USING COLLECTIVE INTERESTS TO ENSURE HUMAN RIGHTS: AN ANALYSIS OF THE ARTICLES ON STATE RESPONSIBILITY

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INTRODUCTION

In 2001, the United Nations International Law Commission[1] (ILC) completed the Draft Articles on Responsibility of States for Internationally Wrongful Acts[2] (Articles)—commonly referred to as the Articles on State Responsibility[3]—setting forth rules governing the obligations that result from a state's wrongful act. The Articles only pertain to obligations between states, a focus that is indicative of a fundamental problem in modern international law: the lack of

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[1] The International Law Commission (ILC) was established by the United Nations in 1947 to promote "the progressive development of international law and its codification." Statute of the International Law Commission, G.A. Res. 174(II), art. 1(1), U.N. GAOR, 2d Sess., at 105, U.N. Doc. A/519 (1947). Its thirty-four members, usually international legal scholars and practitioners, meet each summer to address various issues that they have chosen or that have been referred to their agenda by the General Assembly. The ILC's work often culminates in the creation of draft articles that are submitted to the General Assembly. Past drafts have been adopted as the Vienna Convention on the Law of Treaties and the Statute of the International Criminal Court. *See* UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 7–13, U.N. Sales No. E.95.V.6 (5th ed. 1996) [hereinafter WORK OF THE ILC].

[2] *State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, U.N. GAOR Int'l L. Comm'n, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter *Articles*]. For the ILC commentaries on the Articles, see generally *Text of the Draft Articles with Commentaries Thereto, in Report of the International Law Commission, Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 59–365, U.N. Doc. A/56/10 (2001) [hereinafter *Commentaries*]. The Articles are divided into four Parts that address, respectively, the definition of a wrongful act, the legal consequences of a wrongful act, the types of actions that states are permitted to take in response to a wrongful act, and applicable general provisions. *See Articles*, *supra*. For further discussion of the issues raised by the Articles in their final form, see generally James Crawford et al., *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963 (2001).

[3] *See, e.g.*, Crawford et al., *supra* note 2, at 964.

existing mechanisms through which individuals are able to hold states accountable for human-rights violations, particularly when the victims' own state of nationality is the perpetrator.

The concept of collective interest potentially provides a valuable tool for promoting human-rights enforcement in international law. Over the past century, there has been a growing consensus that the international community as a whole has a collective interest in the fulfillment of certain fundamental human-rights obligations.[4] Therefore, simply by virtue of their membership in the international community, states may be able to claim a legal interest in violations of human rights committed by foreign governments against their own nationals.

This Note provides a critical analysis of the ILC's treatment of this legal interest in the Articles. It focuses on two decisions that the ILC made during the drafting process: 1) the decision to use a narrow definition of "injured state," excluding states that suffer a breach of an obligation owed to them solely as members of the international community;[5] and 2) the decision to replace a provision recognizing and regulating the practice of collective countermeasures with a savings clause that provides no guidance for the use of collective countermeasures, leaving the legality of such actions uncertain.[6]

This Note argues that, although the ILC was correct to weigh the risks of allowing states broad discretion to act in the name of collective interests, the development of the law of state responsibility would have been better served had the ILC taken a more progressive approach to recognizing the interests of the international community in enforcing state responsibility. First, the ILC should have more broadly defined "injured state" to include states that suffer a breach of an obligation owed to them solely as members of the international community, but should also have limited the types of actions such states would be permitted to take in response to a breach. Second, the ILC should have adopted Special Rapporteur James Crawford's proposal that the Articles specifically allow and regulate the practice of collective countermeasures in response to a gross and well-attested breach of certain fundamental obligations.[7] This approach strikes a better balance between the potential value of collective countermeasures as a tool to help those without direct access to the international legal system and the risk that collective countermeasures will be abused by powerful states seeking to further their own interests.

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[4] *See infra* Part I.B.

[5] *See Articles*, *supra* note 2, art. 42, at 11–12.

[6] *Id.* art. 54, at 15.

[7] *See infra* notes 130–33 and accompanying text.

Part I argues that concepts of collective interest legitimize the use of the doctrine of state responsibility to address the current gap between recognition and enforcement of human rights. It describes the difficulty involved in redressing individual human-rights violations in an international system premised on the rights of states and explains the concept of collective interest, which may help to bridge the enforcement gap.

Part II examines arguments the ILC considered in determining the proper legal consequences of a breach of an obligation owed to the international community as a whole in light of these risks. Specifically, Part II considers the arguments against categorizing states owed an obligation solely as members of the international community as "injured" when such an obligation is breached. Part II also outlines the dangers of allowing states to take countermeasures solely on behalf of a collective interest of the international community.

Part III provides a critical analysis of the way the ILC redrafted the Articles in response to the arguments outlined in Part II and argues for an alternative approach that better balances the relevant benefits and risks of action taken by "non-injured" states on behalf of a collective interest. Part III.A contends that, although states suffering purely legal injury as a result of the breach of a collective interest should be distinguished from states injured directly as a result of a breach, this does not require categorizing the former states as "non-injured." Instead, such states should be considered a subset of injured states, with appropriate limitations on the actions they may take in response to a breach. Part III.B argues that a provision explicitly allowing and regulating the use of collective countermeasures in response to a gross and well-attested breach of certain fundamental obligations should have been included in the Articles in lieu of a savings clause.

I

COLLECTIVE INTEREST AS A MEANS OF ENSURING HUMAN-RIGHTS ACCOUNTABILITY THROUGH STATE RESPONSIBILITY

This Part describes the significant obstacles to holding a state accountable for human-rights violations. It then shows how concepts rooted in the idea of collective interest can allow states to use state-responsibility doctrine to overcome some of these obstacles. According to concepts of collective interest, State B can assert legal injury if State A violates the human rights of State A's own nationals. By asserting legal injury, State B can use the legal regime of state

responsibility to demand that State A comply with its obligation to respect human rights and to seek reparations on behalf of the victims. This Part also describes two possible routes by which State B might take action against State A under the law of state responsibility: First, through the invocation of responsibility; or, if that is not a feasible option,[8] by taking collective countermeasures to induce State A to comply with its obligations to the international community.

A. The Dilemma of Human-Rights Enforcement in a System of State Primacy

The international legal system faces a formidable challenge in reconciling traditional international law with the recognition of international human rights. Historically, international law has been a law of nations—a state-centric system that did not recognize the individual as a "subject" of international law, possessing rights and legal standing.[9] The positivist view, which dominated international law in the nineteenth century and much of the twentieth century, held that international law delineated only the rights and duties of states, which attained sovereignty and became subjects of international law by gaining the recognition of existing states.[10] The legal relationship between states and individuals under traditional international law has been analogized to that of humans and animals under modern municipal law: Much like animals, which have no legal rights, but may attain the benefits of the law through their owners or the state, individuals have no rights under international law, but can obtain benefits from laws regulating the rights of states.[11] Because individuals lack rights under international law, an individual can attain legal benefits only to the extent that such benefits accrue when her state of nationality asserts its own rights.[12] For example, if State A enslaves a national of State B, the national, as an individual, has no claim under international law against State A. State B, however, would have a

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[8] *See infra* notes 49–54 and accompanying text.

[9] *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 39, 48–49, 51 (1994) (describing traditional view, in which individuals are "objects," rather than "subjects," of international law, while rights are owed and legal standing is given only to states). *See generally* P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151 (1992) (describing increasing recognition of individuals as subjects of international law).

[10] *See* Menon, *supra* note 9, at 153.

[11] *See, e.g.*, PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 91 (7th rev. ed. 1997). For example, a dog that is harmed by a negligent driver has no rights under municipal law, but its owner can pursue a claim in court based on her rights as the dog's owner.

[12] *See* Menon, *supra* note 9, at 155–56.

claim under international law that it could pursue at its discretion, based on an obligation State A owes State B regarding State A's treatment of citizens of State B.

The recognition of international human rights poses a substantial challenge to the traditional view. Human rights create obligations that are owed to individuals, rather than to states, making individuals subjects under international law.[13] The specific content of these rights and the extent to which they confer legal personality upon individuals is still the subject of much debate.[14] It is clear, however, that the widespread adoption of resolutions and conventions on human rights and the development of customary international law recognizing these rights have undermined the once unquestioned rule that only states may assert rights under international law.[15] Individuals, in some instances, now may complain directly to international institutions about human-rights violations rather than waiting for states to assert a claim on their behalf.[16] This may be done in regional bodies such as the European Court of Human Rights[17] as well as under international agreements such as the Optional Protocol to the International Covenant on Civil and Political Rights.[18]

Although the role of individuals in international law is growing, the limited legal standing granted to individuals has not changed the fact that states remain the overwhelmingly dominant actors in international law. Most of the new regional and international bodies that have emerged to enforce human rights have jurisdiction only over individual perpetators of human-rights violations, leaving little

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[13] *See* HIGGINS, *supra* note 9, at 95.

