, at 18-26. See I. BROWNLIE, *supra* note 12, at 469.

arguments based upon necessity, since no other states would have greater interests or stronger arguments for standing before the Court, and upon the need to protect the human rights of the inhabitants of South West Africa, also failed to sway the Court.⁶² This judgment appeared to mark a reaffirmation of the strict bilateral remedy rule of international law.

Nothing in the Judgment, however, precludes states from entering into international agreements that define legal rights broadly in order to give states substantive standing, even in the absence of an actual direct tangible injury.⁶³ In fact, the Court made clear that legal rights for these purposes are a function of the applicable international law. Thus, it is conceivable that injury to the legal rights of otherwise disinterested third states could be found under specific rules of customary international law.⁶⁴ To this extent, the Judgment is limited, yet it permits the further evolution of the rule of third state remedies.

International reaction to the substance of the 1966 Judgment was swift and clear in condemnation of the Court's action. Within four months the United Nations General Assembly resolved to terminate the Mandate.⁶⁵ In 1969 and 1970 the Security Council adopted resolutions recognizing the termination of the Mandate and imposing sanctions on South Africa.⁶⁶ The request for the 1971 Advisory Opinion sought ICJ advice on the binding legal effect of these United Nations actions.⁶⁷

This time the Court provided support for third state remedies in international law, at least in the context of a collective decision by the concerned community of states. The Court found that the sanctions adopted by the Security Council were binding on all members of the United Nations. Members of the United Nations were affirmatively obligated to carry out the sanctions as established by the Security Council and to avoid any action that would undermine their effective-

62. South West Africa Cases, Second Phase, *supra* note 12, at 34-35, 47. Strong dissenting opinions were filed by a number of judges. See, e.g. South West Africa Cases, Second Phase, *supra* note 12, at 323 (Jessup, dissent). See P. VAN DIJK, *supra* note 19, at 430-37.

63. "[A] legal right or interest need not necessarily relate to anything material or 'tangible,' and can be infringed even though no prejudice of a material kind has been suffered." South West Africa Cases, Second Phase, *supra* note 12, at 32.

64. See *id.*, at 32-34. See also I. BROWNLIE, *supra* note 12, at 469-70. In the Nuclear Tests Cases the Court found that the French declaration created a duty to each state severally, Nuclear Tests Case, (Australia v. France), 1974 I.C.J. 253, 269-70; Nuclear Tests Case, (New Zealand v. France), 1974 I.C.J. 457, 474-75.

65. G.A. Res. 2145 (XXI), 21 U.N. GAOR Supp. (No. 16) at 2-3, U.N. Doc. A/6316 (1966).

66. S.C. Res. 264, 24 U.N. SCOR at 1-2, U.N. Doc. S/INF/24/Rev. 1 (1969); S.C. Res. 276, 25 U.N. SCOR at 1-2, U.N. Doc. S/INF/25 (1970).

67. Namibia Advisory Opinion, *supra* note 29.

ness.⁶⁸ The Court declared, in addition, that the obligations existed for states not members of the United Nations: it was incumbent upon non-members that they support these United Nations resolutions. If they took actions incompatible with the resolutions, they would be subject to counter-measures by the United Nations and its members.⁶⁹

While duties of the member states may have been derived from the Charter, those of non-member states may be derived only from customary international law. There was no suggestion that these remedial actions could be undertaken only by states that were actually injured by the illegal behavior of South Africa.⁷⁰ It appears that the collective decisions by the United Nations added legitimacy to the measures, notwithstanding the fact that the United Nations lacks the legal authority to directly impose legal obligations on non-member states. Furthermore, the Court acknowledged that necessity to provide a remedy for violations of international legal obligations affects the availability of remedies under international law.⁷¹ This advisory opinion has been well received by the international community.

c. *Barcelona Traction Case*

Subsequent to the 1966 South West Africa Judgment but before the 1970 Advisory Opinion, the Court addressed third state remedies directly. In the *Barcelona Traction* case, the Court held that the Applicant State had no standing to bring suit in a dispute where it espoused the interests of nationals who were shareholders of a foreign corporation.⁷² The case provided the Court with another vehicle to explore third state remedies, and it took the opportunity, perhaps to limit the severity of its 1966 Judgment.

68. *Id.* at 55-56, 58. Schachter, *supra* note 11, at 184.

69. Namibia Advisory Opinion, *supra* note 29, at 56, 58.

70. One possible interpretation of the 1966 Judgment and the 1971 Namibia Advisory Opinion is that third states may not seek remedies unilaterally, but must do so through a collective decision of an international organization. E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 115-17. Zoller agrees that this series of decisions need not be read to prohibit or severely restrict third state remedies. *Id.*

71. The Court wrote: "As to the general consequences resulting from the illegal presence of South Africa in Namibia, all states should bear in mind that the injured entity is a people which must look to the international community for assistance. . . ." Namibia Advisory Opinion, *supra* note 29, at 56. A similar interest supported the Court's 1949 Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations. It found that the United Nations had the necessary legal personality to seek remedies for injuries to its agent. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 177-80. Of course, there would still remain the requirement in a judicial proceeding that the judgment could have a practical consequence. Case Concerning the Northern Cameroons, (Cameroon v. United Kingdom), Preliminary Objections, 1963 I.C.J. 15 at 33-34.

72. *Barcelona Case*, *supra* note 12, at 3.

In much-quoted dicta, the Court directly endorsed *erga omnes* obligations and third state remedies in certain situations:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

. . . Such obligations derive, for example, in contemporary international law, from 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. Some of the corresponding rights of protection have entered into the body of general international law . . . ; others are conferred by international instruments of a universal or quasi-universal character.⁷³

The Court's approach might appear to divide international law into two classes, one only enforceable bilaterally and another enforceable bilaterally and by third states. But this language was not meant to be definitive. Rather, it was generally descriptive of the division that the Court saw in international law.⁷⁴

Later in the Judgment the Court explored its conclusion that the Applicant State could not have standing. The discussion provides further insight into the considerations that led the Court to the view that in the instant case standing was limited and bilateral. This examination helps to define those rules that may be enforceable by all states. It was critical to the Court that the injured corporation was a national of a state which did exist and which was capable of seeking a remedy.⁷⁵ The language of the Court suggests that if there had been no such state, or if that state had been precluded from exercising its legal rights by forces beyond its control, the Applicant State might have succeeded in its efforts to gain standing.⁷⁶ Thus, necessity was an important con-

73. *Id.* at 33.

74. In his separate opinion, Judge Riphagen was critical of this *a priori* division. *Id.* at 340. It appears to have broken down in the human rights area. T. MERON, *supra* note 47, at 188-89. See generally, P. VAN DIJK, *supra* note 19, at 412-16.

75. Barcelona Case, *supra* note 12, at 44-45.

76. The Court wrote:

The Canadian Government has, nonetheless, retained its capacity to exercise diplomatic protection; no legal impediment has prevented it from doing so: no fact has arisen to render this protection impossible. It discontinued its action of its own free will. . . . This cannot be regarded as amounting to a situation where a violation of law remains without remedy: in short, a legal vacuum. There is no obligation upon the possessors of rights to exercise them. Sometimes no remedy is sought, though rights are infringed. To equate this with the creation of a vacuum would be to equate a right with an obligation.

Id. See also *id.* at 48; Separate Opinion of Judge Jessup, *id.* at 171-82; Separate Opinion of Judge Ammoun, *id.* at 319-20.

The necessity of a viable remedy played a more central role in the Reparations Advisory Opinion where that element provided the foundation for the Court's determinations that the

sideration in the Court's determination that the Applicant State had no standing. Absent necessity, the Court was reluctant to endorse a situation that would permit "competing diplomatic claims [which] could create an atmosphere of confusion and insecurity."⁷⁷

d. *Intervention Cases*

The intervention cases before the Court have presented other situations in which third state remedies have been implicated. The Statute of the ICJ, like that of the PCIJ, provides for two categories of intervention. One is available when "the construction of a convention [to which the intervening state is a party] is in question."⁷⁸ The other is available when a nontreaty state "has an interest of a legal nature which may be affected by the decision in the case."⁷⁹ The Court has construed both provisions rather narrowly.⁸⁰ This suggests that the Court is reluctant to expand the ability of states to involve themselves in the disputes of others.

The recent failed attempt of Malta to intervene in the Tunisia/Libya Continental Shelf Boundary case⁸¹ and a similar failure of Italy to intervene in the Malta/Libya Continental Shelf Boundary case⁸² illustrate the point. In both cases intervention was sought on the ground that areas that appeared to be subject to boundary adjudication also had been claimed by the states seeking intervention. The petitioners alleged that the adjudications might prejudice their continental shelf interests and might present obstacles to the resolution of disputes they had with the litigating states. The Court defined narrowly the subjects of the cases limiting them to the disputes between the states parties.⁸³ In its judgments the Court did, however,

United Nations had both the capacity to make the international claim and the right to bring the specific claim. 1949 I.C.J. 177-80.

77. Barcelona Case, *supra* note 12, at 49. It distinguished the multiple claimants situation from the case presented when an agent of an international organization is injured on the ground that in the latter case the number of claimants would necessarily be small and their identity would be easily determined.

78. I.C.J. Statute, art. 63.

79. I.C.J. Statute, art. 62.

80. Chinkin, *supra* note 54, at 511-12, 531. See also, Damrosch, *Multilateral Disputes*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 376 (L. Damrosch ed. 1987); Fitzmaurice, *The Law and Practice of the International Court of Justice 1951-4: Questions of Jurisdiction, Competence, and Procedure*, 34 BRIT. Y.B. INT'L L. 1, 124-26 (1958).

81. Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1981 I.C.J. 3 (Application by Malta for Permission to Intervene) [hereinafter Application by Malta].

82. Continental Shelf (Libyan Arab Jamahiriya v. Malta) 1984 I.C.J. 3 (Application by Italy for Permission to Intervene) [hereinafter Application by Italy].

