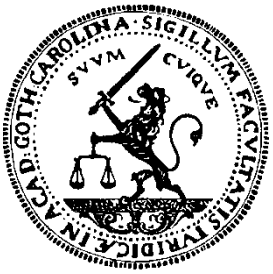

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Concepts in Collusion

Clarifying and comparing the legal obligations of third states and international organizations, and their right to take countermeasures in response to violations of international law

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Summary

On July 19, 2024, the International Court of Justice (ICJ) published its Advisory Opinion on the legal consequences arising from the policies and practices of Israel in the occupied Palestinian Territory, including East Jerusalem. The Advisory Opinion received much attention as the Court devoted a full section to the obligations of third states and international organizations, arising from Israel's breaching of peremptory norms of international law. The obligations discussed were in large identical to those arising under Articles 40 and 41 of ARSIWA and the corresponding Articles 41 and 42 of ARIO. This led to a renewed discussion in the legal debate regarding these two concepts and their practical implications. A reoccurring third concept in these discussions were the concept of countermeasures. However, what the three concepts actually implies and how they relate to each other is not clear, and there is no previous research comparing these concepts. The purpose of the thesis is therefore to clarify each of these concepts practical implication and compare how they relate to each other.

Through a legal dogmatic method, the concept of third states' obligations under Articles 40 and 41 of ARSIWA, international organizations' obligations under Articles 41 and 42 of ARIO and the concept of countermeasures is elaborated. It is concluded that third states and international organizations have certain obligations under Articles 40 and 41 of ARSIWA and corresponding Articles 41 and 42 of ARIO, when states act in violation of jus cogens norms of international law. These contain obligations of non-cooperation, non-recognition, and non-assistance in upholding a situation caused by an unlawful act. Countermeasures on the other hand, may as a general rule, only be taken by an injured state against the injuring state in response to an act in violation of an obligation erga omnes. Despite this, there is an ongoing discussion regarding third states' right to take countermeasures in international law. Third states taking countermeasures however rarely refer to the term countermeasures, but rather to the term 'sanctions'.

After clarifying each of these three concepts, they are compared and analyzed. The analysis shows that third states' and international organizations' obligations under ARSIWA and ARIO have several similarities, despite their fundamental differences. Following international organizations various structures, no general conclusions regarding the relation between states and international organizations can be drawn. These concepts, however, differs from countermeasures for several reasons. Third states' and international organizations' obligations have more similarities with third party countermeasures, even though this legal construction is debated in the legal discussion.

To summarize, these three concepts have several differences. Despite this, they still have a common goal, namely, to prevent serious crimes of international law.

Sammanfattning

Den 19 juni 2024 publicerade den Internationella domstolen ett rådgivande yttrande om de rättsliga konsekvenserna av Israels politik och praxis i det ockuperade palestinska territoriet, inklusive östra Jerusalem. Det rådgivande yttrandet fick stor uppmärksamhet i den juridiska diskussionen då domstolen ägnade en hel sektion åt att diskutera tredje staters och internationella organisationers skyldigheter till följd av Israels brott mot tvingande normer i internationell rätt. Skyldigheterna som diskuterades var i princip identiska med de som följer av artikel 40 och 41 i ARSIWA och motsvarande artikel 41 och 42 i ARIO. Detta ledde till en förnyad diskussion kring dessa koncept och dess praktiska betydelse. I diskussionen nämns återkommande konceptet kring kontraåtgärder. Vad respektive koncept faktiskt innebär och hur de förhåller sig till varandra är däremot inte klart, och det saknas tidigare forskning som jämför koncepten. Uppsatsen syftar därför till att förtydliga respektive koncepts praktiska implikationer och jämföra hur de förhåller sig till varandra.

Genom en rättsdogmatisk metod redogörs för konceptet om tredje staters skyldigheter enligt artikel 40 och 41 ARSIWA, konceptet om internationella organisationers skyldigheter enligt artikel 41 och 42 ARIO, samt konceptet om kontraåtgärder i internationell rätt. Det konstateras att tredje stater och internationella organisationer har särskilda skyldigheter enligt artikel 40 och 41 ARSIWA och motsvarande artikel 41 och 42 ARIO, då stater begår handlingar i strid mot jus cogens normer i internationell rätt. Dessa består av en skyldighet att samarbeta, inte erkänna och inte assistera stater i upprätthållandet av situationen skapad av det olagliga handlandet. Kontraåtgärder får däremot, som utgångspunkt, endast vidtas av en skadad stat gentemot den felande staten som svar på en handling i strid mot en erga omnes skyldighet. Det pågår dock viss diskussion kring tredje staters rätt att vidta kontraåtgärder i internationell rätt. Tredje stater som vidtar åtgärder mot denna typ av folkrättsstridiga handlingar refererar dock sällan till kontraåtgärder, utan snarare till begreppet ’sanktioner’.

Efter förtydligandet av varje koncept jämförs dem med varandra. Analysen visar att tredje stater och internationella organisationers skyldigheter enligt ARSIWA och ARIO har flera likheter, trots att de är olika i grunden. Till följd av olika internationella organisationers olika interna strukturer kan dock inga generella slutsatser kring förhållandet mellan stater och internationella organisationer dras. Dessa koncept skiljer sig dock från konceptet om kontraåtgärder på flera plan. Tredje stater och internationella organisationers skyldigheter har desto fler likheter med tredje parts kontraåtgärder, även om tredje parts rätt till kontraåtgärder är omdiskuterat i internationell rätt.

Sammanfattningsvis kan konstateras att koncepten skiljer sig åt på flera vis, men trots sina olikheter kan de anses syfta till att uppnå samma mål, nämligen att förhindra allvarliga brott mot internationell rätt.

Preface

This thesis marks the end of my four and a half years as a law student in Lund. It has been an incredibly rewarding period of time, and I am grateful for all the memories and friends I have made during my time in Lund.

First and foremost, I would like to thank my supervisor Ulf Linderfalk for all the interesting discussions leading to this thesis and for all the support throughout the writing process.

Further, I would also like to direct a special thank you to Clara and Emilia, for enriching my time at the law program. Without you, it would not have been the same.

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Ida Sahlin

Abbreviations

APEC	Asia-Pacific Economic Cooperation
ARIO	Articles on the Responsibility of International Organizations
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
AU	African Union
ASEAN	Association of Southeast Asian Nations
CARICOM	Caribbean Community and Common Market
EU	European Union
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monetary Fund
UN	United Nations
WTO	World Trade Organization

1 Introduction

1.1 Background

On July 19, 2024, the International Court of Justice (ICJ) published an advisory opinion on the 'Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem'.[1] The advisory opinion received much attention and was considered revolutionary as it contained a full section on the obligations of third states, arising from Israel's breaching of peremptory norms of international law.[2] This led United Nations (UN) experts to state that 'the world stands upon the edge of a knife: Either we travel collectively towards a future of just peace and lawfulness – or hurtle towards anarchy and dystopia, and a world where might make right'. They referred to states' failure to fulfill their respective obligations, reaffirmed by the Court in its advisory opinion[3], namely third states' obligations according to Articles 40 and 41 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[4]

In 2001, the International Law Commission (ILC) adopted ARSIWA, which is a codification of customary international law of state responsibility. The work was successful and resulted in ARSIWA being considered one of the cornerstones of international law.[5] The fundamental principle of ARSIWA is presented in its first Article, which declares that each state is responsible for an international wrongful act committed by that state.[6] An internationally wrongful act occurs when a state's act or omission is attributable to the state in question and consists of a breach of an international provision by which the state is bound at the time.[7] However, some internationally wrongful acts

[1] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion*) ICJ [2024].
[2] Yussef Al Tamimi, 'Implications of the ICJ Advisory Opinion for the EU-Israel Association Agreement' (2024) EJIL:Talk! < https://www.ejiltalk.org/implications-of-the-icj-advisory-opinion-for-the-eu-israel-association-agreement/> accessed 10 March 2025.
[3] UNHCR, 'UN experts warn international order on a knife's edge, urge States to comply with ICJ Advisory Opinion' (2024) <https://www.ohchr.org/en/statements-and-speeches/2024/09/un-experts-warn-international-order-knifes-edge-urge-states-comply> accessed 7 March 2025.
[4] Diakonia International Humanitarian Law Centre, 'Responsibility of Third states and international organizations emanating from the findings of the ICJ's advisory opinion of 19 July 2024' (2024) 5 <https://www.diakonia.se/ihl/news/icj-advisory-opinion-legal-consequences-third-states-international-organisations/>accessed 5 March 2025.
[5] James Crawford, *State Responsibility – The General Part* (Cambridge University Press 2013) 43; Katja Creutz, 'The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An appraisal' (2021) EJIL:Talk! <https://www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/> accessed 28 March 2025.
[6] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (UN Doc A/56/10, 2001) 32 para 1.
[7] ibid 110 para 1.

are considered so serious that they create obligations even for third states. What is considered a serious breach of a peremptory norm of international law is defined in Article 40 of ARSIWA. These acts or omissions must fulfill two criteria: first, the breach must be of an obligation under a peremptory norm of international law, and secondly, the breach must in itself be serious, with regards to its scale or character.[8] The ICJ also emphasized the importance of distinguishing between different breaches in the *Barcelona Traction case*, where the Court concluded that there should be a distinction between the obligations of a state towards the international community as a whole, and those arising towards another state. When a breach of an obligation owed to the international community occurs, all states' have a legal interest in their protection, they constitute obligations *erga omnes*.[9] When a serious breach of an obligation under a peremptory norm of international law occurs, certain obligations are imposed on third states, as stated in Article 41 of ARSIWA.[10]

Today, states are not the only relevant actors in the international arena as international organizations also play a major part. Therefore, the ILC choose to continue its work in 2002 and develop a framework for international responsibility for international organizations, which eventually led to the adoption of the Articles on the Responsibility of International Organizations (ARIO) in 2011.[11] The articles in ARIO follow the same structure as those in ARSIWA. ARIO is however, despite its many similarities with ARSIWA, to be seen as a separate legal framework.[12] As ARSIWA, ARIO too include a chapter dedicated to serious breaches of obligations under peremptory norms of general international law consisting of Articles 41 and 42 of ARIO.[13]

Articles 40 and 41 of ARSIWA received renewed attention following the ICJ's advisory opinion of July 19, 2024.[14] Even though the Court's advisory opinion lacks binding force, it is still considered corresponding to applicable customary law.[15] It is therefore reasonable to further assume that Articles 40 and 41 of ARSIWA constitutes binding customary law. As similar provisions exist with regard to international organizations in Articles 41 and 42 of

[8] ibid 34 para 1.
[9] *Barcelona Traction, Light and Power Company, Limited,* ICJ (1970) para 33.
[10] International Law Commission, ARSIWA (n 6) 113-114.
[11] International Law Commission, *Draft articles on the responsibility of international organizations, with commentaries* (UN Doc A/66/10, 2011) 46 para 1.
[12] ibid 46 paras 3-4.
[13] ibid 82.
[14] Al Tamimi (n 2).
[15] International Court of Justice, 'Advisory Jurisdiction' <https://www.icj-cij.org/advisory-jurisdiction> accessed 28 February 2025.

ARIO[16], it is reasonable to assume that these provisions should also be considered binding customary law, following the ICJ's advisory opinion.

Nevertheless, there are certain circumstances under which the wrongfulness of an act may be precluded.[17] Article 22 of ARSIWA state that an internationally wrongful act of a state towards another state is precluded if it constitutes a countermeasure in response to a wrongful act by the latter state. The countermeasure must, however, be proportionate and taken with an aim to make the targeted state comply with its obligations.[18] Not any wrongful act may be used as a countermeasure. As stated in Article 26 of ARSIWA, an act in breach of a peremptory norm of international law may never be precluded. As a starting point, it is only injured states that may perform a countermeasure towards the injuring state.[19] Nevertheless, there has been some discussion regarding non-injured states, namely third states', right to take countermeasures. Prior to the launch of ARSIWA, there was some acceptance within the ILC regarding third states' right to take legal countermeasures, but even then, there was a lack of consensus. State practice has since been scattered, leaving the question regarding third-parties ability to take countermeasures, unanswered.[20]

The literature elaborating countermeasures often refers to the application of 'sanctions'.[21] However, the term lacks a clear definition and is widely used in various contexts. It is in general terms described as a penalty or punishment to enforce obedience to law.[22] There are, hence, different kind of sanctions; those imposed by the UN, based on a decision taken by the Security Council, and those imposed by states or international organizations individually. UN sanctions are decided by the UN Security Council based on "the existence of any threat to the peace, breach of the peace, or act of aggression", and is considered legal as long as they comply with the UN Charter.[23] Other international organizations or individual states, however, may impose sanctions on other grounds, not based on a Security Council decision.[24] A distinction must

[16] International Law Commission, ARIO (n 11).
[17] International Law Commission, ARSIWA (n 6) 71 para 1.
[18] ibid 75.
[19] ibid 75 para 5.
[20] Martin Dawidowicz, 'Third-Party Countermeasures: A progressive development of international law' (2016) Questions of International Law < https://www.qil-qdi.org/third-party-countermeasures-progressive-development-international-law/> accessed 15 March 2025.
[21] International Law Commission, ARSIWA (n 6) 75 para 3.
[22] Gordon Richard, Smyth Michael and Tom Cornell, *Sanctions Law* (Hart Publishing 2019) 1.
[23] Mika Hayashi and Akihiro Yamaguchi, 'Economic Sanctions against Russia: Questions of Legality and Legitimacy' (2024) 89 International Community Law Review <https://brill.com/view/journals/iclr/26/1-2/article-p69_4.xml?srsltid=Afm-BOopSuCJZul6aiSXlz3WpS0cMtG3SFnS-fRGc9XnwcHn_1v9FNRIV> accessed 8 April 2025.
[24] Richard, Michael, and Cornell (n 22) 4.

further be made between measures that are simply "unfriendly" towards a state, and those measures that constitute an internationally wrongful act.[25] Measures under the term 'sanctions' that is an internationally wrongful act are sometimes referred to as a "third-party countermeasure", despite the discussions surrounding that concept.[26]

Third states as well as international organizations undoubtedly have obligations when states commit serious breaches of peremptory norms of international law. In the meantime, countermeasures may not be taken by third parties. These concepts are of major importance in a changing world, yet how third states' obligations relate to the obligations of international organizations is not clear. Neither is how these concepts relate to the concept of countermeasures.