[14] *See generally* James E. Hickey, Jr., *The Source of International Legal Personality in the Twenty First Century*, 2 HOFSTRA L. & POL'Y SYMP. 1 (1997) (describing emerging views about source of modern legal personality of nonstate entities under international law).

[15] *See generally* MENNO T. KAMMINGA, INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS (1992) (exploring how international enforcement of human rights affects balance between states' rights to national sovereignty and human rights).

[16] *See* Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 809–11 (2002) (discussing role of nonstate actors in invocation of state responsibility).

[17] *See* Weiss, *supra* note 16 at 810–11 (noting importance of individual actors in invocation of state responsibility at regional level). In 2002, the European Court of Human Rights received 30,828 individual complaints claiming violations of the European Convention on Human Rights. EUR. CT. OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 2002, at 31, http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf.

[18] Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 1, 999 U.N.T.S. 302, 302 [hereinafter ICCPR Optional Protocol]. For a discussion of the national and international instruments under which individuals may bring human-rights complaints pursuant to such agreements, see Weiss, *supra* note 16, at 809–11.

recourse for those whose rights have been violated by a state. The International Criminal Court, for example, is an important vehicle for creating accountability for international crimes, but will only hear complaints brought against individual perpetrators.[19] In the few international bodies in which individuals can bring complaints against a state, that power requires the consent of the state against which the complaint is lodged. Four United Nations agreements give individuals or groups of individuals the right to complain about violations of protected rights by state actors: the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR);[20] the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[21] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture);[22] and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[23] States may sign the first two agreements without signing the optional protocols that would subject them to complaints.[24] The complaint procedures of the latter two conventions are similarly optional.[25]

The discretion given to states to decide whether they want to be held accountable for noncompliance with human-rights obligations can result in disparate outcomes for individuals theoretically protected by the same convention. For example, both South Africa and China have signed the ICCPR and are therefore bound by international law to respect certain civil and political rights of individuals under their jurisdiction. Of the two states, only South Africa is a party to the First Optional Protocol,[26] subjecting it to the complaints proce-

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[19] Rome Statute of the International Criminal Court, July 17, 1998, art. 1, 37 I.L.M. 1002, 1003.

[20] ICCPR Optional Protocol, *supra* note 18, art. 1, at 302.

[21] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Oct. 6, 1999, art. 2, 39 I.L.M. 281, 282 [hereinafter CEDAW Optional Protocol].

[22] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 13, 1465 U.N.T.S. 85, 116, 23 I.L.M. 1027, 1030 [hereinafter Convention Against Torture].

[23] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 14(1), 660 U.N.T.S. 195, 230, 5 I.L.M. 350, 361 [hereinafter ICERD].

[24] *Cf.* CEDAW Optional Protocol, *supra* note 21, art. 15, at 285; ICCPR Optional Protocol, *supra* note 18, art. 8, at 303.

[25] Convention Against Torture, *supra* note 22, art. 22, 1465 U.N.T.S at 120, 23 I.L.M. at 1035; ICERD, *supra* note 23, art. 14(1), 660 U.N.T.S. at 230, 5 I.L.M. at 361.

[26] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 3, 10 (2004), http://www.unhchr.ch/pdf/report.pdf.

dure. While an individual whose rights under the ICCPR are violated by the South African government may make a written representation to the Human Rights Committee, an individual whose rights under the ICCPR are violated by the Chinese government has no such recourse available to him. The practical result is that protection of his rights under the ICCPR can be accorded or withheld at his government's discretion without any opportunity for a direct appeal to an international body. Therefore, despite a proliferation of international human rights, constraints like these have resulted in an absence of enforcement methods.[27] The utility of these rights is questionable without the means to defend them.[28]

The Articles are limited in scope to claims arising between states,[29] and, as a result, also encounter enforcement problems. Theoretically, it may still be possible to provide remedies to individuals and groups through the states that represent their interests. In practice, however, this approach is less likely to succeed when human-rights breaches are perpetrated by the victim's state of nationality, the only state traditionally permitted to represent his interests.[30] In those situations, the decision whether to pursue a remedy is left to the whim of the tormenter. The Articles sought to address this problem by recognizing that many human-rights obligations are an expression of collective interest, and that under international law there is a category of obligations that are owed to individuals that create corresponding obligations to the international community.

B. Collective Interest in the Law of State Responsibility

The concept of community interest has its roots in early writings on international law,[31] and its modern application is inherent in two

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[27] *See* HIGGINS, *supra* note 9, at 52 ("[I]t is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself." (quoting Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal, 1933 P.C.I.J. (ser. A/B) No. 61, at 27 (Dec. 15))).

[28] *See* HIGGINS, *supra* note 9, at 51–53 (arguing against distinction between possession of rights and ability to assert them).

[29] The Articles only acknowledge that states may owe obligations to non-state actors in a savings clause which provides that the Articles do not prejudice these rights. *See Articles*, *supra* note 2, art. 33, at 9; *see also* KAMMINGA, *supra* note 15, at 128 (describing how "compartmentalization" of international law has caused ILC work on state responsibility to be largely uninformed by UN human-rights practice).

[30] For a critique of this "nationality-of-claims" rule, see HIGGINS, *supra* note 9, at 51–55.

[31] As early as 1758, Emmerich de Vattel wrote that certain laws among states were so necessary to world order that any state had a right to enforce them, even by force:

> The laws of natural society are of such importance to the safety of all states, that, if the custom once prevailed of trampling them under foot, no nation could flatter herself with the hope of preserving her national existence, and

concepts: *jus cogens* and obligations *erga omnes*. *Jus cogens* are peremptory norms of international law. These "higher norms"[32] impose obligations that cannot be compromised, such as the prohibitions on the use of force, genocide, slavery, racial discrimination, and torture.[33] *Jus cogens* are intended to protect the fundamental interests of the international community.[34] Article 53 of the Vienna Convention on the Law of Treaties, which codifies the *jus cogens* principle, voids any treaty that conflicts with a peremptory norm.[35] The Vienna Convention defines a peremptory norm as a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[36] The requirement that *jus cogens* must reflect the will of the "international community of States as a whole" distinguishes *jus cogens* as norms so fundamental to the community interest that no state or group of states may choose to override them.[37]

One year after the acknowledgement of the provisions of *jus cogens* in the Vienna Convention, the International Court of Justice (ICJ) gave the concept of community interest even stronger support. In its famous *obiter dictum* in the *Barcelona Traction* case, the ICJ discussed obligations *erga omnes*:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. . . . [A]ll States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[38]

> enjoying domestic tranquility . . . . All nations have therefore a right to resort to forcible means for the purpose of repressing any one particular nation who openly violates the laws of the society which Nature has established between them, or who directly attacks the welfare and nature of that society.

EMMERICH DE VATTEL, THE LAW OF NATIONS 61 (Joseph Chitty trans., T. & J.W. Johnson, Law Booksellers 1852) (1758).

[32] Antti Korkeakivi, *Consequences of "Higher" International Law: Evaluating Crimes of State and* Erga Omnes, 2 J. INT'L LEGAL STUD. 81, 82 (1996).

[33] *See* MALANCZUK, *supra* note 11, at 57–58 (discussing criteria by which rules are recognized as "peremptory norms" or *jus cogens*).

[34] *See* ANDRÉ DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 44–45 (1996) (discussing *jus cogens*).

[35] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344.

[36] *Id.*

[37] *See* DE HOOGH, *supra* note 34, at 46 (discussing importance of international acceptance and recognition of peremptory norms).

[38] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, 1970 I.C.J. 3, 32 (Feb. 5).

The Court gave a nonexhaustive list of examples of obligations *erga omnes*, including the prohibition of genocide as well as obligations grounded in "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[39]

Obligations *erga omnes* and *jus cogens* have been the subject of much discussion since the *Barcelona Traction* opinion,[40] particularly regarding the differences between the two concepts.[41] Two important distinctions must be made. First, while *jus cogens* are defined by the fundamental nature of the obligations, obligations *erga omnes* are defined by those to whom the obligations are owed. Second, not all obligations *erga omnes* are peremptory in nature; many laws of the sea are owed to all states, but are not considered unconditional in character.[42] Despite their differences, both categories involve a group of obligations that are the concern of all states.[43]

The concept of higher obligations owed to the international community, such as *jus cogens* and obligations *erga omnes*, has eroded the traditional notion of bilateralism in state responsibility.[44] A breach of an obligation—particularly a nonderogable obligation—owed to the international community is a breach of an obligation to every member of that community. The state that committed the wrongful act owes to the international community secondary obligations of cessation, guar-

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[39] *Id.*

[40] *See, e.g.*, KAMMINGA, *supra* note 15, at 156–63; Bruno Simma, *Bilateralism and Community Interest in the Law of State Responsibility*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 821, 824–25 (Yoram Dinstein & Mala Tabory eds., 1989); Korkeakivi, *supra* note 32, at 96–101; Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 4 ILSA J. INT'L & COMP. L. 315, 316–19 (1998); Alfred P. Rubin, Actio Popularis, Jus Cogens *and Offenses* Erga Omnes, 35 NEW ENG. L. REV. 265, 277–80 (2001). *See generally* James R. Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303 (2001).