83. Application by Malta, *supra* note 81, at 12-13, 16-20; Application by Italy, *supra* note 82, at 24-27.

seek to avoid pronouncing on the boundaries in areas known to be claimed by the states denied intervention. It also acknowledged the sensitivity of the third state question by referring expressly to the intervention decisions.⁸⁴

As mentioned above, the recent Nicaragua case concerned third state remedies under international law.⁸⁵ The matter arose with regard to El Salvador's attempt to intervene in the litigation. That effort at the Jurisdiction Phase was summarily denied.⁸⁶ The issues arising in the litigation concerned the performance of a variety of multilateral treaties to which the United States, Nicaragua, and El Salvador were parties. Many of the alleged illegal uses of force by Nicaragua took place within the territory of El Salvador, or constituted threats to its territorial integrity and political independence. As in the maritime boundary cases, the Court narrowly construed the scope of intervention under the ICJ Statute and summarily dismissed the request. The Court implicitly took a narrow view of third state remedies, at least with regard to questions of jurisdiction.⁸⁷ The Court left open the question whether at the Merits Phase intervention would be permitted. Arguably, third state interests relate to the substantive issues and not to those of the Court's jurisdiction. Discouraged by the peremptory disposition of its request, however, El Salvador did not press the matter at the Merits Phase.

e. *Nicaragua Case, Merits*

At the Merits Phase of the Nicaragua case, the Court refused to uphold the legality of the United States' unilateral use of force in response to Nicaragua's alleged attacks on other Central American States. Although the Court recognized the existence of the right of "collective self-defense against an armed attack,"⁸⁸ it held that the

84. *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 91, 94; *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1985 I.C.J. 13, 26. Similar results were found in previous cases. In *Haya de La Torre (Columbia v. Peru)*, 1951 I.C.J. 71, the Court did permit intervention, but subject to significant limitations on the subjects that the intervening state could address. *Id.* at 77. Fiji's requests to intervene in the Nuclear Tests cases were deferred until the Court ruled upon jurisdiction. *Nuclear Tests (Australia v. France)*, 1973 I.C.J. 320 (Application by Fiji for Permission to Intervene); *Nuclear Tests (New Zealand v. France)*, 1973 I.C.J. 324 (Application by Fiji for Permission to Intervene). Ultimately, the cases were dismissed as moot and the applications to intervene were dismissed. *Nuclear Tests (Australia v. France)*, 1974 I.C.J. 530 (Application by Fiji for Permission to Intervene); *Nuclear Tests (New Zealand v. France)*, 1974 I.C.J. 535 (Application by Fiji for Permission to Intervene).

85. See *supra* notes 1-3 and accompanying text.

86. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1984 I.C.J. 215 (Declaration of Intervention of the Republic of El Salvador) [hereinafter *Declaration of El Salvador*]; Chinkin, *supra* note 54, at 509-14, 531.

87. Chinkin, *supra* note 54, at 511-13, 531.

88. *Nicaragua Case, Merits*, *supra* note 1, at 109-110. Article 51 of the U.N. Charter, *supra*

United States actions were illegal because it found that Nicaragua had not committed an armed attack against other Central American States. This finding was based upon an analysis of the only available evidence of Nicaragua's behavior.⁸⁹ The conclusion was supported by the observation that prior to the United States' intervention, the targets of the alleged Nicaraguan attacks failed to assert that an armed attack had occurred, nor had they requested United States assistance to repel the Nicaraguans.⁹⁰ By this analysis, the Court found that a request by the state target of the armed attack to the third state is a prerequisite to third state intervention by collective self-defense.⁹¹

While the Court did provide support for third states actions in the face of an armed attack, it suggested that third states may not have the independent right to collective counter-measures involving the use of force.⁹² It concluded the discussion of this matter with dicta that also

note 24, preserves the right of collective self-defense. This customary law right permits third states to take action in response to an armed attack on another state. Akehurst, *supra* note 15, at 4; J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 245 (1954).

89. Nicaragua Case, Merits, *supra* note 1, at 119-21. The United States refused to participate at the Merits Phase. This may have contributed to the failure of the evidence in this regard. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116 (1987); Hight, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1, 30-42, 49-51 (1987); Charney, *Disputes Implicating the Institutional Credibility of the Court*, in *THE ICJ AT A CROSSROADS* 288, 291 (L. Damrosch ed., 1987).

90. Nicaragua Case, Merits, *supra* note 1, at 119-21.

91. *Id.* at 103-05, 119-21, 127. In the past, third states have obtained such invitations in order to provide a legal basis for the intervention. For example, requests were made, albeit not in the absence of pressure from the requested states, in the recent interventions in Afghanistan, and Grenada. See generally L. HENKIN, *HOW NATIONS BEHAVE* 155-57 (1979); Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1644-45 (1984); Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145 (1984). The Governor-General's request to the United States in the Grenada intervention has been debated. ECONOMIST, March 10-16, 1984, at 34. Similar questions have arisen in the case of the Afghani invitation to the Soviet Union. A. ARNOLD, *AFGANISTAN: THE SOVIET INVASION IN PERSPECTIVE* (rev. ed. 1985); *Brezhnev's Report To Congress - I*, Pravda, Feb. 23, 1981, at 2, translated in 33 CDSP, No. 8, at 3, 7. Bishop supported the view that the lawful and established government could invite a third state to help put down disorders and rebellions. He recognized, however, the difficulties of this view. Bishop, *General Course of Public International Law*, 1965, 115 REC. DES COURS 147, 440 (1965-II).

It is not unusual to find third state assistance of states claiming the right of self defense. In the Falkland/Malvinas Islands conflict between Argentina and the United Kingdom, the United Kingdom received support from the United States and the European Community. See Doxey, *INTERNATIONAL SANCTIONS IN THEORY AND PRACTICE*, 15 CASE W. RES. J. INT'L L. 273, 283-85. In the Iranian hostages dispute the United States obtained the assistance of segments of the international community in support of its claims that the Iranian actions violated international law. See *id.* at 279-80. Doxey does argue that third state actions and those of the U.N. have not been terribly effective. *Id.* at 278, 286-87; and M. DOXEY, *INTERNATIONAL SANCTIONS*, *supra* note 16, at 142-48 (1987). See also, G. HUFHAVER & J. SCOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 79-92 (1985). Lauterpacht wrote that collective "self defense is a proper expression of the ultimate identity of interest of the international community in the preservation of peace." L. OPPENHEIM, *INTERNATIONAL LAW* 155-56 (H. Lauterpacht, 7th ed. 1952).

92. Nicaragua Case, Merits, *supra* note 1, at 127.

forbid third state counter-measures in the absence of a request from the victim state when another state provides support short of armed force for revolutionary groups operating in the victim state.⁹³ It did not foreclose third state counter-measures in other situations not involving the use of force.⁹⁴ The Judgment, however, is highly controversial.

The Court supported its conclusion that the United States actions violated international law upon the finding that the alleged exercise of self-defense was not accompanied by notification to the United Nations Security Council.⁹⁵ Since the United States multilateral treaty reservation precluded application of Charter obligations, the Court based this consideration on customary law. Failure to resort to available mechanisms for collective decisions apparently will weaken, if not destroy, a case for third state remedies.

In sum, the ICJ has provided only qualified support for third state remedies. It has allowed that legal rights may be defined broadly, even to the extent of acknowledging legal rights owed to all the world, *erga omnes*. The availability of third state remedies may be enhanced if there has been a resort to the community's mechanisms for collective decisions. No judgment, however, has resulted which has provided definitive support for third state remedies. If the Nicaragua case is any guide, third state remedies by the use of force may be prohibited even in the face of a prior illegal use of force, even in the face of an aggression, and even if there has been a violation of a *jus cogens* norm. State practice related to matters before the Court provide support for third state remedies, especially when preceded by a Court judgment, or a collective decision of the interested community.

5. Writers

a. *In General*

Third state remedies have received only limited attention by writers. The paucity of attention may reflect negatively upon such remedies. Increased attention, however, has been seen in recent years. Not surprisingly, those that have addressed the matter are in disagreement. None provide strong support for wide ranging third state remedies.

93. *Id.* Unfortunately, the theoretical foundations for this and other customary law conclusions are questionable. No supporting evidence of state practice was identified in the Judgment. Charney, *Customary International Law in the Nicaragua Case Judgment on the Merits*, 1 HAGUE Y.B. INT'L L. 16, 19 (1988).

94. Nicaragua Case, Merits, *supra* note 1, at 27; See also *id.*, Dissent of Judge Schwebel, at 361-62.

95. Nicaragua Case, Merits, *supra* note 1, at 105.

Writing in 1970, Akehurst argued that third state reprisals are and should be available under customary international law only in three limited areas: enforcement of judicial decisions, breaches of multilateral agreements, and violations of rules prohibiting or regulating the use of force.⁹⁶ Akehurst opposed other third state reprisals on the ground that the risks to international relations would be greater than the benefits.⁹⁷ He was unable to find state practice to support third state reprisals except with regard to the three categories.⁹⁸

Brownlie also appears to be cautious about third state remedies. He has acknowledged that legal interests could attach to cases of intangible interests and to actions by some third states.⁹⁹ He has, however, not supported the ILC efforts to establish an international criminal law enforceable *erga omnes*. Nor has he found support for *erga omnes* and third state enforcement under the doctrine of humanitarian intervention.¹⁰⁰

Tunkin has supported third state remedies in the circumstances of breaches of the peace, threats to breach the peace, acts of aggression, war crimes, crimes against humanity, and colonialism.¹⁰¹ Jessup supported third state remedies under broader, but limited conditions where the protection of the general interests of mankind were found to be at stake. He focused upon genocide, apartheid, the global environment, ocean resources, and the Constitution of the International Labor Organization.¹⁰²

Meron has found support for *erga omnes* treatment of international human rights law, and perhaps other, but not all, rules of inter-

96. Akehurst, *supra* note 15, at 15-16. The first is justified on the ground that once the judgment is reached by an unbiased court the risk of abuse would be limited. The second is limited by the Vienna Convention on the Law of Treaties requirement that all such remedies be adopted by the unanimous collective decision of the non-breaching parties. The third is required because the fundamental purpose of international law is to limit or prevent war. *Id.* at 16-17. While Akehurst uses the term "reprisals," the article is relevant to a wide variety of responses to violations of international law.

97. *Id.* at 17.

98. *Id.* at 2-3, 6, 14-16. *But see id.* at 15 n. 2.

99. I. BROWNLIE, *supra* note 12, at 467.

100. *Id.* at 512-13; I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY, PART I 33 (1983); Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, at 147-48 (R. Lillich ed. 1973).

101. G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 415-425 (1974); G.I. TUNKIN, DROIT INTERNATIONAL PUBLIC: PROBLEMS THEORIQUES 220-24 (1957). The views of other socialist authors are summarized at 1976 ILC Report, *supra* note 15, at 115; and Tanzi, *supra* note 40, at 18-19 nn. 65-66.