1.2 Previous Research

This thesis examines the obligations of third states and international organizations when states act in violation of peremptory norms of general international law and how the concept of countermeasures relate to these concepts. Below is an overview of previous research in the field.

The question of state responsibility goes back to 1948, when the UN General Assembly first created the ILC and choose the issue of state responsibility as one of its first matters. Since then and until the final version of ARSIWA was adopted in 2001, several reports were published, covering all aspects of ARSIWA, including the parts covering third state responsibility and what later became Articles 40 and 41. Five special rapporteurs published reports on the subject, the last rapporteur before adoption being James Crawford.[27] As a result of these many reports, there are a lot of documentation on the discussions that preceded this instrument. States' views on several aspects are presented in these reports and there is thus much previous research on the thought behind state responsibility as resulted in ARSIWA. James Crawford continued to be a prominent scholar on the subject even after the adoption of the articles as he continued to publish literature on the matter.[28] The ILC published comments alongside the articles, providing developed guidelines for how to use them in practice.[29]

[25] Tom Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', in L Van Den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing 2016) 5.
[26] ibid 14.
[27] James Crawford, 'Articles on responsibility of States for Internationally Wrongful Acts' (2001) Audiovisual Library of International Law <https://legal.un.org/avl/ha/rsiwa/rsiwa.html> accessed 19 March 2025.
[28] Crawford, *State Responsibility – The General Part* (n 5).
[29] International Law Commission, ARSIWA (n 6).

In the reports regarding state responsibility, a certain discussion concerning the responsibility of international organizations can be found as well. Following the common origin of ARSIWA and ARIO, much of the literature on state responsibility also touch upon the responsibility of international organizations. Similar to ARSIWA, the ILC provided comments following the adoption of ARIO, providing guidelines for how to interpret the articles.[30] However, these comments draw many parallels with the comments on ARSIWA and are thus not as extensive in themselves.

Following ARSIWA and ARIO, many scholars have examined, in depth, the different parts of these instruments. However, each concept is usually examined on their own in current literature. Countermeasures and its uncertain relation to sanctions takes up much room in the existing literature, leaving third state and international organizations responsibility less discussed.[31] One prominent scholar on countermeasures is Martin Dawidowicz, who in his book 'Third-Party Countermeasures' elaborate on countermeasures, potential third-party countermeasures, and their respective legality.[32] However, the concept of countermeasures and how it relates to these other concepts are not examined in previous research. Further, it should be noted that this thesis examination of the practical implications of the obligations of states as well as international organizations is largely based on the ICJ's Advisory Opinion of July 19, 2024. Due to the fact that the advisory opinion was issued relatively recently, there has not yet been any in depth research additions on its consequence. However, it has been partly discussed in the international law debate consisting of various blog posts etc.[33]

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[30] International Law Commission, ARIO (n 11).

[31] See Crawford, *State Responsibility – The General Part* (n 5); Anders Henriksen, *International Law* (4th edn Oxford University Press 2023); Mirka Möldner 'Responsibility of International Organizations – Introducing the ILC's DARIO' in A Bogdandy and R Wolfrum (eds) *Max Planck Yearbook of United Nations law* (Max Planck Institute, Volume 16, 2012); Brian D. Lepard, 'Customary International Law. A New Theory with Practical Applications' (2010) European Journal of International Law, Volume 21, Issue 3 <https://academic.oup.com/ejil/article/21/3/795/508656> accessed 20 April 2025; Christian J. Tams, Enforcing Obligations Erga Omnes in International Law (Cambridge University Press 2009); Tom Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', in L van den Herik (ed), Research Handbook on UN Sanctions and International Law (Edward Elgar Publishing 2016) etc.

[32] Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017).

[33] See Al Haq and Al Mezan, 'ICJ Advisory Opinion – The EU and its member states must comply with international law' (2024) Euromed Rights <https://euromedrights.org/publication/icj-advisory-opinion-the-eu-and-its-member-states-must-comply-with-international-law/> accessed 14 March 2025; Nathalie Weatherald, 'EU foreign ministers discuss sanctions against Israel' (2024) Politico < https://www.politico.eu/article/eu-foreign-ministers-sanctions-against-israel-micheal-martin/> accessed 14 march 2025; Yael Ronen, 'The obligation of Non-recognition, occupation and the OPT Advisory Opinion' (2024) Verfassungsblog < https://verfassungsblog.de/the-obligation-of-non-recognition-occupation-and-the-opt-advisory-opinion/> accessed 21 April 2025; Matthias Goldmann, 'Non-Recogntion and Non-Assistance Consequences of the Palestine Advisory Opinion for Third States' (2024)

Existing literature provides a solid ground for further research. This thesis will further contribute to current research, through a comparison and clarification between these concepts, with the base of what has already been stated regarding each concept on their own and inclusion of the recently published advisory opinion from the ICJ.

1.3 Purpose and Research Questions

The purpose of this thesis is to clarify the practical implications of the concept of third state obligations under Articles 40 and 41 of ARSIWA, as well as the concept regarding obligations of international organizations under Articles 41 and 42 of ARIO and the concept of countermeasures and compare how these relate to each other.

The ICJ Advisory Opinion of July 19, 2024, shed new light on the provisions under Articles 40 and 41 of ARSIWA, and revived the legal discussion regarding their practical implications in international law. Therefore, it is important for states, as well as international scholars, to be clear about the actual implications of these articles. Similar obligations for international organizations are contained in Articles 41 and 42 of ARIO. Since most of the world's states are members of international organizations outside the UN, such as the EU, AU, CARICOM, and ASEAN, states have an interest to be clear about the obligations of international organizations as well. When discussing states' and international organizations' response to violations of international law, it is often through the term countermeasures. However, how the concept of countermeasure relates to third states' and international organizations' obligations under ARSIWA and ARIO, is not clear.

Concepts like these are crucial, as it is through them that the world is understood. It is impossible for states to fulfil their obligations under these provisions if it is not clear what they mean and what can be included under each of these concepts. As the UN experts said, the world stands upon the edge of a

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Verfassungsblog < https://verfassungsblog.de/non-recognition-and-non-assistance/> accessed 25 April 2025; Dr Mais Quandeel, 'Territorial Annexation of Palestine: Illegality, Third States Obligations and the ICJ's 2024 Advisory Opinion' (2025) EJIL:Talk! <https://www.ejiltalk.org/territorial-annexation-of-palestine-illegality-third-states-obligations-and-the-icjs-2024-advisory-opinion/> accessed 12 March 2025; Yussef Al Tamimi, 'Implications of the ICJ Advisory Opinion for the EU-Israel Association Agreement' (2024) EJIL:Talk! <https://www.ejiltalk.org/implications-of-the-icj-advisory-opinion-for-the-eu-israel-association-agreement/> accessed 10 March 2025; Eugenio Carli, 'Obligations Erga omnes, Norms of Jus Cogens and Legal Consequences for "other States" in the ICJ Palestine Advisory Opinion' (2024) EJIL:Talk! <https://www.ejiltalk.org/obligations-erga-omnes-norms-of-jus-cogens-and-legal-consequences-for-other-states-in-the-icj-palestine-advisory-opinion/> accessed 10 March 2025 etc.

knife, and to prevent it from falling over, these concepts must be clarified and compared.

To achieve this purpose, the following research questions will be answered:

1. What obligations do Articles 40 and 41 of ARSIWA impose on third states?

2. What obligations do Articles 41 and 42 of ARIO impose on third states and international organizations?

3. Under what conditions may states lawfully resort to countermeasures in response to breaches of international law?

4. How does the legal discourse reflect and shape the relation between third-state obligations, international organizations obligations and countermeasures in international law?

1.4 Delimitations

There are several aspects of ARSIWA as well as ARIO that frequently give rise to legal discussions among scholars. As already implied by the research questions, not all of these will be examined. Some of the basic components of ARSIWA as well as ARIO regarding issues concerning attribution etc, will only be touched upon briefly to increase understanding of the instruments. However, these aspects will not be discussed in any further depth. This thesis will therefore be limited to the concept of third state responsibility according to Articles 40 and 41 of ARSIWA and the corresponding obligations for international organizations contained in Articles 41 and 42 of ARIO. The concept of countermeasures as regulated in ARSIWA and ARIO will also be examined. There are several aspects that may be considered regarding countermeasures in ARSIWA and ARIO as the instruments contain several articles, regulating the use of countermeasures. But in accordance with the purpose of the thesis, these aspects will not be elaborated. Focus will therefore be on when an injured or non-injured state may use countermeasures, rather than on what measures that might be.

When considering states' and international organizations' obligations according to Articles 40 and 41 of ARSIWA as well as 41 and 42 of ARIO, it must be noted that the thesis aims to investigate what applies in cases where a state acts in violation of a peremptory norm. The thesis hence does not include cases where an international organization acts in violation of a peremptory norm.

The thesis aims to clarify certain legal concepts which is why all practical cases will be used strictly to exemplify these concepts. No individual assessment will thus be made in either case whether the specific actions constitute a breach of a peremptory norm, etc.

The thesis will further not provide a developed elaboration regarding what constitute a 'sanction'. This is a complex area of international regulation and there is no commonly agreed upon definition. However, the term will appear in the paper when discussing and exemplifying third-party countermeasures, which is why it may be argued that a definition would be preferable. Given the scope of the thesis and the complexity of this issue, it will, however, not be elaborated in detail.

It is possible to imagine several potential acts outside the scope of countermeasures when discussing third states' responsibility and the responsibility of international organizations. But considering the purpose of the thesis and the research questions imposed, this will be left out from the assessment.

1.5 Methodology and Materials

To answer the above-mentioned research questions and fulfil the purpose of this thesis, a legal dogmatic method will be applied. This method is generally considered to aim at finding a solution to a legal issue through the application of a legal rule. Hence, it is based on the generally accepted sources of law, consisting of case law, legislation, preparatory works, legal doctrinal literature such as legal essays and monographs.[34] The legal dogmatic method further allows for a description of what is current legislation (*de lege ferenda*), as well as for a discussion of what the legislation should be (*de lege lata*). This method is applicable for this thesis since it aims, at least partly, to clarify current legislation in practical terms. It is therefore suitable to have a de lege ferenda discussion. However, this thesis does not aim to give any suggestions on how the law should be following its clarifying purpose, and it will therefore not include a de lege lata discussion. The legal dogmatic method further allows for a critical perspective which allows for a deeper analysis of the concepts relevant for this thesis.[35]

The essay regards international law and therefore only international sources will be used. There is no higher legislative power in international law, as states are both the subject and the main legislator of international law. A basic principle is that all states are sovereign and thus only obligated to act aligned with rules that the state itself has accepted. It may therefore be stated that

[34] Jan Kleineman, 'Juridisk metodlära in Maria Nääv and others (eds) *Legal Methodology* (Studentlitteratur AB 2018) 21.
[35] ibid 36.

international law is what states want it to be. Consequently, the line between acts or omissions that are contrary to international law and actions that instead create new norms of international law, in practice is somewhat blurred.[36] To determine what international law is, the sources of international law must be examined. When using sources of international law, the starting point is often taken through Article 38 (1) in the Statue of the International Court of Justice.

According to Article 38 (1), established international sources of international law consist of the following:

a) 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b) international custom, as evidence of a general practice accepted as law;

c) the general principles of law recognized by civilized nations'[37]

Although this provision was created to apply to the Court, it is generally considered applicable when researching international law in general. The sources stated in paragraphs a-c is considered primary sources and thereby sources creating law.[38] However, the Article further includes a paragraph (d), separating judicial decisions and legal doctrine from the sources of law consisting of international agreements, international customary law, and general principles of law. Instead, these can be used to determine what is current law and they are thereby secondary sources of international law. A treaty as well as international custom may further be used to determine the content of a norm. A distinction is therefore made between substantive and formal sources of law, whereas the former is used to determine the content of the right while the latter explain the origin of it.[39]

The purpose of the thesis is to clarify the practical implications of legal concepts and to compare these in order to determine how they relate to each other. To do this, it must be clarified what current law, namely de lege ferenda, is. Therefore, the legal dogmatic method is suitable to this purpose. In accordance with the legal dogmatic method, the starting point will be taken in Articles 40 and 41 of ARSIWA and 41 and 42 of ARIO. These instruments might not be treaties, but they are still considered internationally custom since they were adopted by the ILC and thus considered codifications of established

[36] Ulf Linderfalk, *Folkrätten i ett nötskal* (Studentlitteratur AB 2020) 31–32.
[37] Article 38 of the Statue of the International Court of Justice.
[38] Anders Henriksen, *International Law* (4th edn Oxford University Press 2023) 22.
[39] Linderfalk, *Folkrätten i ett nötskal* (n 36) 33.

international custom.[40] They are therefore in line with the regulation of sources as stated in Article 38 (b) of the ICJ-statue. Even countermeasures are regulated in ARSIWA and ARIO and can therefore also be considered international custom.

To determine the practical consequences of these articles, secondary sources in form of case law and doctrine will be used. This will be done in order to establish de lege ferenda, and therefore in accordance with Article 38 (1) of the Statue of the International Court of Justice. The ICJ Advisory Opinion will further be examined, since it laid the ground for a major legal debate and could therefore be helpful to fully comprehend the scope of the concept of third state responsibility, as well as the responsibility of international organizations.

Lastly, the legal dogmatic method will be applied to compare these concepts to determine how they relate to each other. How the concepts are framed in the legal discussion will be examined when comparing the concepts. Even though no explicit suggestions on how to improve this area of international law, namely de lege lata, will be given, there will be an analysis of the concepts as such and how they are used in relation to each other in the legal discussion.

1.6 Structure

This essay is divided into six chapters, each of which fulfils a separate function in approaching the thesis purpose. The first chapter sets the framework and clarifies the premises for the following chapters.