[41] *See, e.g.*, James Crawford, *Fourth Report on State Responsibility*, U.N. GAOR Int'l L. Comm'n, 53d Sess., ¶ 49, U.N. Doc. A/CN.4/517 (2001) [hereinafter *Fourth Report*] (discussing relationship between obligations *erga omnes* and peremptory norms); Korkeakivi, *supra* note 32, at 81 ("[*Erga omnes* and *jus cogens*] are interrelated [concepts], but perhaps the only characteristic that they . . . indisputably share is that their scope is equally difficult to define.").

[42] Crawford, *supra* note 40, at 314.

[43] Simma, *supra* note 40, at 825 ("[*J*]*us cogens* and obligations *erga omnes* constitute but two sides of one and the same coin, namely, that of certain rules of international law respect for which is, in the words of the [*Barcelona Traction*] Court, 'the concern of all states.'").

[44] *See* B. Graefrath, *On the Reaction of the "International Community as a Whole": A Perspective of Survival*, *in* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, 253, 253–55 (Joseph H.H. Weiler et al. eds., 1988) [hereinafter INTERNATIONAL CRIMES OF STATE] (describing current shift from bilateral understanding of state responsibility to more general understanding that involves community reactions). *See generally* Simma, *supra* note 40.

antees and assurances of nonrepetition, and appropriate reparations, and each state is in the position to demand those secondary obligations be fulfilled.

The existence of these higher obligations has important implications for the consequences of a human-rights violation committed by a state against its own people. For example, if State A enacts a system of apartheid against its own nationals, it violates their human rights as well as its distinct obligation not to engage in such practices, an obligation owed to all states.[45] The breach of an obligation triggers secondary obligations under the law of state responsibility, and states may take formal measures to ensure that these secondary obligations are fulfilled. The use of formal measures to ensure a state's compliance with its obligations is called "invocation of responsibility."[46] Invocation of responsibility can take many forms, such as the commencement of proceedings before an international court or tribunal.[47]

Legal precedent supports the right of a state to invoke the responsibility of another state in response to a breach of *erga omnes* violations. Since *Barcelona Traction*, the ICJ has reaffirmed the right of a state not directly injured by the target state's action to invoke responsibility against that target state on the basis of its breach of an obligation *erga omnes*. In the *East Timor* case, the ICJ acknowledged Portugal's right to bring a claim on behalf of the people of East Timor regarding a breach of their right to self-determination because the right to self-determination created an obligation *erga omnes*.[48]

As mentioned above, however, invocation of responsibility may be ineffective because it frequently requires the participation or consent of the violating state. For example, although states may choose to invoke responsibility by bringing claims before a court such as the ICJ, the violating state first must consent to the jurisdiction of the court. Even if jurisdiction exists, it is often difficult, if not impossible, to enforce the judgment.[49]

In these circumstances, it may be appropriate for a state to resort to the use of countermeasures. A countermeasure is the nonperformance of an obligation by one state in order to induce another state to

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[45] *Cf.* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, 1970 I.C.J. 3, 32 (Feb. 5).

[46] *See Commentaries*, *supra* note 2, at 294.

[47] *Id.*

[48] East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30) ("Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.").

[49] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 227–49 (1991) (describing obstacles to enforcement under international law).

cease a wrongful act and provide reparation.[50] There are several risks, however, inherent in allowing states to use countermeasures to act on behalf of individuals whose rights are being violated by their own state. The use of countermeasures is a product of the shortcomings inherent in a decentralized international legal system.[51] Without a hierarchical enforcement structure, measures of self-help may be the only means to ensure the fulfillment of international obligations. This is partly due to various limitations on the effectiveness of invocation of responsibility as a means of enforcement. If taken within certain bounds,[52] countermeasures generally are acknowledged as a legitimate form of self-help.[53] The ICJ accepted the concept of countermeasures and outlined various guidelines for their practice in its *Gabcíkovo-Nagymaros Project* decision.[54]

Collective countermeasures are countermeasures taken specifically in response to a breach of an obligation owed to the international community.[55] The word "collective" does not imply that they must be taken by multiple states in concert. Instead, it refers to the fact that they are taken on behalf of a *collective* interest of the community. Collective countermeasures are a relatively new legal concept, the legal status of which is still uncertain. Many states, however,

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[50] *Id.* at 184–86 (elaborating on the definition of countermeasures and describing different types of countermeasures); Denis Alland, *International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility*, *in* UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 143, 147 (Marina Spinedi & Bruno Simma eds., 1987) (suggesting boycotts, embargoes, port closures, confiscation of goods, and suspension of treaties in force as some examples of countermeasures).

[51] *See* Bruno Simma, *Counter-measures and Dispute Settlement: A Plea for a Different Balance*, 5 EUR. J. INT'L L. 102, 102 (1994) (describing countermeasures as "a fact of life, indeed a necessity, in an international system still essentially devoid of compulsory third-party settlement of disputes and central law enforcement").

[52] The Articles subject countermeasures to several restrictions. For example, a state may only take countermeasures that are commensurate with the gravity of the original breach and that allow the target state to comply with its original obligation. *See Articles*, *supra* note 2, arts. 49–53, at 13–15.

[53] *See* SCHACHTER, *supra* note 49, at 185–86 (describing countermeasures as generally legally permissible as long as they do not involve prohibited use of force).

[54] Gabcíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25). The ICJ indicated that a legitimate countermeasure must: (1) be a response to a "previous international wrongful act" of another state and be directed at that state, (2) follow a prior request that the breaching state "discontinue its wrongful conduct or . . . make reparation for it," (3) be proportionate to the injury suffered as a result of the wrongful act, and (4) be reversible (in order to induce compliance with international obligations). *Id.* at 55–57.

[55] *See* James Crawford, *Third Report on State Responsibility*, U.N. GAOR Int'l L. Comm'n, 52d Sess., addendum, ¶ 386, U.N. Doc. A/CN.4/507/Add.4 (2000) [hereinafter *Third Report*, addendum 4] (explaining that collective element does not indicate that states must act in concert, but that state taking countermeasure is asserting right to respond in public interest, though not individually injured).

genuinely accept the normative principles behind collective countermeasures, reasoning that obligations to the community interest otherwise would lack teeth.[56] Indeed, several states supported the inclusion of collective countermeasures in the Articles.[57] In a situation in which a state violates an obligation and ignores subsequent demands to cease its wrongful act, collective countermeasures may provide an alternative to a series of fruitless requests for fulfillment of an obligation.[58]

In the context of human-rights obligations, collective countermeasures can help to reconcile the need to recognize human rights and community obligations with the lack of enforcement and deterrence that plagues the international community.[59] Often states refuse to accept international jurisdiction over matters they consider to be domestic affairs, even though these matters may involve serious breaches of international obligations. Lack of respect for international obligations and human rights is unlikely to correlate with deference to international judicial authority. Therefore, violating states may be particularly unlikely to submit themselves to the jurisdiction of international courts.[60]

So, when invocation of responsibility is impossible or ineffective, collective countermeasures may allow states to compel other states to

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[56] *See, e.g.*, *State Responsibility: Comments and Observations Received from Governments*, U.N. GAOR Int'l L. Comm'n, 53d Sess., at 54, U.N. Doc. A/CN.4/515 (2001) [hereinafter *2001 Comments*] (presenting Spain's comment that whenever "serious breach" under article 41 occurs, all states should be able to take countermeasures); *id.* at 87 (presenting suggestion from Netherlands that if obligation to international community is breached, state that has been directly injured should not be allowed to frustrate right of other states to take countermeasures).

[57] *See id.* at 87–88 (presenting statements of Netherlands and Austria supporting inclusion of collective countermeasures); *State Responsibility: Comments and Observations Received from Governments*, U.N. GAOR Int'l L. Comm'n, 53d Sess., addendum, at 18–19, U.N. Doc. A/CN.4/515/Add.2 (2001) [hereinafter *2001 Comments*, addendum 2] (including Poland's comments indicating support for inclusion of collective countermeasures subject to restrictions).

[58] *See* Marina Spinedi, *International Crimes of State: The Legislative History*, *in* INTERNATIONAL CRIMES OF STATE, *supra* note 44, at 7, 123 ("Can one maintain that infringement of their subjective right only entails the new right to require again the same conduct?").