102. Dissent of Judge Jessup, South West Africa Cases, Second Phase, *supra* note 12, at 323, 373-74, 441 (Judgment of July 18); Separate Opinion of Judge Jessup, South West Africa cases, Preliminary Objections, 1962 I.C.J. 387, 425-33; Jessup, *Diversity and Uniformity in the Law of Nations*, 58 AM. J. INT'L. L. 341 (1964); and Jessup, *Non-Universal International Law*, 12 COLUM. J. TRANSNAT'L L. 415 (1973).

national law found to be *jus cogens*.¹⁰³ Similarly, the American Law Institute's Third Restatement of the Foreign Relations Law of the United States found *erga omnes* obligations in a few areas such as human rights law, the law of the sea, and international environmental law.¹⁰⁴ Weil has expressed serious doubt concerning the role of third state remedies in international law, especially those based upon *erga omnes*.¹⁰⁵ Zoller is cautious, but not necessarily as hostile.¹⁰⁶

Schachter is circumspect; in his opinion, the strongest case is found in the field of human rights.¹⁰⁷ Although he is unable to find a case in which a third state has predicated a reprisal strictly on the basis of *erga omnes*, he does identify modern situations in which third states have taken counter-measures in the nature of retortion against states accused of violating fundamental rules of international law.¹⁰⁸ In some situations third states may be obligated to "join in measures against an offending government."¹⁰⁹ He believes many of the areas in which *erga omnes* might be applied could be included within the narrower rule that all states parties to an international agreement have a

103. T. MERON, *supra* note 47, at 187, 189; Meron, *supra* note 11, at 1, 11-12.

104. RESTATEMENT, *supra* note 46, introductory note to Part VI (marine environment); Section 514, Comment f; Section 703 reporters' notes 3 (human rights); Section 901, reporters notes 1; Section 902, reporters notes 1 (1988). The Chief Reporter was Louis Henkin. The three Associate Reporters were Andreas Lowenfeld, Louis Sohn, and Detlev Vagts. See Schachter, *supra* note 11, at 195-96.

105. Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 431-33 (1983).

106. Zoller is skeptical about liberal application of the *erga omnes* theory. The weak international legal system might not support an enforcement system that closely approaches the punitive model of more advanced legal systems. E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 37-38, 52-53, 114-17. Zoller does find evidence of third state enforcement in the domestic legislation of the United States. E. ZOLLER, ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION 67-68 (1985) [hereinafter E. ZOLLER, ENFORCING INTERNATIONAL LAW]. Such United States enforcement is legislatively authorized in situations where other states violate obligations under treaties to which the United States is a party even in the absence of injury to the United States. *Id.* at 69-72. Enforcement is similarly authorized in cases of other states' violations of non-treaty based obligations with respect to human rights, hijacking, terrorism, and certain other international crimes. *Id.* at 101-26. Of course, it should be pointed out that legislative authority does not automatically translate into action. Implementing regulations, rules of construction conforming them to obligations under international law, and Executive discretion will limit the application of these statutes. Sanctions under international law, she argues, are required to be remedial and not punitive. E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 54-55, 57-59; E. ZOLLER, ENFORCING INTERNATIONAL LAW, *supra*, at 146-56. Although she does recognize a role for third state remedies she is cautious lest they approach the punitive model. *Id.* at 105-08, 114-17. She is particularly skeptical about the ILC effort to promote international criminal law. E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 59-60.

107. Schachter, *supra* note 11, at 192-93, 195-96, 201, 342.

108. These actions took place in the context of the interventions of the U.S.S.R. in Afghanistan and Poland, the Falkland/Malvinas situation, and the Tehran hostages situation. *Id.* at 183-84, 197.

109. *Id.* at 184.

legal interest in its performance.¹¹⁰ The multilateral convention rule would apply to the United Nations Charter with its broad coverage of the use of force, human rights, and state responsibility, as well as the many human rights and law of the sea agreements that are now in force or may in the near future be brought into force.

b. *The International Law Commission*

Perhaps the most significant support for wider use of third state remedies may be found in the work of the ILC on the Law of State Responsibility. Such remedies may be available in regard to rules derived from multilateral treaties, customary international law, and international crimes.¹¹¹ The approach of the ILC to third state enforcement has varied over the years. The 1976 ILC Report gave strong support to *erga omnes* over a wide range based upon a review of the history of state responsibility.¹¹² More recently, the Special Rapporteur took a more limited view of *erga omnes*, and appeared to limit third state remedies to international crimes where such actions are authorized by collective decisions.¹¹³ The Draft Articles on the subject are capable of either construction, but appear to follow a middle course. It should be noted, however, that the Draft makes clear that it is not comprehensive. Alternative and supplementary rules of state responsibility found in customary international law and specific international agreements may be applicable despite their omission from the draft.¹¹⁴ Since a new Special Rapporteur has been selected recently,

110. *Id.* Rosenne also has maintained that all parties to a treaty have a legal interest and a right to bring an action before the ICJ. S. ROSENNE, *supra* note 40, at 520. *See also*, South West Africa Cases, 1966 I.C.J. 485, 502 (Mbanefo, J., dissenting); *id.* at 475, 478 (Forster, J., dissenting).

111. *Report of the International Law Commission on the Work of its Thirty-Seventh Session (6 May 2-26 July 1985)*, 40 U.N. GAOR Supp. (No.10) U.N. Doc. A/40/10, reprinted in [1985] 2(2) Y.B. INT'L L. COMM'N 19-27, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Part 2) [hereinafter 1985 ILC Report]. SPINEDI AND SIMMA, *supra* note 40, examines aspects of the ILC work on this subject. An extensive bibliography of other writings in the general area is included with the book. The studies contained in the Spinedi and Simma book were written prior to the adoption of the current draft of Article 5 examined below. Gray has criticized the work of the ILC on this subject as too theoretical and not properly founded upon state practice. Gray, *Is there an International Law of Remedies?*, 56 *IT. 1985 BRIT. Y.B. INT'L L.* 25, 26.

112. 1976 ILC Report, *supra* note 15, at 101-120.

113. *Fourth Report on the Content Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, by Mr. Willem Riphagen, *Special Rapporteur*, [1983] 2(1) Y.B. INT'L L. COMM'N 13-14, 21-22 [hereinafter *Fourth Report of the Special Rapporteur*]. *See also*, *Sixth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles) and "Implementation" (Mise en Oeuvre) of International Responsibility and the Settlement of Disputes (Part 3 of the Draft Articles)*, by Mr. Willem Riphagen, *Special Rapporteur*, [1985] 2(1) Y.B. INT'L L. COMM'N 3, 5-8, U.N. Doc. A/CN.4/389 [hereinafter *Sixth Report of the Special Rapporteur*].

114. *Draft Articles on State Responsibility, 1985 ILC Report, supra* note 110, at 24-25, arts. 2-4 [hereinafter 1985 Draft Articles].

the future direction of the ILC work on this matter is not clear.

The Draft's definition of the "injured State" is central to the question of third state remedies. Article V of the Commission's 1985 Draft Articles on the Law of State Responsibility, Part II, defines the "injured State" which would have rights to seek remedies under international law.¹¹⁵ The remainder of the draft sets out the remedies available to "injured States" and the conditions upon which those remedies may be pursued.

"Injured States" include parties to bilateral treaties, parties to binding decisions of dispute settlement organs and of international organizations, as well as third states that are the beneficiaries of treaty provisions. In addition, the draft sets out situations when violations of multilateral treaties and customary international law may give rise to "injured States":

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

- (i) the right has been created or is established in its favour;
- (ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
- (iii) the right has been created or is established for the protection of human rights and fundamental freedoms.¹¹⁶

This draft article, which has been provisionally adopted by the ILC, applies to norms established either by multilateral treaties or by customary international law. It is nowhere specified that the "injured State" must be a party to the multilateral treaty. Nor is it required that the state which has been injured by a violation of a norm of customary law have suffered a tangible injury.

115. 1985 Draft Articles, *supra* note 114, at 25. See also *Sixth Report of the Special Rapporteur*, *supra* note 113, at 4-15. It was pointed out at the ILC that this is a non-exhaustive definition of the term. The operative language is "In particular, 'injured State' means. . . ." *Summary Records of the 1929th Meeting*, [1985] 1 Y.B. INT'L L. COMM'N 308, U.N. Doc. A/CN.4/SR.1875-A/CN.4/SR.1939 (Statement of Calero Rodrigues, Chairman of the Drafting Committee). Furthermore, in regard to a specific infringement, a state may be an "injured State" under more than one category of Article 5. *Summary Records of the 1901st Meeting*, [1985] 1 Y.B. INT'L L. COMM'N 157, U.N. Doc. A/CN.4/SR.1875-A/CN.4/SR.1939 (Statement of Mr. Riphaen, Special Rapporteur).

116. 1985 Draft Articles, *supra* note 114, art. 5.2.(e), at 25. In the case of parties to multilateral treaties, this provision appears to be more restrictive than intervention before the International Court. The ICJ and the PCIJ statutes appear to predicate the right to intervene on party status only. This Draft requires that party status alone is not sufficient to designate a state as an "injured state" for that purposes. Of course, the ICJ has applied intervention restrictively. See *supra* notes 78-87 and accompanying text.

In 1983 the Special Rapporteur expressed the view that within the context of Article 5(e) he knew of no substantive right under customary law which permitted third states to enforce a rule *erga omnes*. He allowed that such rules may evolve in the future.¹¹⁷ One must assume, therefore that the injured states identified in this provision are the beneficiaries of the primary legal relationships that may be breached.¹¹⁸ This theory is certainly stretched to the limit in subsection (iii) where every state is an injured state if infringements of human rights and fundamental freedoms have occurred.¹¹⁹

Subsection (f) of this Article addresses collective interests, including objective regimes. It states that an "injured State" status arises:

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.¹²⁰

117. He wrote, "[I]t would seem that, beyond the case of international crimes, there are no internationally wrongful acts having an *erga omnes* character." *Fourth Report of the Special Rapporteur*, *supra* note 113, at 13.

118. *Id.*

119. See generally, 1976 ILC Report, *supra* note 15, at 109-10; 1985 ILC Report, *supra* note 111, para. 22 at 27. "The term "human rights and fundamental freedoms" is here used in the sense which is current in present-day international relations." 1985 ILC Report, *supra* note 111, para. 21, at 27. Meron has interpreted an earlier version of this provision as applying to all human rights obligations regardless of importance. Meron, *On a Hierarchy*, *supra* note 11, at 12. He takes the view that categorical distinctions among human rights norms cannot be supported. Such rights may be created by treaty or customary international law. *Summary Records of the 1929th Meeting*, [1985] 1 Y.B. INT'L L. COMM'N 305, 309, U.N. Doc. A/CN.4/SER.A/1985 (Statement of Mr. Calero Rodrigues, Chairman of the Drafting Committee).

Subsections (i) and (ii) do not as clearly provide other categories of legal rights that may have the practical effect of *erga omnes*. These provisions are based upon comparable provisions in the Vienna Convention on the Law of Treaties, but are made applicable also to customary law. Vienna Convention on the Law of Treaties, *supra* note 23, arts. 35, 36, and 60; 1985 ILC Report, *supra* note 110, at 26-27; *Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility) by Mr. Willem Riphagen, Special Rapporteur*, [1980] 2 Y.B. INT'L L. COMM'N pt.2 at 107, 120, U.N. Doc. A/CN.4/330. [hereinafter 1980 Preliminary Report]. The Special Rapporteur suggested a narrow interpretation of perceived *erga omnes* obligations. *Fourth Report of the Special Rapporteur*, *supra* note 113, at 13-14, 21-22. But these subsections may be given broad effect that may, in the case of specific substantive rules, provide for *erga omnes* enforcement. Certainly, a customary law or treaty based norm could be "created" or be "established" in "favour" of all states. Equally an infringement of a norm by a state could be deemed to "affect the enjoyment of the rights or the performance of obligations of" all other states.