The second chapter examines third states' obligations in regard to when states act in violation of a peremptory norm of general international law and relates to the first research question. The chapter aims to provides an in-depth explanation of Articles 40 and 41 of ARSIWA and further clarify the implication of the ICJ's Advisory Opinion for these obligations. Therefore, the chapter starts off with explaining Article 40 and distinguish between obligations erga omnes and norms jus cogens to increase the understanding of the Article. Further, Article 41 is examined, and the three obligations contained in the Article is explained. Lastly, the chapter provides an insight in ICJ's Advisory Opinion and its consequences for third states' obligations.

The third chapter aims to clarify the obligations of international organizations, following states acting in violation of peremptory norms of general international law and thus relates to the second research question. Hence, the

[40] ibid 37–38.

chapter explains Articles 41 and 42 of ARIO. It further elaborates how the ICJ's Advisory Opinion has affected international organizations' obligations.

The fourth chapter elaborate the concept of countermeasures and thus relate to the third research question. The purpose of this chapter is to examine when a state may use a legitimate countermeasure and how this works in practice. To do so, it clarifies what constitute a countermeasure taken by an injured state, before moving on to countermeasures taken by a non-injured state or organization, namely the idea of third-party countermeasures which is exemplified by the EU sanctions against Russia.

The fifth chapter include a comparison between how third states' and international organizations' obligations relate to each other, but also how these concepts relate to the concept of countermeasures taken by an injured state as well as third-party countermeasures. Hence, the chapter relates to the fourth research question. To gain the full picture, some literature from the legal debate will be included in this part. The chapter, however, has an analytical approach and there will be an analysis with the aim of clarifying how these concepts relate to each other.

The sixth and last chapter provide a summary of the main conclusions drawn following the study. This chapter thus aim to clarify the conclusions of what has been stated throughout the thesis.

2 Third State obligations

The articles of ARSIWA distinguish between internationally wrongful acts and 'serious breaches of obligations under peremptory norms of international law'. These serious violations give rise to certain obligations for third states regulated in chapter III of ARSIWA, consisting of Articles 40 and 41[41], which will be elaborated below.

2.1 Application of Chapter III ARSIWA

Article 40 of ARSIWA defines the internationally wrongful acts covered in chapter III and reads as follows:

1. 'This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation. '

Article 40 establish two criteria to distinguish between different internationally unlawful acts. First, the obligation breached must be attributed to a peremptory norm of general international law and secondly, the breach must be serious in its nature.[42]

2.1.1 Peremptory norms of international law

The need to distinguish between different international wrongful acts has long been discussed in the legal debate.[43] Thus, the idea of peremptory norms of international law was established in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. These Articles state the existence of certain substantive norms in international law of such fundamental nature, that no exception is allowed.[44] According to Article 53 in the Vienna Convention, a peremptory norm of general international law is a norm that is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted', namely a norm *jus cogens*.[45]

Not long after the adoption of the Vienna Convention, the ICJ made another distinction between different international wrongful acts in its *Barcelona*

[41] International Law Commission, ARSIWA (n 6) 110 para 1.
[42] ibid 112 para 1.
[43] ibid 110 para 2.
[44] ibid 111 para 4.
[45] Ibid 112 para 2.

Traction case. The Court stated that there should be a distinction between obligations owed by a state to the international community as a whole, and those existing solely between states. All states should further have a legal interest in upholding obligations that a state owes to the entire international community, the Court called it obligations *erga omnes*.[46]

During the drafting of Article 40 of ARSIWA, both jus cogens norms and obligations erga omnes were discussed, but when the Article was finally adopted in 2001, there were no explicit reference to either concept. The Article ended up being applicable to 'serious breaches of obligations deriving from peremptory norms of general international law', making the Article more in line with the narrower concept of jus cogens, than the broader concept of erga omnes.[47]

The ILC concluded that what defines an international norm as peremptory is 'the particular nature of the subject matter with which its deals'. A general characteristic of such rules is that they include not only legal principles, but also ethical considerations and the maintenance of international good order.[48] Jus cogens give rise to the thought that there is an international lex superior, meaning that jus cogens norms stands above usual international law. It can therefore not in any way be limited by ordinary international law.[49] It is not difficult to identify a few jus cogens norms as there is widespread agreement that use of force or threats of use of force, international crimes such as slavery, piracy, or genocide, constitutes violations of jus cogens norms.[50] Despite this, the exact definition of jus cogens remains somewhat uncertain.[51]

Article 53 of the Vienna Convention, however, gives the only existing treaty-based definition of what constitutes a jus cogens norm. The Article states that a jus cogens norm must fulfill three criteria: it must be (a) 'accepted and recognized by the international community as a whole' as a norm that (b) 'no derogation is permitted from', and (c) that 'can only be modified by a subsequent norm of general international law with the same character'.[52] Even though this article only expressly applies in relation to the particular convention or in a treaty between two parties to the convention, it is generally

[46] *Barcelona Traction Case* (n 9) para 32-33.
[47] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2009) 149–150.
[48] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 2010) 49.
[49] Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Elgar International Law 2020) 5.
[50] Ragazzi (n 48) 50.
[51] ibid 48.
[52] ibid 51.

considered to provide the only common definition of jus cogens existing in customary international law.[53]

The wording of these requirements give rise to certain questions following its vague formulation. First of all, it must be clarified what is meant by the international community 'as a whole'. Throughout the drafting of the Vienna Convention of 1969, one of the experts, Yassen, underlined that the formulation comes from the thought that in a situation where one or a few states rejected a norm as peremptory, all other states would not be excused from accepting and complying with the jus cogens norm in question. However, following the adoption of the Vienna Convention, a number of practical criteria were suggested to give further clarification on this matter. For a norm to be considered jus cogens, it must be confirmed and acknowledged by the fundamental components of the international community, eastern and western countries, developing and developed states, and countries located on different continents. Although these criteria increase the interpretation, they cannot be considered timeless. The division of east and west countries is regularly changing, due to its political dimension. Further, the distinction between developed and developing states depends on more parameters then are given. The fact that a state is located on a particular continent may be the only criterion that is somewhat permanent.[54]

Assuming that a particular norm of jus cogens is accepted and recognized by the international community 'as a whole', it must be clarified whether the norm is binding even for states that have opposed its character as jus cogens.[55] The ILC explain, in the commentaries to the draft articles of the Vienna Convention, that no derogations are allowed, even if agreed between states. This means that despite the fact that Article 53 focuses strictly on agreements, the commentary suggests a broader interpretation of the term 'derogation'.[56] Considering the third requirement of Article 53, which states that a norm jus cogens can only be modified by a norm of the same jus cogens character. There is a difference between modifying a rule and derogating from it. Derogation means that one norm has made another norm invalid, whereas it is modified when there is another norm of the same nature that regulates the same relationship but in a different way.[57] Jus cogens norms, hence, aim to safeguard the collective interest of states and fundamental moral values.[58]

[53] Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (n 49) 7-8.
[54] Ragazzi (n 48) 56.
[55] ibid 38.
[56] ibid 58.
[57] ibid 59.
[58] ibid 73.

Despite the differences that can be seen throughout the legal discussion on how to qualify a norm as jus cogens, the ILC repeatedly refer to the definition given in Article 53 of the Vienna Convention. Therefore, the work done by the ILC after adopting the Vienna Convention is broadly based on the definition of jus cogens as given in Article 53. The Article further remained the same in the 1986 Vienna Convention and was even extended to include agreements between states and international organizations and between international organizations themselves. The ILC also refers to the definition under Article 53 when discussing jus cogens norms in its comments to ARSIWA. Hence, the ILC is of the opinion that it has the same definition in ARSIWA as in Article 53 of the 1969 Vienna Convention.[59]

2.1.2 A 'serious breach' of an obligation under a peremptory norm

According to Article 40 (2) of ARSIWA, a breach of an obligation arising under a peremptory norm must be 'serious' for chapter III ARSIWA to be applicable. The term 'serious' indicates that a certain level of wrongdoing is necessary. It is defined within the article as a 'gross or systematic failure by the responsible state to fulfill the obligation'. This limitation is increased by state practice, as states often point to the systematic or grave character of violations when responding to breaches of international law.[60]

For a violation to be considered 'serious', a certain level of gravity and systematization with regards to the breach is necessary.[61] Therefore, the breach must be in violation of a peremptory norm and performed in a gross or systematic manner. The term 'gross' refers to the severity of the violation or its consequences, aiming at breaches directly attacking the fundamental values protected by the rule in question. For a violation to be considered systematic, it must have been performed in an organized and deliberate manner.[62] The ILC defined 'systematic' in relation to crimes against humanity, where it is stated that it does not include isolated or non-connected activities. The breach must further reach the level of intensity needed to be considered systematic.[63]A serious breach is often both systematic and gross which makes these terms not mutually exclusive. The seriousness of a violation may be determined by factors such as the intent to breach the norm, the scope and number

[59] Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (n 49) 8-9.
[60] International Law Commission, ARSIWA (n 6) 113 para 7.
[61] Eric Wyler and Leon Castellanos-Jankiewics, 'Serious Breaches of Peremptory Norms' in Nollkaemper A and Plakokefalos I (eds) *Principles of Shared Responsibility in International Law* (Cambridge University Press 2014) 284-285.
[62] International Law Commission, ARSIWA (n 6) 113 para 8.
[63] United Nations International Law Commission (ILC) Report by Special Rapporteur Dire Tladi (12 February 2018) UN Doc. A/CN.4/714 87-89.

of individual violations and the severity of their impacts on victims. It is further important to recognize that certain peremptory norms, particularly the prohibition of aggression and genocide by definition require large scale international violations.[64]

However, it is not always easy to determine whether a breach is considered serious, and especially not in cases where several actors cause damage jointly or in a cumulative way. The parameters set up in the Article limit the applicable area for the rules, so they include only the most obvious breaches. Some thus consider this problematic in cases where a number of actors are involved in the violations but at various levels. For example, in cases where several parties are involved, each breach, on its own must be considered a gross or systematic violation to invoke third state responsibility as stated in chapter III ARSIWA.[65] However, Article 40 does not specify the process for determining whether or not a serious breach has taken place. It is not the role of the articles to set out the procedures for dealing with individual cases.[66]

2.2 Consequences of a serious breach of peremptory norms of general international law

Article 41 of ARSIWA states particular consequences following a serious breach of an obligation under chapter III ARSIWA, and it reads as follows:

1. 'States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences that a breach to which this chapter applies may entail under international law.'

This Article consists of three paragraphs. The first two impose legal obligations on states when 'serious breaches of peremptory norms' as defined in article 40 occur, while the third works as a saving clause.[67] The three

[64] International Law Commission, ARSIWA (n 6) 113 para 8.
[65] Wyler and Castellanos-Jankiewics (n 61) 291.
[66] International Law Commission, ARSIWA (n 6) 113 para 9.
[67] ibid 114 para 1.

obligations contained in the Article is the obligation of cooperation, the obligation of non-recognition and the obligation of non-assistance.[68]

2.2.1 The obligation of cooperation

According to the first paragraph of Article 41 of ARSIWA, states have a positive obligation to cooperate in order to bring about the cessation of serious violations as stated in Article 40. However, the provision does not specify what form of cooperation is being referred to. Different kind of cooperation, within international organizations but also between states may therefore be included in this provision.[69] The cooperation must, however, be implemented through lawful means, which will vary depending on the circumstances of each case. Nevertheless, it is clear that the obligation to cooperate applies to all states, regardless of whether they are directly affected by the breach or not. In case of a serious breach, a collective and coordinated effort from all states is needed to reduce the negative consequences of the breach.[70]

The provision implies that all states have a duty to cooperate to address a situation of a violation in accordance with Article 40. However, this can be a challenge in cases where there is no clearly affected state that may initiate the cooperation. This is often the case when widespread and systematic abuse of human rights occur within a state.[71]

Another challenge regarding states' positive obligation to cooperate may be seen in practice. It became clear when the General Assembly sought an advisory opinion from the ICJ regarding the legality of 'the Wall'. In the advisory opinion on the Wall, the ICJ concluded that the construction was in violation of international law and thus urged states to put an end to the situation resulting from the breach of international law. Despite this, few states have acted accordingly. Even though the General Assembly later urged all member states to 'comply with their legal obligations as mentioned in the Advisory Opinion', no state took action to change its approach towards Israel. This lack of action could be seen for example, in states provision of development aid to Israel, as it remained on the same level as before the Advisory Opinion was published. As the Court concluded in its Namibia Advisory Opinion, the pure qualification of a circumstance, does not bring it to an end, it requires actions from states. Article 41 of ARSIWA may therefore only go so far, but

[68] Crawford, *State Responsibility – The General Part* (n 5) 382.
[69] International Law Commission, ARSIWA (n 6) 114 para 2.
[70] ibid 114 para 3.
[71] Crawford, *State Responsibility – The General Part* (n 5) 387.

ultimately, enforcing international law depends on the political will to take action.[72]

2.2.2 The obligation of non-recognition

As stated in paragraph 2 of Article 41 of ARSIWA, states have an obligation of non-recognition.[73] This refers to the duty of the international community as a whole to collectively not recognize as lawful situations arising directly from serious breaches, as stated in Article 40 of ARSIWA. The obligation goes beyond formal recognition and prohibits actions that would imply acknowledgement of these situations as well.[74]

One of the clearest examples of non-recognition concerns territorial acquisition following acts of aggression. The obligation existed even before ARSIWA. This can be seen in, for example, Article 5(3) of the General Assembly's definition of aggression, which explicitly state that no such territorial acquisition 'is or shall be recognized as lawful'. A basic standpoint of international law is that when annexation arise as a result from aggression and the aggressor maintain continuous and efficient control over a territory, the international community may not acknowledge any legal rights coming from that situation.[75]

There are several cases in which the obligation of non-recognition has been used, and one example is the international community's approach towards the regime in Southern Rhodesia. A few days before unilaterally declaring its independence from the United Kingdom, the UN General Assembly passed a resolution calling for non-recognition of any administration that did not represent a majority of the people. This was followed by several Security Council resolutions that further clarified the scope of the obligation of non-recognition. They stated that states were obligated to not uphold diplomatic ties with the Southern Rhodesian administration, refrain from recognizing passports issued by the administration if it was not for humanitarian purposes, withdraw trade and consular representatives, invalidate any purported official acts of the regime, and reject all requests for membership in international organizations.[76]

A more recent example of a situation where the principle of non-recognition generated a lot of discussion is the Jerusalem declaration, stating US recognition of Jerusalem as Israel's capital and the following embassy move from

[72] ibid 389.
[73] International Law Commission, ARSIWA (n 6) 114 para 4.
[74] ibid 114 (5).
[75] Crawford, *State Responsibility – The General Part* (n 5) 382.
[76] ibid 382–383.