[59] J. Sette-Camara, *Some Short Remarks: Consequences and Terminology*, *in* INTERNATIONAL CRIMES OF STATE, *supra* note 44, at 263, 263–64 (expressing opinion that denunciation alone is insufficient response to international crime).

[60] In addition, some states are reluctant to invoke responsibility against regimes that they do not wish to recognize for fear of conferring legitimacy on the government. *See* KAMMINGA, *supra* note 15, at 147 (describing Australia's reluctance to file ICJ case against Coalition Government of Democratic Kampuchea (CGDK) in response to Khmer Rouge atrocities for fear that this action would constitute recognition of CGDK (citing H. Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 136 (1989))).

comply with legal obligations or induce them to agree to a dispute settlement procedure.[61] Economic sanctions are an example of countermeasures that have been used successfully in the past to enforce international human rights. Some have lauded certain economic sanctions imposed by the United States for effectively promoting human rights in Brazil from 1977 to 1984, in Uganda under Idi Amin, and in Nicaragua during the rule of Samoza.[62] The threat of U.S. sanctions also may have helped prompt the Burmese government's release of pro-democracy leader Aung San Suu Kyi from her six-year house arrest and may have encouraged Chile's right wing leadership to allow criminal prosecution of some members of the Pinochet regime.[63] In 1986 the U.S. Comprehensive Anti-Apartheid Act suspended South African Airlines's landing rights on U.S. territory[64]—in violation of the 1947 U.S.–South African aviation agreement—in order to encourage the South African government to "bring an end to apartheid . . . [and establish] a non-racial democracy."[65] Collective countermeasures are not only an important method for enforcement of human rights, but also may help to develop international human-rights norms by bringing public attention to human rights and making them part of every state's involvement in the international arena.[66]

Through concepts such as *jus cogens* and obligations *erga omnes*, individuals who otherwise are voiceless and powerless to defend their rights find a voice in the international community. There should be limitations, however, on a state's power to act on the basis of collective interest. The next Part outlines some potential dangers of providing broad mandates for states to act based on obligations owed to the international community.

II
POTENTIAL DANGERS OF THE PROGRESSIVE DEVELOPMENT OF THE COLLECTIVE INTEREST

In drafting the Articles, the ILC had to delineate the consequences of a state's breach of the collective interest. This Part out-

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[61] *But see* James Crawford, *Second Report on State Responsibility*, U.N. GAOR Int'l L. Comm'n, 51st Sess., addendum, ¶¶ 384–387, U.N. Doc. A/CN.4/498/Add.4 (1999) [hereinafter *Second Report*, addendum 4] (discussing undesirability of use of countermeasures to pressure target state into arbitration).

[62] *See* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 5 (2001).

[63] *See id.* at 5–6.

[64] Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 § 306, 100 Stat. 1086, 1100–01 (repealed 1993).

[65] *Id.* § 101(a), 100 Stat. at 1087.

[66] *See, e.g.*, Cleveland, *supra* note 62, at 6–7.

lines the compelling arguments put forth to the ILC advocating a cautious approach to providing states the ability to take action on behalf of interests of the international community through the law of state responsibility.

Throughout the drafting process, the ILC conferred with governments to solicit their feedback on the Articles. The ILC interacts directly with governments through the Sixth Committee, the legal committee of the General Assembly. Various provisions of the ILC statute allow governments an opportunity to provide feedback at every stage of the ILC's work.[67] Under articles 16(h) and 16(i), for example, governments are invited to submit comments on any published ILC draft, and the ILC must take these comments into consideration in preparing its final draft.[68] Additional input is received from the Sixth Committee, which holds sessions to discuss the ILC's annual report to the General Assembly.[69]

During the course of drafting the Articles, the definition of "injured state" and limitations on countermeasures were the source of much commentary and debate.[70] As Part I illustrates, the recognition of collective interests in certain human-rights obligations can provide a valuable tool by which states may hold each other accountable for human-rights violations. There are dangers, however, in providing states with broad powers under state responsibility to enforce these interests. To recognize every state as equally injured by a breach of a human-rights obligation, though some states are "injured" solely due to their membership in the international community and are otherwise unharmed by the breach, may be unnecessary and perhaps even counterproductive to the goal of protecting the victims of human-rights abuses. For similar reasons, it may be dangerous to grant states the right to take countermeasures in response to any human-rights violation.

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[67] Article 16(c) requires the ILC to circulate a questionnaire to governments at the outset of its work, inviting them to submit information relevant to its plan. *See* Statute of the International Law Commission, *supra* note 1, art. 16(c), at 107. Article 16(g) requires the publication of all drafts along with explanations, supporting materials, and information supplied by governments in response to the questionnaire required by article 16(c). *See id.* art. 16(g), at 107–08.

[68] *See id.* arts. 16(h)–(i), at 108.

[69] WORK OF THE ILC, *supra* note 1, at 21. In addition, after the ILC has submitted a final draft to the General Assembly on any topic, the General Assembly also requests comments from governments on that draft. The Sixth Committee reviews these comments before the topic is taken up either by the General Assembly Sixth Committee or as part of a diplomatic conference called specifically to draft a convention on this topic. *Id.* at 21–22.

[70] *See supra* Part I.

A. Distinguishing Between States Owed Obligations Solely as Members of the International Community and "Injured States"

In its 1996 draft of the Articles, the ILC defined "injured state" very broadly,[71] generating a wave of protest from many states. Under this version, any state could claim "injured state" status and subsequently invoke the responsibility of any state that violated a right "created or . . . established for the protection of human rights and fundamental freedoms."[72] The terms of this draft allowed all injured states to take countermeasures.[73] Therefore, *any* state was permitted to use countermeasures against another state that had breached a human-rights obligation. This draft generated a great deal of controversy because it created the potential for states to face significant international consequences for matters that many considered to be purely domestic.

Several commentators, including both states and legal scholars, reacted by noting the significant legal and practical problems such a broad definition posed. In their comments submitted to the ILC, some states argued that the broad definition in this draft could lead to "absurd results" as a result of "a competitive or cumulative competence of States to invoke legal consequences of a violation."[74] Special Rapporteur Crawford agreed that the 1996 definition was so expansive that its effect was "to translate human rights into States' rights."[75]

A broad definition of "injured state" also risks blurring or eliminating the distinction between states that are directly harmed by a violation and states that merely have a legal interest in a violation as members of the international community. Many legal scholars argue that direct victims and states that have merely suffered the breach of

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[71] Article 40(1) of the 1996 draft stated that an "injured state" was one that had suffered infringement of one of its rights due to the actions of another state, if these actions constituted an internationally wrongful act. *See Text of the Draft Articles Provisionally Adopted by the Commission on First Reading, in Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, art. 40(1), at 140, UN Doc. A/51/10 (1996) [hereinafter *First Reading*].

[72] *Id.* art. 40(2), at 140. To claim "injured state" status, it also was necessary for the right that was violated to have arisen from a multilateral treaty or a rule of customary law that bound the state claiming injury. *Id.*

[73] *Id.* art. 47, at 144.

[74] *See State Responsibility: Comments and Observations Received from Governments*, U.N. GAOR Int'l L. Comm'n, 50th Sess., at 96, U.N. Doc. A/CN.4/488 (1998) [hereinafter *1998 Comments*] (including Austria's objections). The United States argued that article 40 would "lead to unacceptable and over-broad conceptions of injury"; the United Kingdom and France likewise advocated a narrower definition. *See id.* at 97–99.

[75] James Crawford, *Third Report on State Responsibility*, U.N. GAOR Int'l L. Comm'n, 52d Sess., ¶ 87, U.N. Doc. A/CN.4/507 (2000) [hereinafter *Third Report*].

an obligation owed to the international community in general comprise two distinct groups, with different sets of rights.[76] The states in the former category have been injured directly, but those in the latter category have suffered no tangible harm. In the case of human-rights obligations, such states are acting both for the benefit of the international community and for the victims of the violation. The interests of the victims, however, should be considered foremost, as they suffer the direct harm of the violation. A broad definition, such as the one included in the 1996 draft, does not adequately recognize the primacy of the interests of those directly harmed by the breach, such as the victims of genocide or apartheid.[77] This concern was voiced by Special Rapporteur Crawford, who advocated a narrower definition that distinguished between states with different interests in an obligation.[78]

Another danger that a broad definition poses is the possibility that states may ask for reparations when they have suffered no real harm. If State A violates the rights of its own nationals, breaching an obligation it owes to the international community as a whole, is it therefore required to make reparations to all other states? If State B, as a member of the international community, is considered injured by State A's actions, then it may invoke responsibility on its own behalf without considering the interests of the nationals of State A whose rights were violated. This might lead to a situation in which several states could invoke the responsibility of State A and demand reparations, with no reparations being provided to the actual victims of the human-rights violation.