120. 1985 Draft Articles, *supra* note 114, at 25. For discussions of the objective regime issues and *erga omnes* in the context of Antarctica, see Charney, *The Antarctic System*, *supra* note 10, at 63-83; Simma, *Le Traité Antarctique: Crée-T-il un régime objective ou non?*, in Francioni and Scovazzi, *supra* note 10, at 137; and Simma, *The Antarctic Treaty as a Treaty Providing for an Objective Regime*, 19 CORNELL INT'L L.J. 189 (1986). Objective regimes are discussed at *Report of the International Law Commission to the Work of Its 35th Session*, [1983] 2 Y.B. INT'L L. COMM'N pt.2, at 1, 41 U.N. Doc. A/38/10.

The interests of the international community in the world's commons quickly come to mind. Many of those interests are the subject of multilateral agreements on the oceans, outer space, Antarctica, and the environment. They can be said to have established norms for the benefit of all states. Infringement of those norms may, as well, affect the enjoyment of the rights of all

This area of third state remedies appears to be limited, requiring a treaty regime and a stipulation for the protection of collective interests. It is established, however, that the entire article does not preclude the application of rules of customary international law which may provide for the protection of collective interests, even though such interests would not be included within subsection (e).¹²¹ The scope of the term "collective interests" is, however, not settled. The records of the ILC suggest that it may have a broad application.¹²²

states. The same could be said of the norms established by the United Nations Charter. Such interests would be more specific than the broader interests of all states in the general effectiveness of rules of international law. *Fourth Report of the Special Rapporteur, supra* note 113, paras. 115-18, at 21-22. Some have suggested that these broader interests may form the basis for seeking international remedies. *See, e.g. Root, supra* note 14, at 7-10; E. VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 3 (1916). The Special Rapporteur acknowledged this argument, but suggested that the line could be drawn between those matters which directly injure specific states and more remote injuries. *Fourth Report of the Special Rapporteur, supra* note 113, at 13-14, 21.

121. 1985 ILC Report, *supra* note 111, para. 25, at 27; *Fourth Report of the Special Rapporteur, supra* note 113, at 21-22. *Summary Records of the 1929th Meeting, supra* note 120, at 309.

122. Mr. Ogiso has expressed concern about the scope of "collective interests" and the likelihood that defining it would give rise to disputes. Statement of Mr. Ogiso, *Summary Records of the 1896th Meeting* [1985] 1 Y.B. INT'L L. COMM'N 121, 122, U.N. Doc. ACN.4SER.A1985.

The ILC Commentary to subsection (f) observes that the doctrine of the common heritage of mankind found in the deep seabed regime of the Law of the Sea Convention represents a case where collective interests exist. 1985 ILC Report, *supra* note 111, para. 23, at 27. The LOS Convention provides that "the Area and its resources are the Common Heritage of Mankind." and that "all rights in the resources of the Area are vested in mankind as a whole. . . ." Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (1982), pt. XI, arts 137, 137.2. It provides that the International Seabed Authority shall act on behalf of all mankind. *Id.* art. 137.2. Specific remedial procedures are also established. *See, e.g. id.* arts. 186-191. At no point does the Convention provide individual states with rights in the deep seabed Area that may be enforced against infringement by any state. Nevertheless, the Article 5(f) collective interests are said to be present in the deep seabed Area, giving all states parties the status of "injured States" in cases of violation. In 1985 the Special Rapporteur expressed the view that the collective interests requirement also would be met in the cases of the EEC, ECSC, EURATOM, and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft. Statement of Mr. Riphagen, *Summary Reports of the 1901st Meeting*, [1985] 1 Y.B. INT'L L. COMM'N 153, 157, U.N. Doc. ACN.4SER.A1985.

Third state remedies might also be established if the substantive treaty contains a general reference to the interests of the community or state parties. This is possible despite the absence of correlative third state substantive or procedural rights or duties, and in the face of specific remedial provisions that do not provide for third state remedies. Such a rule could support third state rights in a wide variety of situations. One might consider whether the maintenance of the freedom of the seas presents a situation in which the collective interest of all states would justify third state remedies in the case of infringements upon those freedoms. The United States actions in the Persian Gulf would appear to be based, at least in part, on this theory. *See Reagan's News Conference on Domestic and Foreign Matters, supra* note 5, at A8, col. 1 (National Ed.). The ILC Rapporteur has not supported this view. *See Fourth Report of the Special Rapporteur, supra* note 113, at 14 n. 42. *See also, 1980 Preliminary Report, supra* note 120, para. 72-73, at 121-22.

Today, of course, the LOS Convention is not in force and some states may never be parties to it, but most, if not all, members of the international community recognize that the Area is the common heritage of mankind and that certain norms attach to the Area notwithstanding the status of the Convention. Perhaps, at present, violations of those norms would establish all states as "injured States" under Article 5(e)(i) or (ii). This view was supported in the ILC by Mr.

The last category of third state remedies considered in the ILC Draft arises in the context of international crimes. The ILC has been at the forefront of efforts to define and promote public international criminal law. The Draft states: "3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States."¹²³

The ILC and its Special Rapporteurs have been squarely behind the *erga omnes* status of international crimes¹²⁴ on the ground that in cases of international crimes all states have an interest in their suppression.¹²⁵ The ILC has not defined those actions that would be classified as international crimes. The Draft does, however, provide specifically that "aggression entails all the legal consequences of an international crime."¹²⁶ The work of the International Law Commission on the Draft Code of Offenses Against the Peace and Security of Mankind may bear on the definition of international crimes for the purpose of State Responsibility.¹²⁷ Consequently, the international

Njenga. *Summary Reports of the 1896th Meeting*, 1 Y.B. INT'L L. COMM'N 121, 123-124, U.N. Doc. ACN.4SER.A1985.

123. *1985 Draft Articles*, *supra* note 114, art. 5.3 at 25.

124. *1976 ILC Report*, *supra* note 15, at 101-02, 109-10, 121; *Fourth Report of the Special Rapporteur*, *supra* note 113, at 11-14; *1985 ILC Report*, *supra* note 111, paras. 27, 28, at 27.

125. *Summary Records of the 1866th Meeting*, [1984] 1 Y.B. INT'L L. COMM'N 308, 313, U.N. Doc. ACN.41366; *Fourth Report by the Special Rapporteur*, *supra* note 111, at 12.

126. *1985 ILC Report*, *supra* note 111, art. 15, at 21 n. 66.

127. These two subjects technically are distinct because the law of state responsibility addresses the responsibility of the state as a legal entity, while the subject of offenses against the peace and security of mankind addresses the responsibility of individuals. See *Draft Code of Offenses Against the Peace and Security of Mankind*, [1985] 2 Y.B. INT'L L. COMM'N 63, U.N. Doc. A/CN.4/387 [hereinafter *Draft Code on Peace and Security*]; *Summary Records of the 1897th Meeting* [1985] 1 Y.B. INT'L L. COMM'N 4, U.N. Doc. A39439 [hereinafter *Summary Records of the 1897th Meeting*]. They do, however, address similar, if not related, behavior viewed as particularly important to the international community.

Offenses Against the Peace and Security of Mankind may be defined rather broadly:

PART III: DEFINITION OF AN OFFENSE AGAINST THE PEACE AND SECURITY OF MANKIND

Article 3

First alternative

Any internationally wrongful act which results from any of the following is an offense against the peace and security of mankind:

- (a) a serious breach of an international obligation of essential importance for safeguarding international peace and security;
- (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples;
- (c) a serious breach of an international obligation of essential importance for safeguarding the human being;
- (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

Second alternative

Any internationally wrongful act recognized as such by the international community as a whole is an offense against the peace and security of mankind.

crimes included in Article 5.3 of the Draft on State Responsibility may very well cover serious violations of norms prohibiting aggression, colonialism, apartheid, genocide, and damage to the environment.¹²⁸ It does not appear, however, that all breaches of *ius cogens* rules are considered to be international crimes by the ILC.¹²⁹

The draft recognizes that "injured States" may seek international remedies against the infringing state or states. The remedies may, however, be limited. Such states would have the unconditional right to seek a return to the *status quo ante*.¹³⁰ If corrective actions prove impossible, the injured state may seek compensation in monetary form.¹³¹ Reprisals in the form of the suspension of legal obligations by the injured state towards the infringing state¹³² would be conditioned upon the following:

1. an exhaustion of available dispute settlement procedures,¹³³ except in the case of interim measures;¹³⁴
2. proportionality;¹³⁵
3. as required by applicable multilateral conventions the authorization of the remedy by collective decisions;¹³⁶
4. avoidance of prejudice to the rights of other states under applicable conventions and rights of natural persons protected by international law;¹³⁷
5. not violating peremptory norms and the immunities of diplomatic persons or other government officials;¹³⁸ and
6. conformance with restrictions found in multilateral agreements, un-

See Draft Code on Peace and Security, supra.

In this context the Special Rapporteur has included in the definition such actions as aggression, the threat of aggression, the perpetration of aggression, interference in the internal or external affairs of states, terrorism, obligations assumed under certain treaties, colonial domination, mercenarism, and economic aggression. *See Third Report by Mr. Doudou Thiam, Draft Code on Peace and Security, supra.*

128. It must constitute a particularly serious breach of public international law. *1976 ILC Report, supra* note 15, at 101-02, 109-10, 116, 121. Mr. Ogiso has questioned how the organic international community can determine which acts may be international crimes. He does not believe that the United Nations has the authority to define international crimes. Statement of Mr. Ogiso, *Summary Records of 1896th Meeting, supra* note 128, at 122. Special Rapporteur Riphagen considers international crimes as constituting a limited exception to bilateral enforcement of international law. *Fourth Report of the Special Rapporteur, supra* note 113, at 11-12. *See Mohr, The ICJ's Distinction Between "International Crimes" and "International Delicts" and its Implications*, in Spinedi & Simma, *supra* note 40, at 126-29.

129. *1976 ILC Report, supra* note 15, at 120. *See also id.*, at 102.

130. *1985 ILC Report, supra* note 111, at 20, n.66, art. 6.

131. *Id.* arts. 6.2 & 7.

132. *Id.* arts. 8 & 9.

133. *Id.* art. 10.1.

134. *Id.* art. 10.2.

135. *Id.* art. 9.2.

136. *Id.* art. 11.2.

137. *Id.* art. 11.1. *See Schachter, supra* note 11, at 180.