Tel Aviv to Jerusalem in 2018.[77] The legal status of the city of Jerusalem has long been disputed. The conflicting claim to the city goes so deep that the issue has been postponed in order to enable progress in other disputed areas. After the 1967 war, Israel gained full control of Jerusalem and annexed the eastern part of the city, declaring it its eternal capital. The legislation and policies put in place by Israel to enforce the annexation were declared invalid by the international community. Therefore, the announcement confirming the US embassy would move to Jerusalem, caused a large debate.[78] The international community saw the move as a departure from long-standing international consensus that considers the question of Jerusalem a final status issue that should be solved through negotiations between the parties in line with relevant UN resolutions.[79] In accordance with Article 41(2) of ARSIWA, states have an obligation not to recognize as lawful situations arising from a serious breach of a peremptory norm of international law. This obligation is frequently linked, through practice, with territorial acquisitions obtained or upheld through threat or use of force.[80] To determine whether the Jerusalem declaration constitutes a recognition in breach of a state's obligation of non-recognition, it must be considered whether the obligation of non-recognition arise regards to the disputes over the legal status of Jerusalem under international law. Jerusalem was split into east and west following the drawing of a map of 1949. However, Israel took control of the east side as well, following a war in 1969, and shortly thereafter Israel extended its jurisdiction to include the entire city. The General Assembly declared these initiatives illegal. Further, the Security Council called on its member states not to recognize this and demanded that those states with diplomatic missions in Jerusalem withdrew them.[81]

The Trump Administration did not directly refer to east Jerusalem. However, the Jerusalem declaration was considered too unclear not to recognize Israel's claim to east Jerusalem. As stated in the comments to Article 41 (2) of

[77] Marco Pertile and Sondra Faccio, 'What we talk about when we talk about Jerusalem: The duty of non-recogntition and the prospects for peace after the US embassy's relocation to the Holy City' (2020) Leiden Journal of International Law <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/what-we-talk-about-when-we-talk-about-jerusalem-the-duty-of-nonrecognition-and-the-prospects-for-peace-after-the-us-embassys-relocation-to-the-holy-city/3146C744BABF20F8EC9C104AB6F2CE0E> accessed 7 April 2025 621.

[78] David Huges 'The US embassy in Jerusalem: Does location matter?' (2018) Questions of international law < https://www.qil-qdi.org/us-embassy-jerusalem-location-matter/> accessed 10 March 2025.

[79] Pertile and Faccio (n 77).

[80] Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford and others (eds) *The Law of International Responsibility* (Oxford University Press 2010) 678.

[81] David Huges 'Did the Trump Administration's Jerusalem Declaration violate international law?' (2018) Opinio Juris < https://opiniojuris.org/2018/03/05/did-the-trump-administrations-jerusalem-declaration-violate-international-law/> accessed 10 March 2025.

ARSIWA, the obligation of non-recognition includes not only direct recognition but also actions that implies recognition.[82] Such indirect recognition may therefore be found in the Jerusalem declaration as well as in the president's statements regarding the embassy move to Jerusalem. These actions are considered inconsistent with the political aim behind the obligation of non-recognition as agreed by the international community.[83]

2.2.3 The obligation of non-assistance

The obligation of non-assistance is stated in the later part of Article 41 paragraph 2 and prohibit states from providing aid or assistance to uphold a situation resulting from a serious breach of a peremptory norm as defined in Article 40 of ARSIWA. Nevertheless, there is another Article in ARSIWA regulating aid or assistance in relation to internationally wrongful acts, namely Article 16.[84] However, the obligation of non-assistance in Article 41 goes further than what is stated in Article 16, including behavior even after the wrongful act that contribute to the responsible state's ability to uphold the situation caused by the violation.[85] Thus, Article 41 not only include assistance in regard to the actual breach but also support to the responsible state for upholding a situation resulted from a violation of a peremptory norm of international law. Further, the idea of non-assistance is based on the assumption that the state providing support is aware of the wrongful act of the state receiving the support.[86]

The obligation of non-assistance is based on the thought that when a state carries out an act that affect the moral principles of all states, a collective reply performed by all is needed to reduce the negative consequences following the breach.[87] It may thus be viewed as an extension of the obligation of non-recognition. However, the scope of application is different regarding measures that do not include recognition of a situation resulting from a serious violation under Article 40.[88] This is further confirmed by the Security Council's resolutions on the matter, prohibiting all kind of support or assistance in maintaining the unlawful apartheid regime in South Africa or the Portuguese colonial regime.[89] In the resolution regarding South Africa an obligatory arms embargo, among other things, was imposed towards South Africa,

[82] International Law Commission, ARSIWA (n 6) 114.
[83] Huges 'Did the Trump Administration's Jerusalem Declaration violate international law?' (n 81).
[84] International Law Commission, ARSIWA (n 6) 115 para 11.
[85] Nina HB Jorgensen, 'The Obligation of Non-Assistance to the Responsible State' in James Crawford and others (eds) *The Law of International Responsibility* (Oxford University Press 2010) 692.
[86] International Law Commission, ARSIWA (n 6) 115 para 11.
[87] Jorgensen (n 85) 691.
[88] International Law Commission, ARSIWA (n 6) 115 para 2.
[89] ibid 115 para 12.

encouraging all states to act according to the resolution and hence not cooperate with South Africa in the production or evolution of nuclear weapons. A similar regulation was included in the resolution regarding the Portuguese colonial regime as well, since the Security Council called upon all states not to provide the Portuguese Government with any assistance that could be used to abuse the people of the area under its administration. The Security Council also encouraged all states to take measures to prevent the Portuguese regime from getting weapons and military supplies for this cause.[90] Similar to the obligation of non-recognition, these resolutions reflect a general thought that apply to all situations arising as a consequence of a serious breach under Article 40.[91] This obligation takes a more effect-oriented approach than the other obligations under Article 41 and thus focus rather on the consequences of peremptory norms of international law.[92]

The obligation of non-assistance is, however, limited to actions that could contribute to upholding the situation caused by the unlawful act. Cooperation with the responsible state in other, non-related areas is therefore not prohibited under this obligation. Hence, the responsible state does not have to be completely isolated. The fact that a state acts in violation of a peremptory norm of international law under Article 40, however, makes it easier for states to cease certain cooperation with the responsible state if it wants to.[93]

2.3 ICJ's Advisory Opinion of July 19, 2024

In its resolution[94] of December 30, 2022, the General Assembly asked for an advisory opinion of the ICJ regarding the legal implications for all states following Israel's occupation of the Palestinian territory.[95] The General Assembly requested answers to two questions:

(1) 'What are the legal consequences arising from the ongoing violation by Israel of the Palestinian people's right to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character, and status of the Holy City

[90] Jorgensen (n 85) 691.
[91] International Law Commission, ARSIWA (n 6) 115 para 12.
[92] Crawford, *State Responsibility – The General Part* (n 5) 385.
[93] Jorgensen (n 85) 691.
[94] Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem UNGA RES 77/247 (9 January 2023) Seventy-seventh session UN Doc A/Res/77/247.
[95] Eugenio Carli, 'Obligations Erga omnes, Norms of Jus Cogens and Legal Consequences for "Other States" in the ICJ Palestine Advisory Opinion' (2024) EJIL:Talk! <https://www.ejiltalk.org/obligations-erga-omnes-norms-of-jus-cogens-and-legal-consequences-for-other-states-in-the-icj-palestine-advisory-opinion/> accessed 10 March 2025.

of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(2) How do the policies and practices referred to in paragraph (a) above, affect the legal status of the occupation and what are the legal consequences that arise for all States and the United Nations from this status?'[96]

The following Advisory Opinion, published on July 19, 2024, were seen as groundbreaking, mostly following its elaborative discussion on the obligations of third states in response to Israel's internationally wrongful acts in Palestine.[97]

2.3.1 The Court's Key Findings

To answer the first question imposed by the General Assembly, the Court start off with the issue of prolonged occupation of the Palestinian territory. It observes that Israel has maintained its occupation of this territory for over 57 years.[98] The legal framework regulating an occupying state's obligations towards its occupied territory is based on the assumption that the occupation is temporary, conducted as response to military necessity and that it cannot transfer sovereignty of the area to the occupying power.[99] However, the fact that an occupation is ongoing over a long period of time does not automatically change its status under international humanitarian law. The continuing occupation's lawfulness must therefore be analyzed with consideration of other rules of international law. To be considered lawful, the occupation must therefore be in line with the rules prohibiting the threat or use of force and the right to self-determination.[100]

When analyzing Israel's settlement policy, the Court confirmed what it concluded in its 2004 Wall Advisory Opinion, namely that the Israeli settlements in East Jerusalem and in the West Bank has been placed and upheld in breach of international law.[101] The Court further identified six various breaches of international law that can be connected to their settlement policy.[102] These

[96] RES 77/247 (n 94) 247 para 18 (a-b).
[97] Al Tamimi (n 2).
[98] ICJ Advisory Opinion July 19, 2024 (n 1) para 104.
[99] ibid para 105.
[100] ibid para 109.
[101] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ (2004) para 120; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* ICJ (19 July 2024) para 155.
[102] Diakonia International Humanitarian Law Centre, 'Summary of the ICJ's Advisory Opinion of 19 July 2024' (2024) < https://www.diakonia.se/ihl/news/summary-icj-advisory-opinion-19-july-2024/> accessed 15 March 2025 9.

breaches include the relocating of civilian citizens to the West Bank and East Jerusalem[103], increased seizure of land[104], utilization of natural assets[105], using Israeli legislation in the occupied territories[106], forced displacement of Palestinians[107] and use of force by settlers directed towards Palestinians.[108] To answer the question asked by the General Assembly, concerning the legal implications resulting from Israel's annexation of the occupied Palestinian territory, the Court explored whether it is actually annexing the area or not. For Israel's actions to qualify as 'annexation', Israel as the occupier must aim to practice lasting control over the occupied area.[109] The Court stated that Israel's actions were performed with the purpose of controlling the occupied territory, and it was therefore a matter of annexation.[110]

The Court further examined whether Israel's policies and practices were discriminatory. It was found that Israel, as the occupier, has adopted several legal acts leading to mistreatment of Palestinians. None of these could be justified with regards to reasonable and objective criteria or otherwise be considered legitimate. Therefore, the Court concluded that the legal order imposed by Israel on Palestinians were systematically discriminatory.[111]

Regarding the right of the Palestinian people to self-determination, the Court underlined that it had already confirmed the existence of the right in its Wall Advisory Opinion. The Court further highlighted that the obligation to respect the right to self-determination constitute an obligation of erga omnes character. In situations of foreign occupation, as this one, the right to self-determination is considered a peremptory norm of international law.[112]

This reasoning led the Court to draw several conclusions. The court stated that Israel's ongoing existence in the occupied Palestinian territory is illegal.[113] Therefore, Israel is obligated to immediately withdraw its unlawful presence in the area, cease all ongoing settlement activities and evacuate settlers from the occupied land. Israel must also provide compensation for the harm caused to all individuals in the area.[114]

[103] ICJ Advisory Opinion July 19, 2024 (n 1) para 119.
[104] ibid para 120.
[105] Diakonia, 'Summary of the ICJ's Advisory Opinion of 19 July 2024' (n 102) 11.
[106] ICJ Advisory Opinion July 19, 2024 (n 1) para 134 and 14.
[107] Diakonia, 'Summary of the ICJ's Advisory Opinion of 19 July 2024' (n 102) 12.
[108] ICJ Advisory Opinion July 19, 2024 (n 1) para 154.
[109] ibid para 159.
[110] ibid para 173.
[111] ibid, para 223.
[112] ibid para 233.
[113] ibid para 285.
[114] Diakonia, 'Summary of the ICJ's Advisory Opinion of 19 July 2024' (n 102) 2.

2.3.2 Legal consequences for other states

To answer the second question imposed by the General Assembly, the Court devoted a full division of the Advisory Opinion to clarifying the consequences for other states following Israel's unlawful actions in the occupied Palestinian Territory.[115]

The Court underlined the fact that some of the obligations violated by Israel constitute obligations erga omnes. Consequently, these obligations concern all states and, following these rights importance, all states have a legal interest in guaranteeing their protection. The obligations erga omnes breached by Israel consists of the obligation to respect the Palestinian people's right to self-determination, the obligation following the prohibition of use of force in order to concur certain territory and some of its obligations according to the international humanitarian law and internal human rights law.[116] The Court further elaborated its reasoning regarding the right to self-determination. It was noted that the Security Council and the General Assembly decide upon which approach is necessary to ensure that the unlawful Israeli presence in the occupied Palestinian territory comes to an end and that the Palestinian people's right to self-determination is respected. Despite this, the Court argue that all states shall work together with the UN to actually implement these guidelines.[117]

Regarding the prohibition of acquiring territory with the use of force, the Court refers to the Security Council resolutions that has repeatedly underlined the illegality of these measures and concluded that all measures taken by Israel to modify the physical character of the Palestinian territories occupied since 1967 is illegal. The Security Council further encouraged all states to differ between the State of Israel, and the areas occupied since 1967.[118] The General Assembly, similar to the Security Council, also encouraged states not to acknowledge any transformation of borders existing prior to 1967, including regarding Jerusalem. If, however, anything else has been agreed by the parties through negotiations, that is exempted from the obligation. States shall also distinguish, in their trade relations, between the land belonging to the State of Israel and the territories occupied since 1967. No aid or assistance shall be given to unlawful settlement engagements and no assistance shall enable Israel to use it in relation to settler activities in the occupied Palestinian

[115] ICJ Advisory Opinion July 19, 2024 (n 1) paras 273-279.
[116] ICJ Advisory Opinion July 19, 2024 (n 1) para 274.
[117] ibid para 275.
[118] ibid para 276.

territories. Lastly, the General Assembly called upon all member states to respect and uphold international law in all situations.[119]