There is therefore a strong argument for requiring that a state suffer material or moral damage to be considered "injured" as the result of a breach.[79] A definition of "injured state" that included this limitation would distinguish those states suffering a purely legal injury from those suffering actual damage. This does not mean, however,

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[76] *See, e.g.*, W. Riphagen, *Crimes of State: The Concept and Response*, *in* INTERNATIONAL CRIMES OF STATE, *supra* note 44, at 258, 259–60 (noting requirement that state must suffer damage before it is entitled to reparation); Ian Sinclair, *State Responsibility and the Concept of Crimes of States*, *in* INTERNATIONAL CRIMES OF STATE, *supra* note 44, at 223, 225; M. Spinedi, *Convergences and Divergencies on the Legal Consequences of International Crimes of States: With Whom Should Lie the Right of Response?*, *in* INTERNATIONAL CRIMES OF STATE, *supra* note 44, at 244, 244–49; Spinedi, *supra* note 58, at 75–76, 94–98.

[77] *See Third Report*, *supra* note 75, ¶ 109.

[78] *See id.* ¶¶ 108–116.

[79] *See Articles*, *supra* note 2, art. 31, at 9 ("Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."); *Fourth Report*, *supra* note 41, ¶¶ 28, 33 (noting general consensus that damage is not necessary for wrongful act, and arguing that definition of injury should require either material or moral damage).

that states suffering only legal injury are powerless under the laws of state responsibility. As outlined in Part III, these states may be allowed to invoke responsibility and even to take countermeasures; they must do so, however, as non-injured states. This distinction prevents them from claiming reparations for themselves and putting their own interests ahead of the interests of those who have suffered true harm.

B. The Argument Against Collective Countermeasures

While countermeasures may promote respect for justice, they also may be used to sidestep it. Countermeasures are especially prone to abuse, particularly by powerful states.[80] Unlike most methods of invocation, there are few procedural controls to guide the use of countermeasures. There is therefore little or no due process protection for target states. Rather than bring the issue before a court, a state can decide unilaterally whether an obligation has been breached and a countermeasure may be taken. A state's determination of the occurrence and severity of a breach may be questionable,[81] potentially leading to to unjustified or disproportionate countermeasures.

There are few ways to guard against the misuse of countermeasures. If countermeasures are used in an abusive fashion, the target state may invoke responsibility against the state taking the countermeasure, but there is no guarantee that the target state will be able to bring this claim before a forum with jurisdiction to settle the dispute. The target state may respond with countermeasures of its own, but such a situation risks escalating into a destructive cycle of retaliatory "counter-countermeasures."[82] To prevent such an outcome, the ILC considered a mandatory dispute settlement procedure to settle complaints against countermeasures.[83] This idea, however, ultimately was discarded as an unacceptable burden on the injured state taking the countermeasure.[84] The availability of countermeasures therefore

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[80] James Crawford, *Third Report on State Responsibility*, U.N. GAOR Int'l L. Comm'n, 52d Sess., addendum, ¶ 290, U.N. Doc. A/CN.4/507/Add.3 (2000) [hereinafter *Third Report*, addendum 3] (noting general concern among ILC members about "unbalanced nature of countermeasures, which favour only the most powerful States"); Simma, *supra* note 51, at 102 (describing countermeasures as means of self-help that "will always be prone to abuse on the part of the strong against the weak").

[81] *See* Oscar Schachter, *Dispute Settlement and Countermeasures in the International Law Commission*, 88 AM. J. INT'L L. 471, 472 & n.8 (1994) (commenting that disputes over application of countermeasures were almost certain to arise).

[82] *See id.* at 472–73.

[83] *See Second Report*, addendum 4, *supra* note 61, ¶¶ 384–387 (arguing against proposed compulsory arbitration).

[84] The mandatory dispute settlement idea was deemed unacceptable in part because it was likely to impose more burdens on injured states than on responsible states; such a

depends on a state's ability to take risky self-help measures. This, combined with the lack of monitoring by higher authority inherent in any self-help, grants powerful states a natural advantage in the practice.[85]

This advantage has created a rift in the international community about the legitimacy of countermeasures; a state's position on the issue tends to hinge on its power and international influence. In their comments to the ILC regarding the procedural restrictions on countermeasures provided for in early drafts of the Articles, many less powerful states such as Mexico and Argentina argued for stronger restrictions on countermeasures.[86] Argentina argued that while countermeasures might be tolerated under some circumstances, nations should not be guaranteed a right to their use.[87] In Sixth Committee debates, some governments argued that the danger inherent in countermeasures was so great as to require the elimination of all articles recognizing them.[88] Tanzania criticized the draft articles on countermeasures as "legitimiz[ing countermeasures], through the development of legal rules on State responsibility based on western practice."[89] Iran expressed concern that codifying law pertaining to countermeasures might "legitimize countermeasures as tools of hegemonistic actions by some Powers."[90] South Africa, speaking

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requirement would give target states a right to mandatory dispute settlement that states who believed themselves to be injured by the target state did not have. *See Second Report*, addendum 4, *supra* note 61, ¶ 387. For discussions of mandatory dispute resolution proposals, see Schachter, *supra* note 81, at 473–75. *See generally* Simma, *supra* note 51 (advocating against excessive procedural hurdles in use of countermeasures).

[85] *See Fourth Report*, *supra* note 41, ¶ 55 (noting "the concern felt by many, especially but by no means only the developing countries, as to the dangers of abuse").

[86] *State Responsibility: Comments and Observations Received from Governments*, U.N. GAOR Int'l L. Comm'n, 53d Sess., addendum, at 8–12, U.N. Doc. A/CN.4/515/Add.1 (2001) [hereinafter *2001 Comments*, addendum 1] (presenting Mexican government's position on countermeasures); *State Responsibility: Comments and Observations Received from Governments*, U.N. GAOR Int'l L. Comm'n, 50th Sess., addendum, at 6–8, U.N. Doc. A/CN.4/488/Add.1 (1998) [hereinafter *1998 Comments*, addendum 1] (presenting Argentinian position on countermeasures).

[87] *1998 Comments*, addendum 1, *supra* note 86 at 7 ("The taking of countermeasures should not be codified as a right normally protected by the international legal order, but as an act merely tolerated by the contemporary law of nations . . . .").

[88] U.N. GAOR 6th Comm., 55th Sess., 20th mtg. ¶¶ 37–38, U.N. Doc. A/C.6/55/SR.20 (2000) (including Mexico's argument that countermeasures should not be included in draft articles); U.N. GAOR 6th Comm., 55th Sess., 18th mtg. ¶¶ 60–62, U.N. Doc. A/C.6/55/SR.18 (2000) (including Cuba's objections to certain provisions on countermeasures); U.N. GAOR 6th Comm., 55th Sess., 15th mtg. ¶ 29, U.N. Doc. A/C.6/55/SR.15 (2000) (including India's objections to countermeasures generally).

[89] U.N. GAOR 6th Comm., 55th Sess., 14th mtg. ¶¶ 45–49, U.N. Doc. A/C.6/55/SR.14 (2000).

[90] U.N. GAOR 6th Comm., 51st Sess., 36th mtg. ¶ 74, U.N. Doc. A/C.6/51/SR.36 (1996).

on behalf of the twelve states comprising the Southern African Development Community, "emphasized that countermeasures were not always a satisfactory remedy between States of unequal size," but advocated the inclusion of binding international rules in the Articles as a way of creating conditions and limits on the use of countermeasures.[91]

By contrast, more powerful states have argued consistently for fewer restrictions. The United States, for example, has argued that restrictions on countermeasures could create an obstacle to the peaceful settlement of disputes.[92] The United Kingdom has taken a similar view.[93]

Collective countermeasures may be even more dangerous than ordinary countermeasures, particularly in the context of human-rights abuses. Decisions to pursue enforcement of human-rights obligations often reflect political rather than legal considerations, resulting in a double standard whereby some states are targeted for their human-rights abuses while similar abuses by other states are ignored.[94] Historically, powerful Western states have been most likely to invoke countermeasures on behalf of the international community in response to a human-rights violation. In the Third Report on State Responsibility[95] (Third Report), Special Rapporteur Crawford gave a history of the use of countermeasures by states not directly injured by the target state's violation and noted that the practice is dominated by Western states.[96] Allowing collective countermeasures runs the risk of encouraging worldwide "vigilantism" by the most powerful states.[97]

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[91] U.N. GAOR 6th Comm., 51st Sess., 34th mtg. ¶ 56, U.N. Doc. A/C.6/51/SR.34 (1996).

[92] *See 2001 Comments*, *supra* note 56, at 76; *see also* U.N. GAOR 6th Comm., 55th Sess., 18th mtg. ¶¶ 68–70, U.N. Doc. A/C.6/55/SR.18 (2000) (including argument by United States that certain restrictions on countermeasures should be lifted); U.N. GAOR 6th Comm., 51st Sess., 35th mtg. ¶ 4, U.N. Doc. A/C.6/51/SR.35 (1996) (including argument by United States that countermeasures "could be an important means to encourage international legality").