138. *1985 ILC Report, supra* note 111, at 21, n.66, art. 12.

less they are made inapplicable by a collective decision of the parties or by severe violations of such agreements.¹³⁹

In accordance with the Draft, if an international crime were committed, every state would be obligated to support enforcement actions by others and to avoid supporting the violator. Thus, all states would be obligated to take a "non-neutral position" in response to international crimes.¹⁴⁰ Third state responses to such crimes would be carried out under the auspices of the United Nations, but only when the machinery for such collective action was available.¹⁴¹

Some fear has been expressed at the ILC that third state remedies may be abused. Accordingly, collective decision requirements and limitations on the remedies available to third states have been included in the Draft.¹⁴² These limitations, however, are not mandatory in all cases of third state remedies.¹⁴³ Third party dispute settlement, collec-

139. *Id.* arts. 11.2 & 13.

140. *Id.* art. 14.2. *Fourth Report of the Special Rapporteur*, *supra* note 113, at 11-12; *1980 Preliminary Report*, *supra* note 120, at 120-21.

Despite the obligation of every state to take a "non-neutral position," all states may not have the "same right of response." Those rights may be "graduated according to the seriousness of the infringement of the right or interests in each case." Statement of Mr. Calero Rodrigues (Chairman of the Drafting Committee), *Summary Records of the Meetings of the 37th Session*, [1985] U.N. Doc. at 309.

The duty of third states to take a "non-neutral position" may not be limited to international crimes. *1980 Preliminary Report*, *supra* note 120, at 121.

141. *1985 Draft Articles*, *supra* note 114, art. 14.3. See *Fourth Report of the Special Rapporteur*, *supra* note 113, at 11-12. But it is clearly understood that the right of self defense to an armed attack would not be predicated upon a prior collective decision. *Id.* at 10. See *1985 Draft Articles*, *supra* note 115, art. 10.2(a), at 20. Furthermore, not all agree that the UN would have the authority to take collective decisions on enforcement actions with respect to all international crimes. See, Statement of Mr. McCaffrey, 1 Y.B. INT'L L. COMM'N 98; Statement of Mr. Ogiso, *id.*, at 122.

142. See *1980 Preliminary Report*, *supra* note 120, at 122; *Summary Records of the Meetings of the 36th Session* [1984] 1 Y.B. INT'L L. COMM'N 313, U.N. Doc. A/CN.4/366 & Add.1/ 1984; *Fourth Report of the Special Rapporteur*, *supra* note 113, at 21-22. See also, Schachter, *supra* note 11, at 201.

143. *Fourth Report of the Special Rapporteur*, *supra* note 112, at 16. It is not clear whether or not the ILC Rapporteur, Mr. Riphagen, sought to compel collective decisions in all cases of third state remedies. At times, it has appeared that the collective decision requirement was non-derogatable. *Id.* at 18, 21-22, 121-23. See Mazzeschi, *supra* note 40, at 84-85; Malanczuk, *Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility*, in Spinedi & Simma, *supra* note 40, at 234. Such institutional requirements are designed to thwart abuses by third states of *erga omnes* enforcement. Alland, *International Responsibility and Sanctions: Self-Defense and Countermeasures in the ILC Codification of Rules Governing International Responsibility*, in Spinedi & Simma, *supra* note 40, at 189.

In his *1986 Report on State Responsibility*, the Special Rapporteur, Mr. Riphagen, proposed machinery for third party dispute settlement in order to avoid abuses. *Seventh Report on State Responsibility* [1986] U.N. Doc. A/CN.4/397, (by Willem Riphagen, Special Rapporteur) [hereinafter *Seventh Report of the Special Rapporteur*].

Schachter has expressed concern that third party standing to bring claims to international courts may make states reluctant to give their consent in advance to jurisdiction before such tribunals. Schachter, *supra* note 11, at 201.

tive decisions under special international agreements, and United Nations decisionmaking become necessary only when they are available and effective.¹⁴⁴ Few of the ILC's limitations on third state remedies would be unavoidable. Such remedies would have to be consistent with norms relating to proportionality, human rights, peremptory norms, and diplomatic immunities.¹⁴⁵ Thus, third state enforcement of international law norms may be readily available under the instant ILC draft in a wide variety of cases.¹⁴⁶

The above analysis, however, may be overdrawn. The ILC Draft could be construed merely to refer back to the substantive law to determine whether the substantive law creates legal rights and duties enforceable by third states.¹⁴⁷ Perhaps a better view of the current Draft would be that the ILC would establish that appropriate norms of international law may be enforceable by third states. Only a redefinition of the legal rights and injuries arising from substantive norms consistent with traditional international law would put these tools into use. Nevertheless, the ILC Draft does provide support for third state enforcement, and *erga omnes*. It goes beyond the limited rules identified by the ICJ in the *Barcelona Traction* case. This support is based upon a genuine desire to promote the rule of international law, particularly in important areas where violations are likely and enforcement is weak. The work of the ILC may facilitate the expansion of third state remedies.

c. Conclusion

The above discussion establishes that states not tangibly injured by a breach of international law may take remedial actions, at least under

144. See *supra* note 141.

145. Mr. Ogiso expressed concerns about the wide latitude provided in the cases of breaches of multilateral treaties. [1985] 1 Y.B. INT'L L. COMM'N 311.

The Special Rapporteur has maintained that reprisals consisting of breaches of rules protecting the human environment, "seem to be inadmissible." Although, he would distinguish between affirmative actions constituting a breach and the non-performance of obligations. *Fourth Report of the Special Rapporteur, supra* note 113, at 17.

146. The term "*erga omnes*" is absent from the draft since the Special Rapporteur understood that members of the ILC felt that it did not take into account the "distinction between the directly and indirectly affected States." Statement of Mr. Riphagen (Special Rapporteur), [1985] 1 Y.B. INT'L L. COMM'N 157. This concern is not incompatible with third state enforcement. To the extent included within the draft articles, third state enforcement rights may not be as extensive as those of directly injured states. It would appear that the current draft makes few distinctions of this nature.

147. The International Law Commission appears to recognize the fact that the definition of the "injured State" is tied to the substantive norm. *1985 ILC Report, supra* note 111, at 26. Some have suggested that this is the proper interpretation of the ILC drafts. In fact, however, the drafts themselves seek to establish that certain classes of norms have *erga omnes* characteristics even in the absence of direct proof that a norm has so evolved. See Gray, *supra* note 111, at 26.

some circumstances. This is accomplished when a state becomes an injured state as a matter of law. A treaty may establish specific legal rights of parties or non-parties. Customary law may establish the legal rights of all parties to a treaty, and duties under customary law may be owed to all states, *erga omnes*. Treaties may authorize states to take remedial actions *vis-a-vis* parties, including the invocation of third party dispute settlement procedures, and sanctions may be authorized by collective decisions. Customary law may also provide for such remedies, especially in the case of international crimes.

III. ISSUES

Once the existence of third state remedies is acknowledged, the issues surrounding their use can begin to be defined. Although there are some inherent problems and possibilities for misuse of the doctrine, there are also some limitations possible which might strengthen it.

A. *Inherent Problems*

States are certainly free to agree among themselves to third state enforcement by treaty, *inter se*. More difficult is third state remedies in response to violations of customary law only. The law may permit third state remedies as a consequence of liberal definitions of legal rights and duties, i.e. *erga omnes*, or liberal constructions of the remedial system. The scope of such remedies may vary depending upon the specific remedy to be taken and upon procedures necessary to invoke such remedies. Such third state remedies, however, do present a variety of difficulties.

1. *Injuries*

The prior discussion clearly establishes that traditional international law does not require that the injury suffered that would give rise to a right to seek a remedy be a direct physical or economic loss. It could merely be a damage to the legal rights of the complaining state.¹⁴⁸ As a consequence, one could consider third state remedies to be based upon a mere redefinition of the substantive legal rights and duties of states.¹⁴⁹ As such, these remedies would represent no radical

148. South West Africa Cases, Second Phase, *supra* note 12, at 32-33. See *Seventh Report of the Special Rapporteur*, *supra* note 144, at 16-17; I. BROWNLIE, *supra* note 12, at 472-73; Schachter, *supra* note 11, at 192-93; Statement of Mr. Riphagen, Special Rapporteur, [1985] 1 Y.B. INT'L L. COMM'N 87. Nor does international responsibility depend upon a finding of fault. Schachter, *supra* note 11, at 189; *Seventh Report of the Special Rapporteur*, *supra* note 143, at 17. But it may be required by the substantive norm. Causal connection is required. *Id.*

149. The International Law Commission has recognized the fact that the definition of the

change from traditional views of international remedy law. One could, on the other hand, take the position that such developments, while technically unexceptional, actually undermine the very essence of the traditional injury requirement. Consequently, they would represent significant diversions from traditional views.

The real problem created when the injury requirement is relaxed, or eliminated altogether, is the risk that states would abuse their rights. Such states might use the third state remedy as an excuse to injure an adversary by taking actions in the absence of a violation, or when such intervention would be unnecessary.¹⁵⁰ A conservative definition of injury and a requirement that the acting state have directly suffered the injury limit the potential for abuse. The international community should be wary of rules that may increase, rather than decrease conflict and discord.

2. Remedial Purposes

In her study of countermeasures, Zoller argues that remedies under international law may be corrective only and may not be punitive. Punitive remedies would suggest the superiority of the punishing state over the alleged violator that would be inconsistent with the sovereign equality of states. Only in mature legal systems with centralized governing systems is punishment of subjects acceptable. Since the international legal community has not so evolved, remedies under international law are limited to the promotion of corrective measures. The remedies must be reversible at the time that the illegal situation is corrected.¹⁵¹ While all might not agree with each of Zoller's conclusions, it is clear that remedies directed towards the promotion of corrective behavior are most desirable.¹⁵² They limit the risk that the dispute will expand undesirably. Third state enforcement of interna-

"injured State" is tied to the substantive norm. *Report of the International Law Commission to the General Assembly on the Work of its Thirty-Seventh Session*, [1985] 2 Y.B. INT'L L. COMM'N 25-26 (Part II). See *Seventh Report of the Special Rapporteur*, *supra* note 144, at 17.

150. See Akehurst, *supra* note 15, at 15-17; Schachter, *supra* note 11, at 184.

151. E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 37-38, 52-55, 57-60, 72-73, 105-08; E. ZOLLER, ENFORCING INTERNATIONAL LAW, *supra* note 106, at 146-56. Zoller writes that even the decisions of the U.N. Security Council are limited to corrective action. E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 69-71. Similarly, reprisal and reparation rules are driven by the concept of correction rather than punishment. Limitations, such as the rule of proportionality, seek to effectuate this objective. *Id.* at 15, 52-53, 57-58. She prefers to use the terms "reciprocity" and "equivalence" to convey the same meaning. Schachter appears to agree with Zoller's general thesis in this regard. Schachter, *supra* note 11, at 171.

152. Alland interprets the work of the ILC as supporting the view that sanctions under international law may be punitive, Alland, *supra* note 144, at 174-75. Alland opposes the use of sanctions and countermeasures as punishment. *Id.* at 176.

tional law need not be punitive in nature. It may, however, take on many punitive characteristics, and thus be undesirable — if not contrary to established law.