The Court underlined the reasoning of the Security Council and the General Assembly. Further, the Court clarified its position on the obligation to distinguish between the territory of the State of Israel and the occupied territories. States are obligated to refrain from contractual relations with Israel in all cases where it benefits or recognize as legal, Israel's illegal activities in relation to the occupation of the Palestinian territory. Further, states shall not have diplomatic relations with Israel that recognize its illegal presence in the occupied Palestinian territories. Instead, states shall act to prevent trade and investment relations that are conductive to the illegal situation created by Israel in the occupied Palestinian territory.[120] Because of the importance of the rights in this case, all states have an obligation not to recognize the situation as legal. No state shall further contribute to Israel's continued illegal presence in the occupied Palestinian territory by giving support in the form of aid or assistance. All states are obligated to ensure that this unlawful situation comes to an end.[121]

2.3.3 Implications for third-state obligations

When the Court state the legal consequences following Israel's unlawful acts in the occupied Palestinian territory, they are basically identical with the obligations stated in Article 41 of ARSIWA.[122] Even though ARSIWA was not expressly mentioned in the Advisory Opinion, it is hard to imagine that it thought of this as obligations different from the ones stated in ARSIWA.[123]

According to Article 41 of ARSIWA, a serious breach of a peremptory norm of international law give rise to certain obligations for third states. Despite this, the Court underline the erga omnes character of the obligations breached by Israel, rather than their status as peremptory or jus cogens norms. A similar line of arguing may be seen in President Salam's statement in which he concludes that the legal obligations arise from the erga omnes character of the obligations breached.[124] This view is further supported by Judge Cleveland

[119] ibid para 277.
[120] ibid para 278.
[121] ibid para 279.
[122] Matthias Goldmann, 'Non-recognition and Non-Assistance Consequences of the Palestine Advisory Opinion for Third States' (2024) Verfassungsblog <https://verfassungsblog.de/non-recognition-and-non-assistance/> accessed 25 April 2025.
[123] Yael Ronen, 'The Obligation of Non-recognition, Occupation and the OPT Advisory Opinion', (2024) Verfassungsblog <https://verfassungsblog.de/the-obligation-of-non-recognition-occupation-and-the-opt-advisory-opinion/> accessed 21 April 2025.
[124] Diakonia, 'Summary of the ICJ's Advisory Opinion of 19 July 2024' (n 102) 23.

who referred to earlier cases where the Court referred to the erga omnes nature of obligations in the context of obligations of third states.[125]

Judge Tladi, however, argue that it is the peremptory character of the norms breached that give rise to legal consequences as stated in Article 41 of ARSIWA, rather than its erga omnes character.[126] This point of view is further supported by Judge Higgings's reasoning relating to the Wall Opinion.[127] The definition of erga omnes can be found in the Barcelona Traction case, in which the Court concluded that erga omnes obligations is 'the concern of all states', and because of the importance of the rights in question, every state have a legal interest in their protection.[128] However, the Court did not mention any creation of new obligations for all states following a state's violation of an obligation erga omnes. Instead, it underlined that the rights involved concerned all states, and that they were of legal interest for all states. In this regard, all the Court said about consequences arising from obligations erga omnes is that states have an ability to institute proceedings in front of the Court towards a wrongdoing state in order to protect their legal interest against that kind of breach. Therefore, obligations erga omnes relate only to the procedural dimension of these particular legal obligations. This means that when a state has a duty towards the international community, all the other states does not automatically have an obligation to respond when the state in question does not fulfill its obligation. Third states obligations in this manner constitutes a different group of obligations that does not come from the collective nature of the obligation breached in the first place. The Court was, however, not particularly clear in its use of obligations erga omnes and norms of jus cogens. There is some overlap between the concepts, but they must remain separated since most scholars agree that all norms jus cogens creates obligations erga omnes, but not the other way around. The Court's use of the terms only led to increased confusion of the concepts.[129]

However, the Court's description of Israel's violation of the Palestinian people's right to self-determination as 'continued', and the occupation as 'prolonged', indicate that the offences are within what is included under Article 40 of ARSIWA.[130] The Court underlined an obligation for all states not to acknowledge the condition of Israel's illegal presence in the occupied Palestinian territory. This formulation is very similar to the one in Articles 40 and 41 of ARSIWA that state an obligation for all states 'not to recognize as legal the situation arising from the breach of a peremptory norm'. Through this

[125] Goldmann (n 122).
[126] Diakonia, 'Summary of the ICJ's Advisory Opinion of 19 July 2024' (n 102) 23.
[127] Al Tamimi (n 2).
[128] *Barcelona Traction Case* (n 9) para 33.
[129] Carli, (n 95).
[130] Ronen (n 123).

formulation, it can be read that the Court qualify Israel's unlawful presence as a peremptory norm. But this assumption in turn raises a few questions. The obligation of non-recognition refers to a legal status and not an actual fact. The Court, however, did not give examples of specific actions that states could take to fulfill this obligation, nor did it give examples of behavior that countries should refrain from to not recognize the situation as legitimate. It is clearer regarding actions that states could take to not recognize Israel's' claim of sovereignty in the occupied Palestinian territory. For example, states should not engage in trade relations with Israel in the sense of Israel acting on behalf of the occupied Palestinian territory. States should also refrain from placing diplomatic missions in this area.[131]

Direct form of support such as deliveries of military supplements with the aim of promoting Israel's control of the occupied area, or economic coercion with Israeli actors that are active on the occupied Palestinian territory, is forbidden. This constitutes a very clear example. However, the scope between clear examples like this and more uncertain types of recognition is not as evident. Different kind of aid and cooperation may be used indirectly to promote Israel's ability to control the occupied territory, and this is something that states must consider before providing aid or support to Israel. One area where the risk is high is regarding military collaboration. Cooperation with joint ventures regarding production of military systems should be a prioritized issue, since it is not possible to know for sure that this kind of technology won't be used to uphold the illegal occupation.[132]

[131] Carli (n 95).
[132] Goldmann (n 122).

3 Obligations of international organizations

The ILC continued its work on responsibility with focus on international organizations in 2002, leading to the adoption of ARIO in 2011.[133] This was an important development since international organizations differ notably from states. Comparing to states, international organizations lack a general competence, and each organization have thus been created to carry out certain functions. However, no international organization is the same as another. They are different from each other in several aspects as they have various powers, number of members, internal structure and relations to other organizations and its members. Following this diversity, some articles in ARIO may be applied to some organizations while others cannot, which must be kept in mind when analyzing its implications.[134]

What constitutes an international organization is defined in Article 2 of ARIO, as an 'organization established by a treaty or other instrument governed by international law and possessing its own legal personality'.[135] Similar as in ARSIWA, ARIO too separates internationally wrongful acts from 'serious breaches of obligations under peremptory norms of international law'. These serious violations give rise to certain obligations and are regulated in chapter III of ARIO, consisting of Articles 41 and 42[136], which will be elaborated below.

3.1 Application of Chapter III ARIO

The area for application of chapter III of ARIO is similar to corresponding chapter III of ARSIWA, which has been elaborated above. It is not as likely that an international organization act in violation of an obligation of a peremptory norm, as it is for a state to do the same. However, the risk of acts like this cannot be excluded. It is not impossible that an international organization commit a crime of aggression or act in violation of an obligation arising from a peremptory norm regarding human rights etc. If an act like this occurs, it generates the same consequences as if the obligation was breached by a state.[137] Article 41 of ARIO defines which acts that fall under the scope of chapter III and reads as follows:

[133] Mirka Möldner 'Responsibility of International Organizations – Introducing the ILC's DARIO' in A Bogdandy and R Wolfrum (eds) *Max Planck Yearbook of United Nations law* (Max Planck Institute, Volume 16, 2012) 285.
[134] International Law Commission, ARIO (n 11) 47 para 7.
[135] ibid 49.
[136] ibid 82.
[137] ibid 82 para 1.

1. ‘This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfill the obligation.’

The Article consists of two parts and is similar to Article 40 of ARSIWA, except the fact that the term ‘state’ in article 40 ARSIWA, is replaced with ‘international organization’.[138] ARIO like ARSIWA, thus distinguish between different breaches of international law. When a state act in violation of a peremptory norm, a jus cogens norm, the obligations of international organizations is invoked in the same way as it is for states under ARSIWA. It can therefore be concluded, through the wording of Article 41 of ARIO, that international organizations are bound by jus cogens norms.[139]

3.2 Consequences arising from serious breaches of peremptory norms of general international law

Article 42 of ARIO state certain consequences following a serious breach of a peremptory norm as stated in Article 41, and reads as follows:

1. ‘States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

2. No state or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.’

If an international organization commit a serious violation of an obligation arising from a peremptory norm of general international law, certain obligations are invoked for states as well as international organizations, similar to those arising for states under Article 41 of ARSIWA. The wording of this Article is the same as in Article 41 of ARSIWA, with the addition of

[138] International Law Commission, ARIO (n 11) 82 para 2.
[139] Sarah Bayani, International Legal Responsibility of International organizations in the ILC Draft Articles and Beyond (Göttingen University Press 2022) 272.

'international organizations' in its first and second paragraph. Therefore, the obligation of cooperation, non-recognition and non-assistance apply to international organizations as well as states.[140] There is, however, a lack in practice of cases where an international organization has violated its obligations arising from a peremptory norm of general international law. It should therefore be noted that the obligations under Article 42 is considered applicable to international organizations even when a crime is committed by a state.[141] There are some examples of acts in violation of peremptory norms of international law committed by states, concerning international organizations obligations according to this Article. One example is Iran's annexation of Kuwait, upon which the Security Council encouraged not only member states but also international organizations, not to recognize the situation as legal or provide aid or assistance to uphold the situation following the unlawful acts.[142]

The first obligation stated in this article is the international organizations obligation of cooperation. Before the adoption of ARIO, some international organizations argued that they cannot have an obligation to cooperate outside the scope of their internal regulation. This was taken into account, and the obligations of international organizations are therefore limited by their respective mandates, regardless of what is stated in ARIO. The first paragraph of Article 42 stating the obligation of cooperation therefore does not aim for organizations to act outside of what they are allowed to according to their internal regulation.[143] This was further confirmed by the Organization for the Prohibition of Chemical Weapons, stating that all measures taken by an international organization, must be in line with its mandate and internal regulation. The obligation to cooperate hence, does not exceed these limitations, not even in cases where there might be international expectations or norms in favor of a certain kind of cooperation.[144] However, this Article does not limit the obligations of any international organizations to cooperate in response to certain crimes, following its international rules, for example the United Nations obligations in cases of aggression.[145]

International organizations, similar to states, have an obligation of non-recognition. The existence of this obligation was reaffirmed in the ICJ Advisory Opinion on the 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', in which the Court concluded that Israel had an obligation to stop building the wall. The Court went on noting that no state

[140] International Law Commission, ARIO (n 11) 83 para 1.
[141] ibid 83 para 5.
[142] ibid 83 para 7.
[143] ibid 83 para 4.
[144] ibid 83 para 3.
[145] ibid 83 para 4.

should recognize the situation following the unlawful actions of Israel as legal and this applied to the UN as well.[146] Another case, in which international organizations obligation of non-recognition has been applied is the situation of annexation of Kuwait by Iran. In relation to this situation, the Security Council specifically called upon all international organizations not to recognize the unlawful annexation as legal. It further stated that international organizations should refrain from taking measures or engage in trade relations that could lead to recognition of the situation's lawfulness. The European Community further recognized the existence of this obligation even before its formulation in ARSIWA, in a declaration adopted in 1991 regarding the recognition of new states in eastern Europe and the Soviet Union. In this declaration, it was concluded that the European Community and its member states should refrain from recognizing new states if they resulted from acts of aggression.[147]

Article 42 of ARIO further state an obligation of non-assistance, applicable for international organizations. However, there is a lack of clear and precise guidelines for this obligation in relation to international organizations. The fact that there is a discussion surrounding this obligation thus becomes evident, especially in relation to international financial institute or international organizations with the purpose of providing aid. These institutions did repeatedly express their concern to the ILC before adopting ARIO, arguing that the simple knowledge of a certain situation of a state's violation of a peremptory norm of international law would be too little to invoke the responsibility of the international organization when it comes to financial aid. This have caused a major discussion on Articles 14 and 15, but also Article 42 of ARIO, in relation to different projects performed by agencies whose main assignment is providing aid and assistant to its members as well as third parties, such as for example UNESCO.[148] Similar as to the corresponding articles of ARSIWA, Articles 14 and 15 of ARIO is written with an aim to forbid any legal person in international law, regardless of whether it is a state or an international organization, from acting to ease the wrongdoing of a responsible legal person.[149] The same reasoning can again, be found in relation to Article 42 of ARIO, regulating international organizations obligations in response to serious violations of peremptory norms of international law. The ILC tried to reduce these worries of the international organizations, by explaining in its comments following ARIO that this is not a problem, an explanation that did not achieve its calming purpose. It is clear that the obligation of non-assistance in cases where states act in violation of a peremptory norm of international law, applies to international organizations, as similar to states under

[146]International Law Commission, ARIO (n 11) 83 para 6.
[147] ibid 83 para 7.
[148] Bayani (n 139) 138.
[149] ibid 138.