[93] *See 2001 Comments*, *supra* note 56, at 84–85 (arguing for fewer procedural obstacles to taking countermeasures); U.N. GAOR 6th Comm., 51st Sess., 34th mtg. ¶ 44, U.N. Doc. A/C.6/51/SR.34 (1996) (describing idea that further development of international law would eliminate need for countermeasures altogether as "dangerously utopian").

[94] *See, e.g.*, Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811, 811, 819–33 (1984); *see also* SCHACHTER, *supra* note 49, at 345–48 (describing political motivations behind selective enforcement of human-rights obligations).

[95] *See Third Report*, *supra* note 75.

[96] *See Third Report*, addendum 4, *supra* note 55, ¶¶ 391–400.

[97] *See* S. McCaffrey, Lex Lata *or the Continuum of State Responsibility*, *in* INTERNATIONAL CRIMES OF STATE, *supra* note 44, at 242, 244 (arguing that collective countermeasures might lead to state vigilantism and be "invitation to chaos").

Collective countermeasures were a major topic of debate among ILC members, among states submitting comments to the ILC, and in Sixth Committee debates. Mexico, for example, asserted that collective countermeasures are unsupported by international law and potentially could complicate relations among nations.[98] This latter argument was also mentioned in comments submitted by the United Kingdom.[99] Mexico also argued that the unilateral nature of countermeasures could lead to arbitrary and dangerous results because each state would be left to its own devices to decide how to apply them and when they would be terminated.[100]

Mexico's comments specifically noted the danger posed if every state were entitled to determine unilaterally whether a serious breach of an essential obligation to the international community as a whole had occurred, thus warranting countermeasures.[101] Such an independent determination could have catastrophic consequences.[102] This is particularly true when no state is directly injured by the target state's actions, such as a situation in which a state has perpetrated abuses against its own people, or denied a people their right to self-determination. When a state seeks to act on behalf of individuals or groups, there may be serious questions about whether that group's interests are represented appropriately.[103] It may be impossible for a state taking collective countermeasures to understand the interests of the victimized group if the group has no government or official representative to speak for it as a collective. Consequently, states may formulate uninformed interpretations of the extent and gravity of the breach. By basing their actions on these assessments, states risk taking measures that could increase political and economic instability

98 *2001 Comments*, addendum 1, *supra* note 86, at 9–12.

99 *2001 Comments*, *supra* note 56, at 89 (arguing that such countermeasures could destabilize treaty relations).

100 *2001 Comments*, addendum 1, *supra* note 86, at 10.

101 *Id.*

102 *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 432–33 (1983) ("[A]ny state, in the name of higher values as determined by itself, could appoint itself the avenger of the international community.").

103 *See Third Report*, addendum 4, *supra* note 55, ¶ 403 (noting lack of representative organs that could reliably convey victims' wishes to international community).

in the target state, making respect for human rights even less likely.[104] Such measures are likely to further injure victims.[105]

Once a state has determined that a serious breach of an obligation to the international community has occurred, it must next decide what type of countermeasures would address the breach appropriately. If the victims lack a representative voice, the state making this decision must resolve complex issues of proportionality and effectiveness without full understanding of the scope and effect of the breach and the potential consequences of countermeasures.[106] After concluding that countermeasures would be appropriate and determining how to apply them, the state must decide at what point the breaching state had complied with its obligations such that countermeasures should be ended. A state with little connection to the victims, however, may be unable to determine what form of reparation is called for, much less at what point that reparation had been fulfilled. Encouraging a state to take this role creates significant potential for interference in delicate domestic issues that might involve, for example, the redistribution of wealth, land, or political power along ethnic, religious, gender, or racial lines. While ordinary countermeasures are guided by an injured state's assessment of its own needs, collective countermeasures create the danger that an outside state interfering in these delicate issues with bias or innocent miscalculation may make a bad situation worse.

This danger would be compounded if several members of the international community simultaneously took countermeasures in

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[104] The U.S. embargo against Cuba, though not initially in response to human-rights abuses, has become a matter of free elections and human rights. This method of enforcing human rights in Cuba faces a great deal of criticism from those who believe that the Cuban people are its only victims, and that Castro's regime is more likely to be forced to comply with human rights if the embargo were ended and free trade ensued. Editorial, *No Cuba Libre, No Trade*, N.Y. TIMES, May 21, 2002, at A20.

[105] *See Third Report*, addendum 4, *supra* note 55, ¶ 403 (noting risk that third states acting without accurate information will exacerbate situation). There was much concern that countermeasures would only aggravate economic inequalities between states, particularly since they are most often taken by powerful states. *See 1998 Comments*, *supra* note 74, at 114–15 (including argument made by Denmark, on behalf of Nordic countries, that only powerful nations are likely to be capable of pursuing countermeasures); *1998 Comments*, addendum 1, *supra* note 86, at 7 (including argument by Argentina that ability to use countermeasures often depends upon resources at nation's disposal); *State Responsibility: Comments and Observations Received from Governments*, U.N. GAOR Int'l L. Comm'n, 50th Sess., addendum, at 6, U.N. Doc. A/CN.4/488/Add.3 (1998) [hereinafter *1998 Comments*, addendum 3] (including argument made by Singapore that ability to impose countermeasures and impact of countermeasures is dependent upon nations' economic and political positions).

[106] *See Third Report*, addendum 4, *supra* note 55, ¶ 403 (explaining dangers of non-injured states acting on their own conclusions about situations involving human-rights violations).

response to a breach of an obligation owed to the international community. Article 51 and the 2000 draft's article 54 required several states taking such countermeasures to act in concert to ensure proportionality. This type of joint action may require the assembly of complex and unmanageable coalitions. Even if states attempt to act in concert, the above decisions, which risk arbitrariness when taken by one state, risk outright catastrophe when taken by several.[107]

III
CRITICAL ANALYSIS OF THE ILC DRAFT ARTICLES AND PROPOSAL OF ALTERNATIVE APPROACHES

This Part provides a critical analysis of how the Articles address two questions: 1) whether states with a legal interest in an obligation due to their membership in the international community should be considered "injured" when that obligation is breached, and 2) what actions such states may take in response to that breach. Part I described the potential benefits for the enforcement of human rights of state action based on collective interest. Part II, however, illustrated the potential risks of granting "non-injured" states expansive powers to act on behalf of the international community. Throughout the drafting process, the ILC weighed these benefits and risks. Ultimately, the ILC made two changes to the Articles: 1) The definition of "injured state" was narrowed to exclude states owed an obligation solely as members of the international community; and 2) a previous acknowledgement of an expansive right to invoke responsibility and use countermeasures when human-rights obligations were breached was subsequently trimmed down to a much more restrictive acknowledgement of the right to invoke responsibility, taking no clear position on the issue of countermeasures.[108] This metamorphosis has led some commentators to term the project, "The Incredible Shrinking Articles."[109]

As described above, the 1996 draft of the Articles included a sweeping definition of "injured state" in which any state could claim injury as a result of any other state's violation of a human right.[110]

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[107] *2001 Comments*, addendum 1, *supra* note 86, at 11. As noted in the addendum:

> It is one thing for an individual State to conduct its diplomatic or trade relations as it sees fit and another very different thing for a group of States . . . to impose a situation of complete diplomatic ostracism or economic blockade on the target State with no chance for mitigation or exceptions . . . .

Id.

[108] *See infra* notes 112–15 and accompanying text.

[109] *See* Daniel Bodansky & John R. Crook, *The ILC's State Responsibility Articles, Introduction and Overview*, 96 AM. J. INT'L L. 773, 790 (2002).

[110] *See supra* Part II.A.

This definition raised significant concerns that states might opportunistically claim injury, seeking to further their own interests instead of the interests of the victims, or that states might intervene inappropriately in domestic affairs.[111] As a result, the subsequent 2000 draft divided states that had been defined as "injured" in the 1996 draft into two categories: 1) "injured states" and 2) non-injured states with a legal interest in the obligation.[112] States owed only an *erga omnes* obligation fell into the latter category.

Non-injured states possessing only a legal interest in the fulfillment of an obligation were allowed to take many of the same measures as injured states in response to a breach, but they were required to put the interests of the true victims first. These states could seek from the breaching state cessation of the wrongful act, assurances and guarantees of nonrepetition, and reparations on behalf "of the beneficiaries of the obligation breached."[113] They also were permitted to take countermeasures, but could do so only "in the interest of the beneficiaries of the obligation breached."[114] Thus, states owed an obligation solely as members of the international community still could invoke responsibility or take countermeasures to protect individuals whose rights were being violated by their own government. In doing so, however, the state was obligated to put the interests of the individual victims first.