In the absence of a tangible injury, the complaining state may not be able to suggest to the accused state a course of behavior that would be corrective. As a consequence, actions taken by third states might have punitive impacts only. Sensitivity to the need for a remedial purpose has been demonstrated by the ICJ. In the *Northern Cameroons* case the Court declined to act because no conceivable court order could correct the alleged delict.¹⁵³ The Court has issued declaratory judgments, as in the *Corfu Channel* case.¹⁵⁴ Such judgments have been rendered, however, when a directly injured state has been a party and when the declaration could encourage the party at fault to take remedial actions.¹⁵⁵ The same may not necessarily be true in some third state enforcement situations. Certainly, the calculation and disposition of reparation by restitution or indemnity would be difficult.¹⁵⁶ While a third state might have a legal right that would give it standing before an international tribunal, it may not be able to obtain a judgment on the merits in its favor if no judgment could remedy the situation. It is not necessarily true, of course, that third state remedies taken to enforce a rule of law require that all third states have standing to bring suit in an international court as an *actio popularis*.¹⁵⁷ Nor may such states have the right to take every specific remedy that might be available to a directly injured state.

3. Containment

For reasons of containment, classical international law tends to limit the remedies available to directly injured states. While violations of international law may be disruptive to international relations, some remedies may be equally if not more disruptive. Thus, the rule of proportionality assures that the remedy would not be so disproportionate

153. Case Concerning the Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15 (Preliminary Objections of Dec. 22, 1963) at 33-34. See I. BROWNLIE, *supra* note 12, at 472.

154. *Corfu Channel Case* (U.K. v. Alb.) 1949 I.C.J. 4, 36 (April 9, 1949).

155. In the North Sea Continental Shelf Cases, 1969 I.C.J. 3, the Court declared the law. Afterwards, the parties negotiated a settlement of their ocean boundary dispute based upon the Judgment. Some have focused on the question of whether a specific affirmative remedy was requested or whether reparations in the form of monetary compensation might be available. I. BROWNLIE, *supra* note 12, at 471-72; Statement of Mr. Roukounas, [1985] 1 Y.B. INT'L L. COMM'N 140.

156. Weil, *supra* note 105, at 432-33.

157. Standing before the ICJ need not be the same as standing to seek remedies outside of court. S. ROSENNE, *supra* note 41, at 374-75, 518-20; Schachter, *supra* note 11, at 201, 342.

to the delict that the remedy would exacerbate the situation.¹⁵⁸

Traditional international law of third state neutrality is another situation in which international law contains conflicts, even though one state may be in the wrong and involvement by others might facilitate effective law enforcement. Auto-enforcement by the international community presents a serious risk that the conflict would expand. The third states actions may reflect bias or be based upon the mistaken belief that the law has been violated.¹⁵⁹ Containment through neutrality may be preferable to additional international conflict through expansion.¹⁶⁰

Further expansion risks arise when a state is the object of a remedy and claims the right to engage in remedies in response. If third states were able to take remedial actions against a state that allegedly violated the law, the alleged violator might take counter actions and expand the conflict further.¹⁶¹

Another expansion problem posed by third state remedies involves the relationship of the third state to innocent states. In bilateral remedy situations a breach may relieve the injured state of the duty to perform a legal obligation owed to the breaching state.¹⁶² That release may not operate to affect the injured states' obligations towards other states. This limitation is difficult in bilateral situations. It becomes even more difficult if a third state takes action. In the case of third state remedies, limiting the secondary effects of a release from legal obligations owed to the breaching state may not be accomplished easily.

An equally important aspect of the containment issue concerns the interest of the directly involved state. That state may not want third states to become involved in its relations with the alleged violator. It may prefer to have complete control over such bilateral relationships.

158. Air Services Award, *supra* note 40, at 444-45; Akehurst, *supra* note 15, at 15-17; Weil, *supra* note 105, at 431-33; E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 15, 52-53, 57-58. See also 1980 Preliminary Report, *supra* note 120, at 127. The requirement that remedies be *ratione materiae* serve a similar containment purpose. See E. ZOLLER, ENFORCING INTERNATIONAL LAW, *supra* note 106, at 152.

159. In the absence of a violation, international law may not permit remedial actions. Thus, international law may be violated if a state purports to take remedial actions when there has not been an actual violation in the first place. Schachter, *supra* note 11, at 171.

160. Akehurst, *supra* note 15, at 15-17. Bishop suggested that the whole concept of neutrality may not be viable under the United Nations system. It appeared to be predicated upon the assumption that all states would be involved in the maintenance of peace. Bishop, *supra* note 91, at 449.

161. Wengler, *Public International Law: Paradoxes of a Legal Order*, 158 REC. DES COURS 9, 23-24 (1977 V); *Seventh Report of the Special Rapporteur*, *supra* note 143, at 6-7.

162. This might not be appropriate in the case of human rights obligations and *ius cogens* norms.

The directly injured state may never seek to remedy the violation of its rights, it may delay pursuing a remedy, or it may join the grievance with other aspects of the relationship with the alleged violator. Even though the third state may act to benefit the directly injured state, third state involvement may limit the directly injured state's options. Such results may not be appreciated. Community interests certainly should predominate over bilateral relations if they are to justify third state involvement in what are essentially bilateral relationships. That explains why third state enforcement is most favorably considered in the context of *jus cogens* norms. Otherwise, the interest of containment argues against third state remedies.

4. Confusion

A final problem raised by third state remedies is the possibility that confusion may result. If multiple states exercise rights to engage third state remedies, settlement of the dispute may be difficult.¹⁶³ Would each enforcing state have to be satisfied with the remedial action tendered by the accused state? If all are not satisfied, how would a final resolution of the dispute be reached? If a judgment were entered between the accused state and one or more enforcing third states, would it be binding on all other actual or potential third state enforcers? To whom would reparation be directed?¹⁶⁴

This review of the significant problems inherent in third state enforcement of international law argues in favor of caution. While third state remedies may not be inappropriate, it is clear that such remedies should be available under restricted conditions.

B. Limitations

1. Remedy Choice

A variety of limitations may be placed upon third state remedies. It is not necessary, for example, that third states have the right, much less the duty, to invoke all the remedial tools available to a directly

163. The problem of confusion created by multiple states having the right to seek international remedies was one of the reasons why the ICJ did not favor the standing of the stockholders' state of nationality in the *Barcelona* Case, *supra* note 12, at 49-50. Previously, in the *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Advisory Opinion, April 11, 1949), the Court had indicated that this was a concern. Nevertheless, it found that the United Nations could bring the claim. *Id.* at 185-86. In *Barcelona* the Reparations opinion was distinguished on the ground that claims of the United Nations would be limited in number and easy to resolve.

164. See *South West Africa Cases, Second Phase*, *supra* note 12, at 319, 552 (Joint Dissenting Opinion of Judges Spender and Fitzmaurice).

"injured state" under international law.¹⁶⁵ Reparation or standing to bring suit in the International Court might be rarely appropriate remedies.¹⁶⁶ Some remedies might be unavailable to third states.¹⁶⁷ On the other hand, less difficulty may be created in cases of *droit du regard*, retortion, diplomatic protests, and cooperation with states having the primary right to take remedial actions. Too many restrictions may nullify the effectiveness of third state enforcement; too few restrictions, however, may permit third state remedies which cause more difficulties than they solve. Fashioning a regime that will strike the proper balance and avoid unworkable complexity may be difficult indeed.

2. Collective Decision

Another potential limitation on third state remedies would require a collective decision by the relevant international community to authorize the third state actions. Thus, the Vienna Convention on the Law of Treaties calls for a collective decision by the non-breaching parties in the case of certain violations of multilateral conventions.¹⁶⁸ The ILC Draft on the Law of State Responsibility sets out a similar collective decision provision in the cases of international crimes, violations of multilateral treaties, and objective regimes.¹⁶⁹ The ICJ ap-

165. Meron recognizes that the identity of the appropriate remedies available for third states is not settled. Meron, *On a Hierarchy*, *supra* note 11, at 11-12.

166. Variations in the rights of states to seek remedies is discussed at 1976 ILC Report, *supra* note 15, at 112-13. See also, *Seventh Report of the Special Rapporteur*, *supra* note 143, at 17; Statement of Sir Ian Sinclair, [1984] 1 Y.B. INT'L L. COMM'N 303-304, U.N. Doc. A/CN.4/366.

Jiménez de Aréchaga has defined reparation as the "generic term which describes the various methods available to a State for discharging or releasing itself from . . . responsibility [for injuries caused by a breach of an international obligation]. The forms of reparation may consist in restitution, indemnity or satisfaction." Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 REC. DES COURS 1, 285 (1978 - 1).

Reparations in the form of payment of money or transfers of property would present great difficulties if they were to go to third states. The management of such reparations to benefit other states could be difficult indeed. A declaration of illegality, however, would not present the same difficulties. Some would consider such declarations to be reparations. Tanzi, *supra* note 40, at 21-22.

The 1985 Draft Articles 6 and 7 provide for monetary reparations in favor of the injured state if the wrongdoer has not reestablished the *status quo ante*. In Court monetary reparations, however, are unusual. Gray points out that the PCIJ and the ICJ have assessed damages in two cases only, although they were requested in about one-third of the cases. The two cases, the Wimbledon and Corfu Channel cases had unusual features. Gray, *supra* note 111, at 36. The International Court has not developed a discrete jurisprudence on the assessment of damages. *Id.* at 39. Currently, the ICJ is about to consider the request reparations in the Nicaragua case.

167. 1985 Draft Articles, *supra* note 114. See I. BROWNLEE, *supra* note 12 at 472-73; *Fourth Report of the Special Rapporteur*, *supra* note 113, at 13-14.

168. Vienna Convention, *supra* note 23, art. 60, para. 2(b). See, *Fourth Report of the Special Rapporteur*, *supra* note 113, paras. 50, 58-63 at 10 & 12. See also Bazylar, *supra* note 45, at 602.

169. 1985 Draft Articles, *supra* note 115, at arts. 10 & 11. See *Fourth Report of the Special Rapporteur*, *supra* note 112, para. 115, at 22. This idea is derived from the ICJ's reliance in the Advisory Opinion in the Namibia case on the decision of the U.N. Security Council. 1980 Pre-

pears to favor third state remedies taken in the context of collective decisions.¹⁷⁰ This approach is driven by the concerns addressed above. Confusion, conflict, and difficult remedy decisions arise when multiple enforcement agents are free to act unilaterally. Since third state enforcement reflects community interests, the community in question should respond collectively to the breach. Unilateral third state remedies may be impermissible.