ARSIWA. Despite the fact that the specific criteria for when an international organization acts in breach of this violation to some extent remain unclear, the obligation does exist. This is reaffirmed by the IJC in the case of the unlawful annexation of Kuwait by Iran, and the Advisory opinion on the Wall in the occupied Palestinian territory. In both of these cases the ICJ firmly establish that international organizations should refrain from providing aid or assistance that may be used by the wrongdoing state to uphold the situation caused by the unlawful act.[150]

3.3 Implications of ICJ's Advisory Opinion of July 19, 2024

With a majority of twelve votes in favor and three against, the Court concluded that even international organizations have a duty not to recognize the situation following Israel's unlawful presence in the occupied Palestinian Territory as legitimate.[151] Therefore, the obligation of non-recognition applies to international organizations as well as states. The General Assembly has further strongly encouraged international organizations not to recognize, cooperate or assist in relation to any action taken by Israel in order to take advantage of resources in the occupied area, or to change the physical character or structure of the area. All international organizations must further distinguish between the State of Israel and the occupied Palestinian territory in their trade relations with Israel. These duties apply to the UN as well.[152]

The former EU High Representative for Foreign affair, Joseph Borell, published a statement shortly after the ICJ's Advisory Opinion, confirming the EU's steadfast support for the ICJ and its decisions. Borell further concluded that the implications of the Advisory Opinion must be exanimated to evaluate how it effects current EU policy.[153] The Advisory Opinion also gave rise to extensive discussions within the EU regarding potential sanctions against Israel. The need to review the EU-Israel Association Agreement was highlighted.[154] The ICJ's Advisory Opinion thus led the EU Foreign Ministers to initiate a meeting with Israel to discuss Israel's compliance with this agreement. However, the meeting did not take place. The obligations on third states established by the Court have major impacts on trade relations, both regarding

[150] Bayani (n 139) 139.
[151] ICJ Advisory Opinion July 19, 2024 (n 1) 79 para 3.
[152] ibid 280.
[153] EEAS Press Team 'Israel/Palestine: Statement by the high Representative on the Advisory Opinion of the International Court of Justice' (2024) The Diplomatic Service of the European Union <https://www.eeas.europa.eu/eeas/israelpalestine-statement-high-representative-advisory-opinion-international-court-justice_en> accessed 7 March 2025.
[154] Nathalie Weatherald, 'EU foreign ministers discuss sanctions against Israel' (2024) Politico < https://www.politico.eu/article/eu-foreign-ministers-sanctions-against-israel-micheal-martin/> accessed 14 March 2025.

relations between individual states and Israel, but also between the EU, as an international organization, and Israel.[155]

The Association Agreement between the EU and Israel was adopted in 2000, and it sets out a framework for the collaboration between the entities regulating among other things, political dialogue, and economic cooperation between the parties. The treaty further includes provisions for a free trade area between the EU and Israel.[156] However, the agreement also includes a so called 'human rights clause', stating that all cooperation based on the treaty must be performed with respect for human rights. The EU frequently include this sort of clauses in bilateral agreements, to be able to withdraw from treaties in situations where human rights are violated. This agreement is no exception and based on what is stated in Article 79 of the agreement, the EU may, if it determines that there are gross violations of human rights, suspend the agreement, in whole or parts of it. This clause can be seen as a negotiation tool, that the EU may use to put pressure on Israel to act according to its obligations under international law, through soft means, if it wishes. However, this kind of actions by the EU towards Israel may no longer be considered legally accepted. The ICJ made it clear in its Advisory Opinion that EU and its member states must take more severe measures to act in accordance with their legal obligations. The ICJ's ruling shed new light on this debate and consequently there is a need to review EU's trade relations with Israel. One of the most relevant obligations, stated by the Court, is the prohibition of possession of land by the threat of or use of force. Consequently, the EU cannot engage in business relations regarding trade or economic relations with Israel that could recognize or facilitate Israel's unlawful existence in the occupied Palestinian territory, affecting several continuing treatments.[157]

The most evident effect for the EU following the Advisory Opinion arise from the fact that the Advisory Opinion expressly prohibit all economic cooperation in the occupied areas. Despite the fact that the EU, in accordance with its internal policy, mark all goods coming from settlements, European companies further trade and offer services in the occupied areas. Thus, these measures taken by the EU so far have not been sufficient to reduce the illicit trade. It is therefore necessary to review this agreement to ensure its inclusion of tracking and punishment functions for violations of the obligations imposed by the Court. The Advisory Opinion also touch upon the issue of prevention. Hence, the EU must prevent investment and trade relations that facilitates Israeli presence in the occupied territory. It is a challenge to differ

[155] Al Tamimi (n 2).
[156] European Union, 'Israel' Trade and Economic Security <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/israel_en> accessed 16 April 2025.
[157] Al Tamimi (n 2).

between legal relations with Israeli companies linked to the unlawful occupation and Israeli companies who are not. However, in some cases it is relatively simple. One of these is the fact that Israeli made drones, weapons, and surveillance equipment that are used in the occupied territory are frequently sold and tested in European states. This economic coercion is directly contributing to upholding the unlawful situation and is therefore forbidden according to the Court. It is also a challenge to separate the state of Israel and the occupied Palestinian territory in trade relations since Israel treat settlements as an integrated piece of its lawful territory. Consequently, the EU must provide its legal framework with more clear rules about the origin of Israeli products and services.[158]

Many scholars argue that the EU must impose an arms embargo on Israel. These further argue that the EU should prohibit all trade that interfere with illegal settlement, cancel all trade that indicate support for the illegal occupation, and suspend the Association Agreement in accordance with its Article 2. Some scholars go even further, meaning that the EU must draw more attention to Prime Minister Netanyahu's dismission of the Advisory Opinion, which in turn challenged the entire international rules-based order.[159]

[158] Al Tamimi (n 2).

[159] Al Haq and Al Mezan, 'ICJ Advisory Opinion – The EU and its member states must comply with international law' (2024) Euromed Rights <https://euromedrights.org/publication/icj-advisory-opinion-the-eu-and-its-member-states-must-comply-with-international-law/> accessed 14 March 2025.

4 Countermeasures

The regulation regarding countermeasures was developed relatively recent comparing to how long the concept has existed in the international system.[160] It was first formulated in the fifth chapter of ARSIWA. The chapter setted out certain situations where a state may commit an international wrongful act without being held responsible since the wrongfulness of the act is precluded. One of these is countermeasures.[161] However, not only states may take countermeasures, but this possibility exists also for international organizations as can be read from Article 22 of ARIO. Nevertheless, ARIO does not examine what it takes for a countermeasure taken by an international organization towards a wrongdoing state to be legal. Hence, ARIO only regulates what applies when an international organization take a countermeasure towards a wrongdoing international organization. ARSIWA may however be used by analogy for this matter.[162] Therefore, the elaboration below will focus on countermeasures as stated in ARSIWA, with the assumption that these regulations apply to international organizations when taking countermeasures towards states as well.

4.1 Circumstances precluding wrongfulness

As stated in Article 22 of ARSIWA, the wrongfulness of a measure taken in violation of an international obligation owed to a certain state, is precluded if it is performed as a countermeasure, as stated in the second chapter of ARSIWA's part three.[163] However, a countermeasure in accordance with Article 22 does not preclude the wrongfulness of all imaginable measures. Article 26 thus conclude that no paragraph in the chapter preclude the wrongfulness of any acts in violation of an obligation derived from a peremptory norm of general international law.[164] With regards of what is stated in Article 53 of the 1969 Vienna Convention, any agreement that contravenes peremptory norms of general international law is not applicable.[165] Even though a state can take countermeasures, it can never act in violation of a peremptory norm. A genocide can thus never excuse a war of aggression.[166] One example is when President Putin tried to justify Russia's full-scale invasion of Ukraine as a countermeasure following an alleged genocide in the Donbas region of Ukraine. There is, however, no evidence that the claims of genocide have any

[160] Dawidowicz, Third-Party Countermeasures in International Law (n 32) 3-4.
[161] International Law Commission, ARSIWA (n 6) 71.
[162] International Law Commission, ARIO (n 11) 72 paras 1-2.
[163] International Law Commission, ARSIWA (n 6) 75.
[164] ibid 84.
[165] ibid 84 para 1.
[166] ibid 85 para 4.

credibility at all. Even if they did, scholars in the legal debate all agree, arguing that it would not justify the use of force regardless.[167]

4.1.1 Definition of countermeasure

Chapter II part three regulate countermeasures which are internationally wrongful acts precluded from wrongfulness when performed as a response to an unlawful act committed by a state in the first place and in order to ensure that the wrongdoing state end its wrongful actions and/or make reparation for the injury caused by it.[168] The system of which countermeasures is part of, aim to give an injured state certain means to ensure their rights and restore the legal relation with the state responsible for the wrongful act.[169] This thought is supported by the ICJ, stating repeatedly that an act carried out as a response to a previous wrongful act committed by another state, if the unlawful act is directed towards that state, is justified as a countermeasure.[170]

Originally, the term 'reprisals' have been used to describe states use of what would be considered an unlawful measure if not taken in self-help as response to another state's breach of an obligation. Nowadays, this term is used to describe actions used in armed conflict while the term countermeasure relates to reprisals outside of armed conflict. Countermeasures must further be distinguished from retorsion, which are 'unfriendly' actions that do not constitute a breach of an international obligation by the state taking the particular measure, even though they are in response to a wrongful act. Examples of reprisals may include imposing certain bans on diplomatic missions, trade embargoes or suspensions of aid. However, when these measures are not in breach of an obligation, they cannot be considered countermeasures. Countermeasures are thus actions in breach of an international obligation, that is not only precluded from wrongfulness, but further considered legitimate, because it fulfills the requirement of a countermeasure.[171]

Countermeasures must further be separated from a legitimate denunciation or withdrawal from an agreement, following a state's illegal behavior, as regulated in Article 60 of the Vienna Convention. It is only when a denunciation or withdrawal of a contract occurs outside the scope of what is allowed under Article 60 that it constitutes a wrongful act. Therefore, it is only in such cases,

[167] Rene Värk, *Russia's Legal arguments to justify its aggression against Ukraine* (International Centre for Defence and Security 2022) 6.
[168] Crawford, *State Responsibility – The General Part* (n 5) 274.
[169] International Law Commission, ARSIWA (n 6) 128 para 1.
[170] *Case concerning the Gabikovo-Nagymaros Project (Hungary/Slovaki*a) ICJ (25 September 1997) para 83; *Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Service Transit Agreement (Bahrain, Egypt, and United Arab Emirates v Qatar)* ICJ (14 July 2020) paras 80-98; International Law Commission, ARSIWA (n 6) 75 para 2.
[171] International Law Commission, ARSIWA (n 6) 128 para 3.

i.e., when the suspension itself is unlawful, that the measure may be discussed as a potential countermeasure. However, countermeasures are temporary measures outside treaty relations taken with a specific purpose, namely, to make the wrongdoing state cease its illegal actions and eventually provide reparations for the damage caused by the wrongdoing. When the purpose is achieved, the countermeasures should be suspended, which is difficult if an entire treaty has been renounced.[172] Hence, the purpose with countermeasures is not to punish the wrongdoing state. There is, however, large room for misuse of countermeasures, whereas ARSIWA provide some limitation on the matter.[173]

4.1.2 Objects and limits of countermeasures

Article 49 of ARSIWA sets out the premises and regulates the objects and limits of countermeasures and reads as follows:

1. 'An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.'

As stated in the first paragraph, only an injured state may resort to countermeasures. What constitutes an injured state is defined in Article 42 of ARSIWA. According to Article 42, a state is considered 'injured' in cases where the obligation breached is owed to that specific state or a number of states, where the state in matter is included. The violation should generate negative consequences, especially for that state in particular, or alter the dynamics between the states in relation to compliance with the obligation.[174] For a state to be 'injured', the obligation breached must be one that the wrongdoing state owes specifically to the injured state. This is the case if for example, the wrongdoing state act in breach of a bilateral agreement.[175] However, some multilateral agreements may also have bilateral aspects as all states bound by

[172] International Law Commission, ARSIWA (n 6) 128-129 para 4.
[173] ibid 129 para 6.
[174] ibid 117.
[175] ibid 118 para 6.

the treaty have an interest in its fulfillment.[176] A state may thus be considered injured even if the wrongdoing state breaches an obligation owed to a number of states. However, certain criteria must be fulfilled for a particular state to be considered injured in that case.[177] The state must be 'specially affected' and therefore more negatively impacted than other states following the breach. However, no specific criteria for what it takes to be considered specially affected is stated, and it must therefore be determined on a case-by-case basis.[178] Some breaches may further have a negative impact on all states to which the obligation is owed, no matter whether the state is 'specially affected' or not.[179] These obligations arise from the model of the Vienna Convention and constitutes a category of 'interdependent' obligations. Obligations like these can be found in agreements that must be fulfilled by all parties in order to achieve its purpose. One example could be a disarmament treaty, where all parties are obligated to reduce their military capacity to the same extent as all other parties. If any part fails to fulfill its obligations under the treaty, the ability of all parties to fulfill their obligations is altered, as one state's failure threatens the military balance that the treaty aims to uphold. In this case, all parties to such a treaty could be considered injured, regardless of whether or not it was specially affected by the breach.[180]

An injured state may take countermeasures directed towards the state responsible for the injury. Countermeasures may, however, only be taken with the aim to make the responsible state act in accordance with its obligations, namely, to stop its wrongdoing and take remedial measures to the aggrieved state. Countermeasures should not be a punishment, but a mean for injured states to ensure that the wrongdoing state acts in accordance with its obligations of international law.[181] It must be kept in mind that a state deciding to take countermeasures towards a wrongdoing state, take those measures based on their own assessment of the situation. That state therefore holds the risk of committing an international wrongful act itself in case its assessment turns out to be wrong.[182]

A countermeasure must be aimed at the state responsible for the internationally wrongful act, who has not fulfilled its obligations of cessation and reparation. A countermeasure may therefore not be taken towards any other state. In case an act of countermeasure affects the state's fulfillment of its obligation towards a third state, the act may still be considered wrongful towards the

[176] Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility* (EJIL 2002) Vol 13 No 5, 1133.
[177] International Law Commission, ARSIWA (n 6) 118 para 11.
[178] ibid 119 para 12.
[179] ibid 119 para 13.
[180] Sicilianos (n 176) 1134.
[181] International Law Commission, ARSIWA (n 6) 130 para 1.
[182] ibid 130 para 3.

third state. The justification of a countermeasure, hence, only apply between the injured and the injuring state.[183] However, this does not imply that countermeasures never have implications for third parties. It is possible that the cessation of, for example, a trade relation between two states has negative consequences for a third state. In that case, however, the third state has no right to take action as it does not have any individual rights in the specific case. However, this type of indirect damage to third states cannot be completely excluded.[184]

Following the second paragraph of Article 49, countermeasures should be temporary in its nature, and it is thus usually consisting of a state's non-performance of an obligation owed to the wrongdoing state. The idea is that when the wrongdoing state has complied with its obligation, the relation should be able to return to normal yet again reaffirming that countermeasures aim to be a mean to ensure compliance and not a punishment.[185]

The third paragraph of Article 49 states that countermeasures, when possible, should be able to restore. If a state suspends an agreement as a countermeasure, it should not take measures that makes it impossible to resume the treaty in a later stage. There is, however, no absolute obligation to select a restorable countermeasure since this might not be possible in all situations. To cause the wrongdoing state damage beyond repair could be considered a form of punishment or sanction rather than a justified countermeasure. The injured state should hence, if possible, always choose a measure that is restorable.[186] This is to enable the retorsion of the countermeasure, which according to Article 53 of ARSIWA should be done when the responsible state has ceased its wrongful actions and fulfilled its obligation of reparation.[187]

4.2 Third-party countermeasures

It is two separate legal situations when an injured state takes a countermeasure and when an uninjured state does the same. There must therefore be a distinction between these situations.[188] According to Article 54 of ARSIWA nothing in Chapter II, part three of ARSIWA, precludes the right of a state, as stated in Article 48 of ARSIWA, to take lawful measures directed towards the responsible state to ensure the cessation of the internationally wrongful act and reparation to the injured state.[189]

[183] ibid 130 para 4.
[184] ibid 130 para 5.
[185] ibid 130 paras 6–7.
[186] ibid 131 para 9.
[187] ibid 137.
[188] ibid 117 para 3.
[189] ibid 137.