In its final 2001 draft of the Articles, however, the ILC created an additional distinction between injured states and non-injured states having only a legal interest in an obligation. The ILC removed the article allowing and regulating the practice of countermeasures by non-injured states and, in its place, adopted article 54—a savings clause neither recognizing nor refuting the right of non-injured states to take countermeasures, and providing no guidelines for the practice, assuming its legality.[115]

The following two sections argue that, although the ILC was correct to consider the substantial dangers of allowing states to take

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[111] *See supra* Part II.A.

[112] *Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading*, U.N. GAOR Int'l L. Comm'n, 52d Sess., arts. 43, 49, at 12–14, U.N. Doc. A/CN.4/L.600 (2000).

[113] *Id.* art. 49(2)(b), at 13.

[114] *Id.* art. 54(2), at 15.

[115] *Articles*, *supra* note 2, art. 54, at 15. The savings clause states:

> This Chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Id.

action based on collective interest, alternatives were available that might have mitigated the danger of this practice. Part III.A argues that states owed obligations solely as members of the international community should be considered a subset of "injured state" instead of being excluded from the category altogether. Part III.B argues that, instead of inserting a savings clause on the subject of collective countermeasures, the ILC should have followed Special Rapporteur Crawford's suggestion to recognize and regulate collective countermeasures in situations where there has been a gross and well-documented breach of certain fundamental obligations.

A. The Injured State

The ILC narrowed the definition of "injured" state partly in recognition of the dangers associated with an overly broad definition. The definition in the 1996 draft would have allowed every state to invoke responsibility and take countermeasures in response to any human-rights violation. This would have conflated human rights with states' rights, allowing each state an unprecedented involvement in the domestic affairs of other states. Furthermore, as discussed in Part II, it actually might have frustrated the enforcement of human rights on behalf of victims without a voice in the international legal community. The Articles still allow these states to invoke the responsibility of a state that breaches such an obligation.[116] However, the state invoking responsibility is now subject to limitations to ensure that it places the interests of the direct victims of the violation ahead of its own interests.

The ILC's decision to narrow the definition of an injured state was based on an understanding that differently affected states should have different rights. States owed an obligation solely based on membership in the international community are affected only indirectly when this obligation is breached. Scholars commonly refer to states with a legal interest in the obligation that are nonetheless not the direct victims of the breach as "not directly injured states."[117]

It does not follow that merely because a state is affected differently by a breach that it is not injured. The term "not directly injured states" would imply some indirect injury. The Articles, however, categorize these states as "states other than . . . injured states"[118] implying that there is *no* injury when an *erga omnes* obligation is breached. Yet

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[116] *See Articles*, *supra* note 2, art. 48, at 13.

[117] *See, e.g.*, Spinedi, *supra* note 58, at 75–76, 94–98 (outlining various views about rights of "not directly injured" states).

[118] *See Articles*, *supra* note 2, art. 48, at 13.

the ILC has stated that "any breach of an international obligation towards another State involves some kind of 'injury' to that other State."[119] This implies that states owed any obligation, even merely as members of the international community, are injured when that obligation is broken.

It is debatable whether the differences between injury that causes harm and purely legal injury justify the complete exclusion of states in the latter category from the definition of "injured states." It seems more likely that the distinction is based on the ILC's conclusions about the appropriate rights and remedies for differently affected states rather than on the existence *vel non* of injury. Both categories of states are entitled to invoke responsibility. Those that have suffered no damage and are invoking responsibility based only on the breach of obligations owed to the entire community are permitted to ask for reparations only on behalf of those directly injured by the breach. It may be unnecessary to classify these states as "not injured" when the same effect could be obtained by recognizing them as a subtype of injured state, but one with limited remedies available to it.

The ILC instead could have distinguished a category of injured states that are injured solely as a result of a breach of an obligation established for the collective interest. A separate provision could then limit the consequences of invocation of responsibility by these states: The demands of injured states in this category could be limited to cessation, assurances and guarantees of nonrepetition, and appropriate reparations on behalf of parties that have suffered damages. Monetary damages clearly would be inappropriate for states in this category and could be prohibited explicitly in the Articles or their commentaries.

Similarly, these states could be limited in their ability to take countermeasures in response to the breach. If State A breached an *erga omnes* obligation and the breach directly injured State C, then the Articles could prohibit State B from taking countermeasures except on behalf of State C and with its consent. If there were no directly injured state—for example, if State A breached an *erga omnes* obligation by violating the rights of only its own citizens—then the Articles could prohibit State B from taking countermeasures except on behalf of those citizens of State A whose rights were violated. With regard to invocation of responsibility, these proposed rules

[119] *Report of the International Law Commission to the General Assembly*, U.N. GAOR Int'l L. Comm'n, 25th Sess., U.N. Doc. A/9010/REV.1 (1973), *reprinted in* [1973] 2 Y.B. Int'l L. Comm'n 161, 183, U.N. Doc. A/CN.4/SER.A/1973/Add.1.

would be substantively identical to those contained in the present Articles.

The approach described above and the approach of the Articles, however, have important conceptual differences. The former stresses the importance of the obligations that the international community has deemed fundamental and universal. By refusing to acknowledge states suffering a legal injury as "injured states," the Articles de-emphasize the injury to the international community that occurs when states breach obligations necessary to ensure the fundamental interests of the international community. The proposed approach retains this emphasis while still protecting against the risks outlined in Part II.

This approach is meant to encourage members of the international community to take obligations *erga omnes* seriously. There is symbolic importance in recognizing an "injury" to all members of the international community in that it may encourage states to take formal legal measures, either individually or collectively, on behalf of those who cannot aid themselves.[120] The proposed approach also would further a dialogue emphasizing the legal injury to the international community when human rights are violated. This dialogue could encourage states to take formal measures that protect the rights of marginalized groups and persons and deter future violations. At the very least, the recognition of the parallel injury to all states that results from these violations may increase the attention paid to the plight of marginalized groups and persons.

The rules proposed above diverge from those contained in the present Articles with regard to the issue of countermeasures. As discussed above, the savings clause in the current Articles leaves unanswered the question of whether a state suffering a breach of an obligation owed to it solely due to membership in the international community may take countermeasures, and, accordingly, provides no guidelines for their use. The following section argues that, regardless of whether states owed an obligation purely as members of the international community are considered injured, an article should have been inserted specifically allowing collective countermeasures, but limiting their use to situations in which there has been a gross and well-attested breach of an obligation *erga omnes*.

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[120] While this Note is concerned primarily with the situation in which a state violates the human rights of its own people, development in this direction would also have implications for many other situations in which the victims would otherwise be powerless under international law, such as violations of the rights of stateless peoples or individuals whose states are complicit in another state's violation of their rights.

B. Collective Countermeasures

The inclusion of a savings clause was a compromise that, like many compromises, may reflect what was possible rather than what was best. The ILC weighed the serious dangers associated with collective countermeasures against their potential for enforcing human rights and their nascent but developing place in state practice. Unable to reach an agreement on how it should comment on this developing practice and its potential benefits and pitfalls, the ILC settled for a savings clause so that the legal status of this practice might continue to develop. This Section argues, however, that by inviting states to develop the law on collective countermeasures through practice, the ILC increased the risk of the very abuse it hoped to avoid. An alternative approach, suggested by Special Rapporteur Crawford, would have limited collective countermeasures to the situations in which they were needed most and regulated the practice to encourage its development while guarding against its abuse.

Although there are several risks associated with allowing states to take collective countermeasures,[121] a blanket prohibition of collective countermeasures would be an overreaction to these concerns and might create inconsistencies within state responsibility law. The Articles provide all states with additional obligations in the event that any state commits a "serious breach . . . of an obligation arising under a peremptory norm of general international law."[122] A serious breach is defined as one "involv[ing] a gross or systematic failure by the responsible State to fulfil [*sic*] the obligation."[123] All states are prohibited from recognizing the situation resulting from the breach as lawful or rendering aid or assistance to maintain the situation.[124] They are also required to cooperate in order to bring the breach to an end.[125]

To fulfill these obligations, collective countermeasures may be not only warranted, but required. These obligations may require a state to breach a preexisting obligation to the responsible state that has perpetrated the serious breach,[126] consistent with the ICJ advisory

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121 *See supra* Part II.B.

122 *Articles*, *supra* note 2, arts. 40–41, at 11.

123 *Id.* art. 40, at 11.

124 *Id.* art. 41(2), at 11.

125 *Id.* art. 41(1), at 11.