In a mature legal system a collective decision rule might be commendable. For the instant situation, the requirement may not be appropriate. Unrealistic expectations about the role to be played by international institutions in the enforcement of international law could lead to poorer, rather than better, enforcement of important substantive norms.¹⁷¹ Furthermore, it is not clear that there is a forum available to take action in the case of all potential situations.¹⁷² The United Nations Security Council is available in cases of threats to the peace, breaches of the peace, or acts of aggression, and disputes likely to endanger the maintenance of international peace and security.¹⁷³ Its jurisdiction, however, is not exclusive, nor is it all-encompassing. What functioning organs for collective decisions are really available in cases of genocide, other violations of human rights laws, violations of the laws of the sea, and violations of international environment law? The General Assembly may have some role, but it, too, is neither exclusive nor comprehensive.¹⁷⁴

In the case of threats to the peace, breaches of the peace and acts of aggression, the United Nations Security Council is vested with certain

liminary Report, *supra* note 119, para. 74, at 122. See E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 105-08.

170. See *supra* text accompanying notes 70-71 and 95.

171. It is doubtful that the international community would tolerate a powerful central authority to coerce obedience to the law. Schachter, *supra* note 11, at 167. Zoller considers the bilateral remedy system of international law fundamental to the rudimentary legal system. Collective decisions to remedy violations might be supplemental to bilateral remedies, but could not replace them. The idea that remedies in cases of the most important violations would require a collective decision is "quite astounding" and runs counter to "common sense." E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 112, 114, 117. See also Weil, *supra* note 105, at 431-33.

172. The Special Rapporteur often seems to make this assumption. See *supra* note 144.

173. U.N. Charter, *supra* note 24, art. 39. E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 111-12, 115-17; Statement of Mr. Ogiso, [1985] 1 Y.B. INT'L L. COMM'N 122, U.N. Doc. A/CN.4/L.382.

174. U.N. Charter, *supra* note 24, arts. 10-16. E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 111-12, 115-17 (1984); Statement of Mr. Ogiso, *supra* note 174, at 122. Malanczuk, *supra* note 144, at 235-38, reaches the conclusion that a decision on a dispute by an international organization would satisfy the obligation even if it were not legally binding so long as it was not *ultra vires*. Mohr, *supra* note 129, at 137, agrees that in the absence of an appropriate supra-national authority, unilateral action by third states may be taken in response to international crimes.

enforcement jurisdiction.¹⁷⁵ Unfortunately, even its effectiveness is questionable. In many important cases the veto rule¹⁷⁶ has prevented effective actions. Studies of collective enforcement by the United Nations and other groups of states have documented the limited effectiveness of international institutions in such situations.¹⁷⁷ Under current conditions, a collective decision requirement could eliminate the possibility of third state remedies in many areas and make effective remedies unlikely in others.

3. Community Interests

Another restriction might limit third state enforcement to a specific list of international law norms. The listed norms would be those that the community considers to be so important to the international community as a whole that effective enforcement by third states would be desired despite the difficulties created by such enforcement. Unfortunately, identifying those substantive norms may be insurmountable. This problem is best illustrated by the inability of the community to designate all but a very few peremptory norms (*jus cogens*) of international law.¹⁷⁸ If the international community were to identify certain norms or situations as extremely important to the international community as a whole, and if it were to tie remedies to an ineffective procedural system, the result might, unfortunately, obstruct the promotion of the very objectives that it would purport to promote.

4. Problems With Limitations

Balancing the interest in the rule of law through effective enforcement and the problems inherent in third state enforcement is not easy. This has been most pointedly expressed in the context of the debate over the proper role for *erga omnes* in international law. Weil, for example, has expressed grave reservations with regard to third state enforcement of international law norms. He has argued in favor of the traditional bilateral enforcement mechanisms of international law:

Like the *jus cogens* doctrine and the theory of international crimes, [*erga omnes*] is inspired by highly respectable ethical considerations. Yet, here too, subjects of doubt and perplexity come crowding in.

This is so, in the first place, because it is no easier, of course, to iden-

175. U.N. Charter, *supra* note 24, arts. 39-49, at 1043-44.

176. U.N. Charter, *supra* note 24, art. 27.

177. M. DOXEY, ECONOMIC SANCTIONS, *supra* note 16, at 142-48; M.S. DAOU DO & M.S. DAJANI, ECONOMIC SANCTIONS, IDEALS AND EXPERIENCE 159 (1983). It has been suggested that states which are merely reciprocating for injuries done to them are not acting within any sort of legal, philosophical order. N. ONUF, REPRISALS: RITUALS, RULES, RATIONALES 11 (1974).

178. Meron, *On a Hierarchy*, *supra* note 11, at 13-16.

tify obligations *erga omnes* than peremptory norms or essential obligations. Even if the number of obligations *erga omnes* is in principle to remain small, the examples given by the Court [in the *Barcelona Traction* case] are still mere examples, and we are once more faced with a category capable of an expansion all too likely to get out of hand. . . .

But the prime source of perplexity lies in the ambiguity surrounding the precise identity of the *omnes* to whom the obligations are owed. Have the corresponding rights become vested in the "international community as a whole," or in each of its component states *ut singuli*? The first alternative would imply the possession by the international community of some organic representation capable of taking legal action for the protection of its rights, which is certainly not the case. The second would signify that any state, acting separately and on its own behalf, could clearly claim the fulfillment of an obligation *erga omnes* and invoke the international responsibility of any other state committing a breach of it. But then more questions arise. Is it contemplated that there should be some reparation of the classic type? If so, it is hard to see what injury would have been sustained by the applicant or what, apart from a declaratory judgment, an individual constituent of the *omnes* could claim. Is punishment envisaged? In the absence of any judicial channels organized to that end, that would mean that any state, in the name of higher values as determined by itself, could appoint itself the avenger of the international community. Thus, under the banner of law, chaos and violence would come to reign among states, and international law would turn on and rend itself with the loftiest of intentions.¹⁷⁹

Responding to Weil's criticism, Schachter first acknowledges that Weil's fears have a legitimate foundation. Schachter believes, however, that the international community will approach *erga omnes* in a traditionally conservative manner and will avoid the difficulties suggested by Weil. The potential benefits of enhanced obedience to important norms outweigh the limited risks.¹⁸⁰

179. Weil, *supra* note 105, at 431-33. See also Marek, *Criminalizing State Responsibility*, 14 REV. DE BELGIUM DROIT INT'L. 460, 470-71 (1978-9); Dupuy, *Observations Sur le "Crime International de L'Etat"*, 84 REVUE GENERALE DE DROIT INT'L PUB. 449, 463-67 (1980).

180. Schachter writes:

I would guess that they will do so infrequently and then almost always as a supplement to a claim based on a legal interest derived from probable injury (as in pollution) or from participation in a relevant treaty (e.g., United Nations Charter or a human rights treaty). States, by and large, are not inclined to open a Pandora's box which would allow every member of the now numerous community of States to become a "prosecutor" on behalf of the community in judicial proceedings. Even if a State should decide to be a "guardian" of international law, there is no reason to assume that "chaos or violence" will ensue (as was suggested by one eminent scholar). . . . On the affirmative side, there are surely advantages in strengthening an awareness among States that the obligations of international law relating to aggression, basic human rights, and the shared environment are of general interest and common concern. This awareness may be given legal implementation by recognizing a *droit de regard* that would permit States to express their concern regarding actions of others that have adverse repercussions on the community and its system of norms. Carried further it would be the basis of the *actio popularis* enabling a State to initiate judicial action in the common interest. . . . Both of these legal concepts may of course be abused by individual States acting for their own political reasons and it may be necessary to develop procedures in the political bodies and possibly in judicial organs to deter or limit such abuse.

IV. FUTURE DEVELOPMENTS

A. *In General*

The shape of these developments is difficult to predict. No one element will determine the future role of third state remedies under customary law. The evidence suggests that the scope of legal rights and third party remedies will depend substantially upon a variety of factors. These include the scope of collective decision requirements, the importance of legal norms to the community at large, the need for effective enforcement vehicles, the risks that third state remedies would produce undesirable consequences, and the nature of the specific remedies to be used, among others. The limited third state remedies available under customary law and the uncertain role played by *erga omnes* today, attest to the cautious approach taken by states.¹⁸¹

As this law evolves, the limitations inherent in the international legal system and the political context in which it operates will play important roles. Since the international legal system is not a mature and centralized one, the advanced enforcement systems of highly developed legal systems are not available. The bilateral remedial system generally available to enforce norms of international law is not likely to change. There may be, however, an appropriate albeit limited place for third state remedies. Third state remedies involving any significant intrusion into bilateral relationships between states may be desirable only in the context of situations that are fundamental to the international community, and then only when actual violations pose serious threats which otherwise cannot be remedied. Only in such cases may the difficulties presented by such third state remedies be overcome by their potential benefits.

B. *Situations Which May Be Appropriate for Third State Remedies*

In that context, we could identify situations in which a bilateral enforcement system may be particularly inadequate to meet the needs of the international society. Third state remedies may be most desirable in those cases. One type of situation in which the need may arise is when no directly injured state would have traditional standing to seek a remedy. For example, this may be presented when a government commits genocide against its own nationals, or when damages are caused to common spaces outside of the jurisdiction of any state.

A second situation may be found even when there is a directly and

Schachter, *supra* note 11, at 200-01.

181. 1985 ILC Report, *supra* note 111, paras. 27 & 28, at 27. A permissive third state remedy system is not likely to develop, nor is it desirable at this stage of international law.

severely injured state with a legal injury, but that state is incapable of seeking a remedy due to reasons beyond its control. This may take place, for example, in the case of aggression against a state which places the target state under the effective control of the aggressor.

In a third situation there may be directly injured states with the interest and ability to seek a remedy, but blatant and widespread violations of the law committed by a powerful state or group of states may have created a situation such that the injured states alone are not able to effectuate a remedy.¹⁸²

In all three situations the unavailability of an effective remedy causes serious consequences justifying third state remedies. The violation of a particular important norm does not establish the appropriateness of third state remedies. Under specific circumstances many rules of international law, even ordinary ones, might justify such treatment. In these cases the bilateral remedial system may be incapable of responding effectively to serious violations of the law which have community-wide consequences. It is in these cases that the international community as a whole may have the necessary stake in the promotion of obedience to the law. Third state remedies may be capable of meeting these needs.

At the core is the view that third state remedies are exceptional and are driven by necessity.¹⁸³ In the absence of necessity, the traditional bilateral system of remedies is likely to remain untouched. If one of the situations like those identified above were to arise, a third state may find that it has standing to seek remedies that would be intrusive into otherwise bilateral relationships. Third states would have the obligation to establish that a violation of the law has taken place and that the condition of necessity does exist.

182. See Root, *supra* note 14, at 5-6. In support of third state recourse to force as collective self-defense, Lauterpacht wrote, "unless such right of collective self-defense is recognized the door is open for piecemeal annihilation of victims of aggression by a State or States intent upon the domination of the world." 2 L. OPPENHEIM, *supra* note 91, at 156.