Article 48 of ARSIWA states the following:

1. ‘Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

    a. the obligation breached is owed to a group of States including that State, and is established for the collective interest of the group; or

    b. the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke the responsibility under paragraph 1 may claim from the responsible State:

    a. cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

    b. performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.’

This Article can be considered a complement to Article 42, since it regulates responsibility for internationally wrongful acts invoked by states that has not suffered any damage from the wrongful act. A state invoking the responsibility of a wrongdoing state based on Article 48 does that in its capacity as a member of a group, to which the obligation breached relate, or as a member of the international community as a whole.[190] The thought behind this Article is that since there are certain obligations protecting the common interests of a group or the international community as a whole, other states than the injured one should be able to hold the wrongdoing state responsible. The ICJ elaborated on obligations owed to the international community as a whole in the Barcelona Traction case. However, it must be noted that this ruling came before the adoption of ARSIWA. The Court, nevertheless, concluded that although all states may have a legal interest in the enforcement of certain rights, they are not given any special status. This reasoning was also followed by the ILC when formulating Article 48.[191] The Article notes that all states that have not suffered any damage are included under the Article, and that it therefore includes basically all states. Each state may act on their own and are not obligated to coordinate their actions with each other. Thus, these rights have many similarities with the right for injured states according to Article 42.

[190] ibid 126 para 1.
[191] ibid 126 para 2.

However, they are not exactly the same considering that an injured state under Article 42 have a right to compensation, a right an uninjured state lacks.[192]

4.2.1 Erga omnes partes and erga omnes

The first paragraph of Article 48 provides which sort of obligations, whose violations may give other states than the injured one a right to take action. The obligations owed towards a group of states and those owed to the international community as a whole is separated and divided in subparagraph a-b.[193]

According to paragraph 1 (a), two criteria must be fulfilled for a non-injured state to have a right to hold the wrongdoing state responsible. First of all, the obligation violated must have been owed to a certain group of states to which the state in question is a part. Secondly, the obligation must have been created to ensure protection of a collective interest. The Article does not, however, differ between various sources of international law and it can therefore include the breach of obligations derogating from multilateral agreements or international customary law. The obligations referred to can sometimes be called 'obligations erga omnes partes'.[194]

These obligations must be collective ones and therefore applicable between a group of states and created in order to protect a collective interest. These obligations are not necessarily restricted to agreements created with the aim of benefiting member states but could also include arrangements created by a group of states to protect a broader common interest. However, the agreement must be broader than only those between two states. The Article further, does not define what is to be considered a collective interest. Hence, the main purpose of the obligations must be to promote the insurance of a collective interest.[195]

According to paragraph 1 (b) all states may take action to hold the wrongdoing state responsible in case it has violated an obligation owed to the 'international community as a whole'. This formulation refers to what the ICJ concluded in the Barcelona Traction case, namely that there must be a distinction separating obligations owed from one state to another, and those obligations that a state owes the international community as a whole.[196] The obligation

[192] ibid 126 para 4; Articles 34 and 36 of the Draft Articles on Responsibility of States for International Wrongful Acts.
[193] International Law Commission, ARSIWA (n 6) 126 para 5.
[194] ibid 126 para 6.
[195] ibid 126 para 7.
[196] ibid 127 para 8; *Barcelona Traction Case* (n 9) para 33.

owed to the international community as a whole were according to the Court considered obligations 'erga omnes'.[197]

However, the wording of 'erga omes' is not included in the Article. The article does further not include any specific examples of what constitutes obligations erga omnes, and even if it did, such a list would not be particularly valuable since the concept evolves over time. The Court has, nevertheless, given a few examples consisting of acts of aggression, genocide, some human rights including protection against slavery and racial discrimination, as well as the right to self-determination.[198] Every state, in its capacity as a member of the international community as a whole, have a right to take action to hold the wrongdoing state responsible if a state acts in violation of any of these obligations. There is no need for any specific criteria in order to define what constitutes a member of the international community, since all states can be included in that by nature.[199]

4.2.2 What measures may be taken?

The second paragraph of Article 48 sets out what specific measures that may be taken by states invoking responsibility under the Article. The measures available are not as extensive as the measures on hand for injured states as stated in Article 42. A state that has not suffered any damage as a result from the wrongful act, is not likely to request compensation for their own losses. Instead, the main purpose of a third-part's action, according to Article 48, is therefore to make the wrongdoing state cease its wrongful actions.[200]

According to paragraph 2 (a) of Article 48, all states included under the Article may demand that the illegal acts come to an end and that, if the circumstances require it, necessary assurance and guarantees of non-repetition is given. Such a state also has a right to require compensation in accordance with paragraph 2 (b) of Article 48. It is possible that a state commits an international wrongful act without harming any individual state by its wrongdoing. However, some states may still require compensation. Such a demand, however, must be presented in the interest of the injured state, if there is one, or in the interest of those who has the right that the obligation breached aim to fulfill. This aspect of the Article indicates a progressive development of international law, which is necessary since it gives a way to protect the broad collective interest at stake. In this case, it may be highlighted that some provisions, following for example certain human rights treaties, allow for any state party to the treaty to invoke the responsibility of any state who acts in

[197] International Law Commission, ARSIWA (n 6) 127 para 8.
[198] ibid 127 para 9.
[199] ibid 127 para 10.
[200] ibid 127 para 11.

breach of the agreement.[201] A state that has not been injured cannot, however, require compensation in a case where not even the injured state could have done the same. If a non-injured state requires compensation, it must thus be in the interest of the injured state or for the beneficiaries of the obligation breached.[202]

4.2.3 Legal discussion regarding third-part countermeasures

The legal status and potential regulation of countermeasures taken by third parties, remains unsettled in the legal debate. Critics have presented several arguments against the legality of third-party countermeasures. One reoccurring argument is that it would further increase the differences in power balance between larger and smaller states since it could be used as an argument for states to intervene in other sovereign states affairs.[203] On the other hand, some argue that third-party countermeasures are of major importance to increase the effectivity of obligations erga omnes.[204]

When drafting ARSIWA, the ILC were supportive of the idea of third-party countermeasures, as can be seen through Article 54 of ARSIWA. However, the wording of the Article was a bit vague following the fact that there was no recognized agreement regarding this matter.[205] The wording of Article 54 ARSIWA thus leaves the issue open for further evolution of international law.[206] There is a major lack of practice in this area and the existing practice differs in its outcome, contributing to the already uncertain legal implications in the area. There are some cases where states have reacted against what they considered being breaches under Article 54, without being injured themselves. This has often been done through sanctions or measures such as interrupted air links or other contacts.[207] It is further impossible to deny the remarkable increase of non-military enforcement over the past years. The use of both one wayed, as well as collective enforcement measures occur more frequently than before. These measures have, however, been justified in different ways, some of them as acts of solidarity, taken to protect core interest of the international community by economic enforcement measures.[208] However, current legal framework regarding third-party countermeasures is not clear and there is currently no commonly agreed upon right for states as

[201] International Law Commission, ARSIWA (n 6) 127 para 12.
[202] ibid 128 para 13.
[203] Dawidowicz, *Third-Party Countermeasures in International Law* (n 32) 8.
[204] ibid 11.
[205] Dawidowicz, 'Third-party Countermeasures: A progressive development of international law' (n 20).
[206] Dawidowicz, *Third-Party Countermeasures in International Law* (n 32) 13.
[207] International Law Commission, ARSIWA (n 6) 137 para 3.
[208] Jarna Petman, 'Resort to Economic Sanctions by Not Directly Affected States' in Forlati L and Sicilianos L (eds) *Economic Sanctions in International Law* (Martinus Nijhoff Publishers 2004) 309.

mentioned in Article 54 to take countermeasures. Therefore, Article 54 includes a saving clause mentioning 'lawful measures' instead of 'countermeasures' and does hence not take a stand in the question regarding legality of third-party countermeasures.[209]

When a state acts in violation of an obligation erga omnes or erga omnes partes, all states have an interest in the matter. It does not matter whether the state is affected by the breach or not since there is no requirement of material or moral damage when it comes to this sort of breaches. What is important, however, is that the violation consists of an act that impairs the ability of a state to fulfill an obligation towards another state. All states as well as international organizations may hold the wrongdoing state responsible in this case.[210] Nevertheless, some scholars argue that there are situations where a state should not be left alone, for example in cases where a state is injured and unable to request help or if the state in question breach an obligation erga omnes towards its own inhabitants. But yet again, some argue that one sided act as response to violated obligations could create a system where the most powerful states get the means necessary to create a world order of their choice by choosing which violations that creates enforcements and which do not.[211]

Thus, the practice has been widespread and some ILC members argue that it remains unclear to this day whether there is any agreement regarding this issue or not. It was concluded, when drafting ARSIWA, that third-party countermeasures are closely connected with policy development and exists in an area where international law and foreign policy is closely linked. Despite this, states have used economic sanctions for many years, justified with arguments presumably arising from Article 48 ARSIWA.[212]

The legality of sanctions is commonly discussed in the legal discourse regarding third-part countermeasures. On the one hand, some argue that all states are free to reverse their legal relations with other states, since no state is obligated to uphold for example, trade relations with any other states. On the other hand, some consider all coercive measures with the main purpose of making the target state change its policies in a certain way illegal.[213] Nevertheless, there have been some statements suggesting the existence of opinio juris on this matter. One example is a statement given by the Council of the European Union in 2004. The statement concluded that the use of sanctions, as third-party countermeasures, were in line with the EU foreign policy

[209] International Law Commission, ARSIWA (n 6) 139 para 7.
[210] Petman (n 208) 311.
[211] ibid 314.
[212] Dawidowicz, 'Third-party Countermeasures: A progressive development of international law' (n 20).
[213] Matthew Happold and Paul Eden, *Economic Sanctions and International Law* (Hart Publishing 2016) 2-3.

guidelines when it comes to upholding democracy, human rights, and the rule of law.[214] The European Commission reaffirmed this position in 2008, noting that sanctions have been used by the EU to promote change in policies to ensure protection of certain rights.[215] It is thus unclear whether there is any opinion juris in this area or not.[216]

4.2.4 Third-party countermeasures as sanctions

The term 'sanction', despite its uncertain definition, often appear in news media etc., but to comprehend the discussion regarding third-part countermeasures, a distinction must be drawn between countermeasures and sanctions. Speaking in general terms, a countermeasure could be a 'sanction', in case the term is used to describe a coercive measure as a response to an unlawful act.[217] Nevertheless, the term 'sanction' refers to a reaction by states in collective or institutional capacity through a common international organ.[218] Countermeasures, on the other hand is rather a decentralized or unilateral reaction taken by one state or a number of states, each state acting through its own organs. Sanctions, in contrast to countermeasures, must not be preceded by an internationally wrongful act, especially when considering sanctions imposed by the UN Security Council.[219] It must further be noted that actions taken by international organizations should not to be considered sanctions merely for the reason that it is an international organization taking them.[220] The EU could be stated as an example, since it never specifically refers to countermeasures but rather to the term 'sanctions'.[221]

One contemporary example is the EU sanctions on Russia. Following Russia's annexation of Crimea in 2014, EU member states imposed several sanctions on Russia. The EU specifically limited its diplomatic relations with Russia and incorporated means making it possible to further take immediate actions such as imposing travel bans and freezing assets if the situation worsened. The EU warned Russia that it would take even more comprehensive coercive measures if their wrongful actions was not ceased, which was later done on 17th March 2014.[222] Ever since, the EU has developed its sanctions, imposing new sanctions against Russia on multiple occasions. The sanctions

[214] Council of the European Union, 'Basic Principles on the use of restrictive measures' (7 June 2004) 10298/1/04 Rev 1, para 3.
[215] Council of the European Union, 'Sanctions Guidelines – update' (4 May 2018) 5664/18.
[216] Report of the International Law Commission on the work of its fifthy-third session (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10, 23 para 4; Dawidowicz, 'Third Party countermeasures: A progressive development of international law' (n 20).
[217] Dawidowicz, *Third-Party Countermeasures in International Law* (n 32) 22.
[218] ibid 22-23.
[219] ibid 22-23.
[220] ibid 24.
[221] ibid 25.
[222] ibid 233.

are mainly directed towards the defense and energy sector as well as the financial part of Russia's economy.[223]

After Russia carried out its full-scale invasion of Ukraine on February 24, 2022, the EU intensified its sanctions against Russia. Since that, several sanctions packages have been adopted, whereas the 16th and latest were adopted on February 24, 2025.[224] This package includes several measures with the aim of limiting Russia's economic capacity and thus aggravate its ability to continue its aggression. Among the sanctions are measures limiting trade, consisting of import bans of Russian aluminum, export restrictions, liming measures regarding energy, transport and infrastructure, measures to limit disinformation etc.[225]

All sanctions packages taken against Russia consists of both unfriendly and unlawful actions. An unfriendly act is not necessarily unlawful and could consist of imposing travel restrictions or closing airspace. These measures are not unlawful, but simply unfriendly, provided that the specific measure is not covered by an agreement stating otherwise. Thus, these unfriendly actions do not have to be justified. When it comes to the unlawful measures, however, it may be argued that these constitute countermeasures and hence is justified. It is not obvious which measures of the sanctions package that is unlawful, but some measures affecting trade can be mentioned. Russia, as a member of the World Trade Organization (WTO), have certain rights and Russia's ambassador to the WTO has argued that some sanctions targeting specific goods affects Russia's rights as a member according to WTO regulation. Another measure that has generated much discussion is the freezing of Russian assets. It has been noted that these measures are in breach of the regulation regarding inviolability and immunity.[226] Taking it even further and going from freezing to confiscating assets as a part of the sanctions imposed by the EU caused even more legal concerns.[227]

Hence, the legality of EU's sanctions is not clear. The EU itself and its member states consider these actions to be legitimate, but simultaneously, the same actions is considered illegal by Russia and other states with the main argument that these measures have not been authorized by the UN Security

[223] Dawidowicz, 'Third Party countermeasures: A progressive development of international law' (n 20).
[224] European Commission, 'Sanctions adopted following Russia's military aggression against Ukraine' (2025) <https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en> accessed 26 April 2025.
[225] European Commission, 'EU adopts 16th package of sanctions against Russia' (2025) <https://finance.ec.europa.eu/news/eu-adopts-16th-package-sanctions-against-russia-2025-02-24_en> accessed 26 March 2025.
[226] Hayashi and Yamaguchi (n 23) 89.
[227] ibid 91.