126 *See* Spinedi, *supra* note 58, at 123–24 (explaining that obligations imposed on non-injured states as consequence of state crimes might require states to take actions "not in conformity with the obligations toward the State author of the crime").

opinion concerning the South African presence in Namibia.[127] In that opinion, the ICJ confirmed the Security Council resolution declaring that the South African occupation was illegal and added that all states were obligated not to take any action recognizing the South African administration in Namibia, except for cases in which nonrecognition would harm the Namibian people.[128] This decision can be interpreted as permitting, and even requiring, collective countermeasures in cases of well-established, grave, and systematic abuses of collective obligations, as long as these countermeasures are subject to certain restrictions, such as those ensuring the protection of the victims.[129]

In the Third Report, Special Rapporteur Crawford gave an alternative to a blanket prohibition or authorization of collective countermeasures that is consistent with the *South West Africa* decision.[130] He also proposed that states be allowed to act individually when, for example, a "gross and reliably attested breach" has occurred,[131] reasoning that the potential for miscalculation and bias inherent in collective countermeasures would be reduced where the breach in question was "gross, well-attested, systematic, and continuing,"[132] such as a "serious breach" as defined by articles 41 and 42. Due to the nature and extent of such a breach, misinterpretation would be unlikely.

Perhaps more importantly, there is a strong normative argument for permitting collective countermeasures in these circumstances. Where the victims have no voice in domestic or international fora, collective countermeasures may be the only means to end a violation of international law. Although there is the risk of uninformed representation of victims' interests, the alternative—inaction in the face of a gross and systematic violation of human rights—is intolerable.

Given these considerations, it is difficult to reconcile a prohibition on collective countermeasures in the context of a widely acknowledged and severe violation, such as genocide or apartheid, with the

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127 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 (June 21).

128 *Id.* at 54–56.

129 *See* SCHACHTER, *supra* note 49, at 198 (asserting that ICJ opinion indicated that states may be required to take collective countermeasures when offending state has committed serious breach of obligation owed to international community). The breach can be considered "well-established" in the case of the South African occupation because it had been recognized by the Security Council as illegal; the binding nature of that decision was vital to the Court's decision. *See id.*

130 *See Third Report*, *supra* note 75, ¶ 114.

131 *Id.* ¶ 115.

132 *Third Report*, addendum 4, *supra* note 55, ¶ 405 ("As a matter of policy, the constraints and inhibitions against collective countermeasures . . . are substantially reduced where the breach concerned is gross, well-attested, systematic and continuing.").

concepts of peremptory norms and obligations *erga omnes*. Such a policy illogically would prohibit all parties owed an obligation from reacting to the most serious and systematic violations of peremptory norms that international law has recognized as being the most grave.[133]

The inclusion of a savings clause in the form of article 54 was a compromise between the potential risks and benefits of collective countermeasures, added to secure the acceptance of the Articles. The ILC was unable to find a solution to the serious concerns that collective countermeasures would be abused, even under the limited circumstances in which the Special Rapporteur advocated permitting them. It was also, however, unable to deny the role that collective countermeasures have played and likely will continue to play in promoting respect for international obligations such as human rights, particularly when undertaken with caution and fairness. The inclusion of a savings clause in place of the article governing collective countermeasures reflects two motivations: the fear that such countermeasures would be abused, and the desire to ensure that the ILC did not remark prematurely on a developing practice, thereby exceeding its mandate to progressively develop international law.

While these apprehensions were well-founded, it is unclear that the approach ultimately chosen by the ILC was the best means to address them. By failing to pursue the Special Rapporteur's suggestion, the ILC may have chosen a more adventurous course than it intended. The ILC was not forced to forge a new path on the subject of collective countermeasures; it left this task to individual states. Powerful states therefore have more incentive to take collective countermeasures, but they have little guidance to protect against their potentially disastrous effects. A savings clause is meant to reserve judgment and encourage state practice to determine the law. It is therefore in the interest of powerful states to take collective countermeasures in order to assert their rights to the practice and thus shape the law.[134] In his Third Report to the ILC, Special Rapporteur Crawford included a thorough analysis of the use of collective countermeasures under international law, providing examples that showed

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133 *See* Spinedi, *supra* note 58, at 123 (finding it "difficult to imagine that customary law would prohibit . . . [a] State from committing acts of genocide . . . but authorize no subject [under international law] to take countermeasures").

134 David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 828 (2002) (describing savings clause of article 54 as "intended to induce significant state practice").

international support for the practice.[135] The report described what Crawford later called an "embryonic" practice[136] that was dominated by Western states.

The Special Rapporteur's examples of Western dominance over the development of this practice are numerous. In 1981, the United States and other Western countries suspended treaties with Poland and the Soviet Union in response to the movement of Soviet troops along Poland's border and the Polish imposition of martial law and internment of dissidents.[137] In April 1982, after the United Nations Security Council demanded Argentina's immediate withdrawal from the Falkland Islands, a number of countries followed the proposal of the United Kingdom and adopted trade sanctions, in violation of the GATT, against Argentina in response to that country's aggressive actions.[138] In 1998, in response to the humanitarian crisis in Kosovo and the human-rights abuses perpetrated under the direction of Slobodan Milosevic, the European Community adopted legislation freezing Yugoslav funds and instituting an immediate flight ban, in breach of bilateral aviation agreements to which Germany, France, and the United Kingdom were parties.[139] The U.S. Comprehensive Anti-Apartheid Act, described in Part I.B,[140] is another example of the use of collective countermeasures by a powerful Western state.

It is unlikely that a savings clause in a nonbinding instrument will deter powerful states from continuing to take collective countermeasures that serve their interests. The savings clause instead may encourage these states to shape development of the practice and perhaps extend it unjustifiably.

By contrast, the suggestion made by Special Rapporteur Crawford in the Third Report would limit collective countermeasures to situations in which the potential for risk is reduced, the collective interests of the international community are protected, and the interests of the victims are prioritized.[141] Given the limitations of the tactic of invoking responsibility, collective countermeasures may provide a valuable opportunity to provide assistance to individuals with no other recourse under the Articles. The use of collective countermeasures, however, should be limited and subject to restrictions to ensure that

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135 *See Third Report*, addendum 4, *supra* note 55, ¶¶ 391–400 (listing and assessing several historical examples of collective countermeasures in international community).

136 *See Fourth Report*, *supra* note 41, ¶ 71.

137 *See Third Report*, addendum 4, *supra* note 55, ¶ 391.

138 *See id.* at 14–15.

139 *See id.* at 15–16.

140 *See supra* notes 64–65 and accompanying text.

141 *See supra* notes 130–32 and accompanying text.

abuse is rare. The Special Rapporteur's proposal strikes an appropriate balance, adequately accounting for the potential dangers inherent in collective countermeasures, while ensuring their availability when most needed.

CONCLUSION

The ILC attempted to bridge the gap between the widespread recognition of human-rights obligations and the existing lack of accountability for human-rights violations by expanding a state-centric legal regime beyond its traditional bilateralism. It recognized the right of states not directly injured by a breach to take action on the basis of obligations owed to the international community, a right which has developed out of the concepts of obligations *erga omnes* and *jus cogens*. The ILC should be commended for this progressive development of the state responsibility doctrine with regard to community interests. Insofar as the Articles recognize the rights of indirectly injured states to invoke responsibility, and recognize the obligations that all states incur when any state commits a serious breach of an obligation owed to the international community, they are a positive step toward ensuring compliance with human-rights obligations in which all states have a stake.

These developments, however, are not without their dangers. States acting in the name of the interest of the international community may abuse their right to invoke responsibility; politically motivated claims will likely continue to result in the selective application of human-rights standards. The Articles attempt to mitigate this danger by providing rules governing the invocation of responsibility, hopefully deterring outright abuse. The international community may need to accept some number of unwarranted claims as the price it must pay for a system in which the rights of individuals and the interests of the international community in such rights are given serious weight.[142]

In drafting the Articles, the ILC balanced the benefits and dangers of allowing states to take action in response to the breach of an obligation owed to the international community. In doing so, it erred on the side of caution, adopting a narrow definition of "injured state" and relying upon a savings clause to deal with the issue of collective countermeasures.

This Note advocates a more progressive approach that would counter many of the risks of allowing states to act on behalf of the international community, while encouraging the development of prac-

[142] *See* Weiss, *supra* note 16, at 805.

tices that could help to promote human rights. Furthermore, the proposed approach may prove less dangerous than the one actually adopted by the ILC, which leaves the development of this practice in the hands of powerful states. Although only time will tell how states react to the draft Articles and their subsequent endorsement by the General Assembly,[143] it will be nearly impossible to measure the degree to which their actions are influenced by the Articles. Given the trend away from bilateralism and toward broader concepts of community obligations, however, state responsibility may become a common tool for the enforcement of human-rights obligations. With the guidance of the Articles and the international community, state responsibility may even be able to develop this new role in a way that furthers the rights of victims rather than the power of states.

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[143] On December 12, 2001, the General Assembly adopted Resolution 56/83, which "commend[ed the Articles] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action." G.A. Res. 56/83, U.N. GAOR, 56th Sess., at 2, U.N. Doc. A/RES/56/83 (2002).