183. The necessity of a particular action is capable of judicial examination. Nicaragua Case, Merits, *supra*, note 1, at 122-23. The reader will recall from the earlier discussion that the ICJ has previously addressed the necessity argument reaching differing results. See *supra* notes 54-76 and accompanying text. A teleological result in a particular case based upon necessity may be rejected. The positive law may, however, evolve to permit remedies in particular cases of necessity. In the Reparations Advisory Opinion the ICJ based its finding of United Nations capacity to bring an international claim and right to bring the specific claim upon the fact that it was essential to carrying out its responsibilities. Reparations for Injuries Suffered in the Service of the United Nations, *supra* note 164, at 179-80, 182-84.

Of course, the procedural scheme to be discussed could be grafted upon each and every international norm that is a candidate for third state remedies. But at that point the distinction between procedure and substance would be effaced. What is procedure but a general rule that may be invoked in connection with a variety of norms under particular circumstances. Weil is concerned that *erga omnes* presents special difficulties identifying the substantive norms and restraining states from abusing their third state enforcement rights. Weil, *supra* note 104, at 432.

C. Procedure

In these situations, the relevant international community may have the first opportunity to take collective decisions when the moving party is a third state. Thus, the third state may be obligated to make an effort to obtain the support of the interested community through a collective decision. As reported above, however, there are precious few institutions available with the authority and ability to resolve such disputes. International organizations may have authority to discuss a variety of matters and to adopt resolutions, but their determinations may not be binding and are often not effective. Certainly, third state remedies should not be tied irrevocably to these often ineffective procedural systems.

International organizations may, however, exert significant and desirable influence on a violator and may help to shape the remedial efforts even in the absence of the authority to issue compelling orders. In general, a first resort to an appropriate international forum places community restraints on abuses of significant third state remedies and on potential violators when a remedy by the directly injured state is unavailable.¹⁸⁴ Such a first resort may, however, be satisfied if this and

184. Article 10 of the International Law Commission's Draft Articles on State Responsibility Part II would require the exhaustion of available international procedures for the peaceful settlement of disputes prior to the institution of forceful and non-forceful reprisals. *1985 ILC Report*, *supra* note 111, art. 10, at 20 n. 66.

The United Nations Charter requires an exhaustion of such procedures only in the case of situations that are likely to lead to threats to or breaches of the Peace. U.N. Charter, *supra* note 24, article 33.1, at 1042.

The Vienna Convention on the Law of Treaties also requires the resort to a collective decision of states parties in cases where there has been a material breach of a multilateral treaty and the non-defaulting states seek to terminate the treaty. Vienna Convention, *supra* note 23, art. 60.2(a), at 893. The Convention does not free the complaining third states from the collective decision requirement if resort to such procedures proves futile. Exceptions to the collective decision requirement are provided only if suspension is sought by the specially affected party or by other states in cases where the breach undermines the whole regime of the treaty. *Id.* art. 60.2(b) & (c). See *Report of the International Law Commission* 1 Y.B. INT'L L. COMM'N 169, 253-55, paras. 6-8.

The International Law Commission draft does not appear to limit its required collective decision process to those forums that would have the jurisdiction to compel remedial action. *Draft Articles on the Law of State Responsibility*, *supra* note 143, art. 10.

In the case of international crimes, resort to a collective decision is specified in the ILC Draft, *supra* art. 14, through the incorporation of the UN Charter obligations with respect to the maintenance of international peace and security. The United Nations obligation may be satisfied if the efforts are exhausted. In the Nicaragua case the Court recognized a connection between the customary international law of self defense and the United Nations Charter obligation to bring the matter to the attention of the United Nations Security Council. *Nicaragua Case, Merits*, *supra* note 1, at 105, para. 200. This would suggest that customary international law of international remedies might appropriately include an obligation to make an effort to seek a collective decision.

Zoller argues that as a matter of "principle . . . there is no preliminary procedural condition for the use of countermeasures by a state." E. ZOLLER, PEACETIME UNILATERAL REMEDIES, *supra* note 11, at 119.

other efforts are exhausted without remedy or time constraints require that action be taken first.¹⁸⁵ If these preconditions for such third state remedies are met, the third state may have a strong basis for the unilateral right to take such remedial action against the alleged violator.

D. Remedies

The extent of the remedies available to the third state, however, still may not be identical to the remedies that may be available to a directly injured state. Much depends upon the certainty of the violation, the nature of the violation, the risk to the international community and to world order posed by the violation, the risks of injury to the alleged violator and to other states, and the risks that the conflict would expand undesirably as a result of remedial actions by the third state.

Also relevant to the exercise of third state remedies may be the relationship of the third state to the alleged violation. Up to this point, we have assumed that there are two categories of states: states which have suffered direct tangible injuries and third states. In any situation, there may be many interested third states or there may be a few. Some third states' interests may be remote and focus on general systemic concerns. Others may be particularly interested due to their proximity to the actors, or their practical stake in the outcome of the matter.

While a division of third states into sub-classes may be difficult and impracticable, the degree of the tangible interest that the state has in the matter is relevant. The greater the interest, the closer the remedy approaches the bilateral system and the less likely that severe management problems may be presented. At some point, the interest of the third state and that of a directly injured state approach each other.¹⁸⁶ This continuity between the interests of states is found also in the definition of legal interests. As discussed above, legal rights and duties can be defined narrowly or broadly. Thus, the distinction between injured states and third states is not clear cut. Consistent with this, rem-

185. Of course, the extent of the obligation to exhaust alternative remedies and to seek community action requires further elaboration to avoid abuses and inefficiencies. This idea is implicit in the ICJ judgment in the Nicaragua case where it looked to determine whether the United States brought the matter to the UN Security Council, notwithstanding the fact that the issue before the Court related to customary law and not the law of the Charter. Nicaragua case, Merits, *supra* note 1, at 105. See also, Bazzyler, *supra* note 46, at 606-07.

186. Riphagen recognizes that the dividing line between injured states and third states may not be easily identified. *Fourth Report by the Special Rapporteur, supra* note 113, paras. 75, 114, at 14, 21-22.

edies available to states may not be based upon categorical divisions between injured states and third states.

E. *Conservative Growth*

Certainly it is hard to predict how third state remedy law may evolve. Since strong centralized institutions will not be established in the near term, the system is likely to tolerate only the most limited third state remedies. Those will be founded upon necessity and the involvement of the concerned international community. Hard lines and rules do not appear to be forming; rather, a balance is to be sought among the relevant community and state interests.

In this regard, it should be noted that states are reluctant to use their enforcement rights even in ordinary bilateral situations. Unremedied violations of public international law are all too common. During the years since the ICJ declared the existence of *erga omnes* and third state remedies, states have not made significant use of third state remedies. All the evidence would suggest that states will continue to be extremely conservative in this regard. If anything, the facts may justify some effort to encourage third state remedies in order to make fully effective some important norms of international law.

V. CONCLUSION

In conclusion, concerns about third state remedies under international law are legitimate. State practice and *opinio juris* do not clearly support such remedies except under the most limited circumstances. The practice is illustrated by the three situations set out at the beginning of this article. Let us revisit them briefly in the light of the conclusions that have been reached.

In the Nicaragua case the ICJ addressed the United States third state use of armed force against Nicaragua. The alleged Nicaraguan behavior was grave, but the facts necessary to establish the allegations were not presented, and the third state response (the use of armed force) was the most severe. Other directly injured states responded to the Nicaraguan threat by various means. Collective efforts, including those through the Contadora process, had not been exhausted. There was no widespread support in the international community for the United States' actions. Consistent with the above analysis, the ICJ condemned the unilateral third state remedy.

In the Persian Gulf a terrible war was in progress for several years. The United Nations and regional groups unsuccessfully sought to stop the war and to prevent injuries to neutral states. There is no dispute

that the war caused direct injuries to the interests of the international community in the Persian Gulf. Warnings were issued to no avail. As a consequence, a few neutral states began to take defensive actions as a last resort. These actions escalated and expanded to cover neutral shipping under other flags only after repeated breaches of the combatants' duties to avoid damage to neutral shipping.¹⁸⁷ The caution exhibited by the third states, their first exhaustion of collective processes at the United Nations and elsewhere, and their defense of collective interests argues in favor of third state remedies in this situation.¹⁸⁸ Those remedies were supported by the general international community.

In the Antarctic, enforcement of the norms has taken place within the Antarctic Treaty system. States found to have violated the norms have been placed under diplomatic and other pressure within the Antarctic Treaty system. The Consultative Parties to the Treaty, the primarily interested states, have acted collectively. Even efforts by non-parties appear to have been subject to these pressures.¹⁸⁹ None have argued that the third states did not have standing to encourage lawful behavior. Recent efforts at the United Nations to establish a broader base for the collective decision system are not incompatible with the third state enforcement of the existing norms.¹⁹⁰

In these three examples the community has taken a conservative approach to third state remedies. As the international community explores third state remedies, it must reconcile the conflicting interests of the international community.

At present, substantial support for a broad rule of third state international law enforcement does not exist. Actual state practice and holdings of international courts on the subject are difficult to find. On the other hand, legal interests have been broadly defined with respect to parties to multilateral treaties. These definitions may produce a result that permits a wide range of third state enforcement under international law. A wider third state role would permit more states to participate in the enforcement of norms for which increased conform-

187. Third state rights to remedy violations of the rights of neutral shipping have been advocated in the past. See *Naval and Aerial War*, *supra* note 16, article 114.

188. Former U.S. Secretary of State Cyrus Vance and Former U.S. Secretary of Defense Elliot Richardson have called for further collective measures through a United Nations peacekeeping force that would provide neutral ships with escort and other services. *A Proposal for a United Nations Observer and Peacekeeping Mission in the Persian Gulf; Hearings Before the U.S. Senate Foreign Relations Committee*, October 28, 1987, WASHINGTON WEEKLY REPORT XIII-35 (30 Oct. 1987)(statements of Cyrus R. Vance and Elliot L. Richardson).

189. See F. AUBURN, *ANTARCTIC LAW AND POLITICS* at 115-116, 127, 128 (1982); and Charney, *The Antarctic System*, *supra* note 10, at 75-76.

190. See Charney, *The Antarctic System*, *supra* note 10.

ity may be sought. Despite the values of more aggressive law enforcement, the international legal system might not tolerate a substantial expansion of international law remedies to give third states a significant role. Ultimately, such third state remedies might erode, rather than enhance, obedience to the rule of law. At best, third state remedies under customary international law may be appropriate in the case of a few subjects of international law under limited circumstances.

The application of third state remedies to limited circumstances only, and then subject to important but realistic procedural safeguards, may be evolving. Attention must be directed towards developments which permit the genuine interests of the international community to be promoted without unacceptable costs. Under such conditions, it is possible that third state remedies will expand in the future.