Council.[228] The states taking these measures does not explain why each and every measure is legal in detail. However, it is clear that these measures have been taken as response to Russia's aggression against Ukraine.[229] In the EU guidelines regarding the use of restrictive means, it is stated that 'the implementation of restrictive measures always must be in accordance with international law'. This statement is in line with what is stated on the official EU website where it is concluded that all sanctions is in accordance with its obligations under international law. However, the EU does not provide any evolved explanation as to why this is so.[230]

Some scholars consider EU's sanctions against Russia a clear example of countermeasures taken by a third part. The prohibition of use of force as provided by customary international law constitutes an erga omnes obligation, and therefore the first component of Article 42 is fulfilled. But in this case, the states imposing sanctions cannot be considered injured, since they have not been particularly affected by Russia's unlawful behavior. Their ability to uphold these obligations in the future have not been affected either. But because of the erga omnes character of the obligation, all states have a legal interest in the cessation of the wrongful act.[231] Especially the freezing and confiscation of assets is an unlawful measure performed by the EU. However, it has been argued that it is still legitimate since it constitutes a third-part countermeasure.[232]

Apart from the legal political debate characterizing this field of international law, a number of studies conducted after the adoption of ARSIWA shows that the right of third states to take countermeasures has been established through case law. This conclusion has been reached by assessing cases involving sanctions and using them as examples of third-state countermeasures.[233]

[228] ibid 69.
[229] ibid 74.
[230] ibid 76.
[231] Miles Jackson and Federica Paddeu, 'Proxy Countermeasures in International Law' (2024) EJIL:Talk! <https://www.ejiltalk.org/proxy-countermeasures-in-international-law/> accessed 26 March 2025.
[232] Hayashi and Yamaguchi (n 23) 93.
[233] ibid 95-96.

5 Comparing the concepts

Having elaborated the concepts of third states and international organizations respective obligations when a state acts in breach of a peremptory norm of international law, as well as the concept of countermeasures above, these will now be compared and analyzed in relation to each other.

5.1 Third state vs. international organizations obligations

To fully comprehend the differences between third states' and international organizations' obligations in relation to states acting in breach of peremptory norms of general international law, the relation between states and international organizations themselves must be examined.

Before the prevailing existence of international organizations was established, the general idea was that only states were considered legal subjects with legal personality in international law. But as more international organizations were created, this idea gradually changed.[234] International organizations are created by agreements between sovereign states. Different international organizations have different powers, depending on what is agreed upon by the states' part of it. Certain organizations are able to force its members to compliance, one example being the UN Security Council, some of whose decisions are binding upon all member states. However, it is not very common that organizations have these powers and usually they have to use more subtle means to ensure that its members act according to its obligations. The relation between obligations, compliance with these obligations and enforcement are different in every international organization. International organizations thus normally have their own legal personality, different from that of states, and may therefore have separate obligations and rights.[235]

Furthermore, it must be noted that while ARSIWA is considered a codification and a main pillar of current international law[236], ARIO is to a larger extent viewed as a progressive development of the same.[237] ARIO has thus received criticism on several grounds. Some argue that the articles are ahead of

[234] Chrysanthi Samara, 'International Responsibility Of International Organizations (The Draft Articles of the International Law Commission)' (2019) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3480061> accessed 25 March 2025, 3.
[235] Ian Hurd, International Organizations (5th edition Cambridge University Press 2024) 1.
[236] Katja Creutz, 'The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal' (2021) EJIL:Talk! < https://www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/> accessed 28 March.
[237] International Law Commission ARIO (n 11) 47 para 5.

their time, following that there is not sufficient practice for it to be considered a codification of customary law and hence what applies to international organizations' remains unclear. All international organizations differ from each other, and the assessment of whether an international organization is bound by a certain agreement must therefore be examined on a case-to-case basis. This reasoning applies to ARIO as well, which has led some scholars to question the practical implications of the articles. This questioning is increased by the fact that no international courts, except in very specific cases, may hold international organizations accountable for acting in breach of international regulations. However, there are some supportive voices in the debate as well. Some in favor of ARIO argue that the articles help explain the norms binding international organizations under international law.[238]

In this thesis, however, focus is on Articles 40 and 41 of ARSIWA and corresponding Articles 41 and 42 of ARIO. The obligations of third states and international organizations obligations when other states act in violation of peremptory norms and how state responsibility relates to the responsibility of international organizations in this matter. The exact formulation of these articles is basically the same, with the major difference being that Articles 41 and 42 of ARIO applies to international organizations and states, instead of the latter only, in cases where international organizations act in violation of peremptory norms of general international law.[239] It may thus be noted that both third states' and international organizations' responsibility is activated in case a violation of a jus cogens norm of international law occur. Further, Article 41 of ARSIWA and Article 42 of ARIO, both state several obligations arising from a breach of a peremptory norm. States, as well as international organizations therefore have obligations of cooperation, non-recognition, and non-assistance.[240] However, for chapter III ARIO, and hence its Article 42, to be applicable according to the articles, the violation must be performed by an international organization.[241] Despite this, the obligation of international organizations is frequently mentioned in the legal discussion regarding the ICJ Advisory Opinion of July 19, 2024. There is further a lack of practice of cases where international organizations act in violation of peremptory norms of general international law and the ILC therefore considered the obligations applicable even in cases where a state acts in violation of peremptory norms.[242]

The ICJ, in its Advisory Opinion of July 19, 2024, highlighted these obligations for states as well as for international organizations. States and

[238] Kristina Daugirdas, 'IO Reputation and the Draft Articles on IO Responsibility' (2015) EJIL:Talk! <https://www.ejiltalk.org/io-reputation-and-the-draft-articles-on-io-responsibility/> accessed 31 March 2025.
[239] Article 40 and 41 ARSIWA; Article 41 and 42 ARIO.
[240] Article 41 ARSIWA; Article 42 ARIO.
[241] International Law Commission, ARIO (n 11) 82 para 1.
[242] ibid 83 para 5.

international organizations may take several measures to fulfill their obligations under ARSIWA and ARIO, which was reaffirmed by the ICJ in its Advisory Opinion. Which of these legal entities that can do what, however, depends on the structure between the state and international organization in question. Taking the EU as an example, that is the only actor that may propose laws and make decisions in some areas of trade, following its exclusive competence in this area of law, granted to it by its member states.[243] The EU therefore makes trade related decisions on behalf of its member states, and the EU currently upholds several agreements with various countries outside the organization.[244]

One of these EU negotiated treaties is the Association Agreement between the EU and Israel. As the ICJ concluded in its Advisory opinion of July 19, 2024, both states and international organizations have an obligation to cooperate to bring the situation caused by the unlawful actions to an end. States and international organizations also have an obligation not to recognize nor assist in upholding the situation.[245] The Court's reasoning thus goes in line with what is stated in Articles 40 and 41 of ARSIWA, and corresponding Articles 41 and 42 of ARIO. Since it is the EU that is party to the agreement in this case, it is up to the EU as an international organization to comply with Article 42 of ARIO. It further stands clear within the EU that there is a need to review this agreement.[246]

Judging from the above, it is relevant to analyze how the obligations of states relate to the obligations of international organizations, such as the EU, in this case. The EU is a political organization, with abilities given to it and regulated by its member states. The member states have thus given the organization authority to enter into agreements with non-member states. When the non-member state in question acts in violation of peremptory norms of international law, it is therefore, the organization as such that are bound by the agreement. In this case, it is therefore the EU that must comply with its obligation of cooperation, non-recognition, and non-assistance in relation to the Association Agreement. This applies in all situations where the EU is party to a treaty with a state that acts in violation of a peremptory norm of international law.

However, the relation between different states and between states and international organizations and their respective obligations in situations like this

[243] European Commission, 'Areas of EU action' <https://commission.europa.eu/about/role/law/areas-eu-action_en> accessed 31 March 2025.
[244] European Commission, 'Negotiations and agreements' <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en> accessed 31 March 2025.
[245] ICJ Advisory Opinion July 19, 2024 (n 1) 76.
[246] Weatherald (n 154).

are regulated as both ARSIWA and ARIO contain some articles on the matter. There are three situations in which a state may be held responsible for the wrongdoing of another state. As stated in Article 16 of ARSIWA, a state may be held internationally responsible if it provides a wrongdoing state with aid or assistance, provided that the first state is aware of the wrongdoing of the latter, and that the wrongful act would be considered wrongful if performed by the first state.[247] Similarly, a state directing and controlling the unlawful act of another state may be internationally responsible if the first state is aware of the act's wrongfulness and it would have been wrongful if the first state performed the act, as stated in Article 17 of ARSIWA.[248] Lastly, according to Article 18 of ARSIWA, a state may be held responsible if it coerces another state to perform an internationally wrongful act if the act is internationally wrongful and the coercing state is aware of that.[249] However, the articles of ARSIWA does not have an impact on the individual responsibility of a legal person acting on behalf of a state, according to Article 58 of ARSIWA. Therefore, the articles in ARSIWA do not affect the responsibility of international organizations, as regulated by ARIO.[250]

According to Article 17 of ARIO, an international organization may be held responsible for an internationally wrongful act if it circumvents its international obligations by making a decision that binds its member states to an obligation that involves committing an internationally wrongful act that would be wrongful if committed by the international organization itself. This reasoning also applies if the organization circumvents its international obligations by authorizing its member states to commit an act that would be considered wrongful if performed by the international organization itself, and the act is performed because of the authorization.[251] An international organization may thus not use its member states to fulfill certain aims without risk being held internationally responsible itself.[252] It is presumed that the member states of an international organization act in accordance with the binding decisions of the organization. Thus, both member states and international organizations may be held responsible for the same internationally wrongful act.[253] There are situations where the member states does not have any possibility to act in another way than what is stated by the international organization, and the member states can in that case not be the only one held responsible for the wrongdoing.[254] A state, as a member of an international organization, may also be held internationally responsible if it uses the competence

[247] International Law Commission, ARSIWA (n 6) 65.
[248] ibid 67-68.
[249] ibid 69.
[250] ibid 142-143.
[251] International Law Commission, ARIO (n 11) 68.
[252] ibid 68 para 1.
[253] ibid 68 para 5.
[254] ibid 68 para 7.

of the international organization in a way that induce the organization to commit an act which, if committed by the state would be considered wrongful, as stated in Article 61 of ARIO.[255]

From this review, the following analysis can be made. It can, first of all, be concluded that the connection between ARSIWA and ARIO, and thus between states and international organizations, to some extend appear even in their respective articles. The articles concern the way in which states and international organizations may be held responsible for internationally wrongful acts performed by one and the other. Both states and international organizations are separate legal entities, and thus responsible for their own actions. However, as can be seen above, the acts of one may affect the responsibility of another, when the acts of one part leads the other to perform an internationally wrongful act as well. Both ARSIWA and ARIO apply in parallel, and therefore both international organizations and states may be held responsible for the same act. This reasoning can be applied in cases where a state or an international organization fails to fulfill its obligations under Articles 40 and 41 of ARSIWA or corresponding Articles 41 and 42 of ARIO. The Association Agreement between the EU and Israel may be used as an example. It has been concluded by the ICJ in its Advisory opinion of July 19, 2024, that Israel has violated a jus cogens norm, thereby activating third states' and international organizations' obligations under Articles 40 and 41 of ARSIWA and corresponding Articles 41 and 42 of ARIO. The Association Agreement may thus be used as an example, aiming to illustrate the relation between states and international organizations when involved with a third party that has violated a jus cogens norm. The following analysis therefore does not aim to conclude whether or not the upholding of this agreement constitutes a breach of these obligations or not.

All EU member states are, because of their membership of the EU, bound by the Association Agreement between the EU and Israel. Since the ICJ concluded that Israel has acted in violation of a norm jus cogens, there is no doubt that the obligation of cooperation, non-recognition and non-assistance is activated for states and international organizations in relation to Israel. Meanwhile, the member states are potentially unable to fulfill these obligations, and hence adjust the agreement to fulfill these, without taking it through the EU. This illustrates how states and international organizations have their own separate legal personalities and thus separate rights and obligations, yet still can be affected by the acts of one another. Since both ARSIWA and ARIO applies in parallel, the responsibility of states and international organizations in relation to the treaty may be assessed on their own. However, the EU may fail to fulfill its obligations under Articles 41 and 42 of ARIO if it upholds

[255] ibid 98.

the agreement. Similarly, the member states may fail to fulfill their obligations under Articles 40 and 41 of ARSIWA if they continue to act in accordance with the agreement. This undoubtedly puts states in a difficult position since it might be impossible for them in a reasonable amount of time to convince the international organization to change its policies. The EU and its member states are different legal subjects and should be assessed as such. However, it seems challenging for member states to fulfill their obligations under Articles 40 and 41 of ARSIWA, in cases like this, where the international organization is bound to a treaty leading to the international organization itself, not fulfilling its obligations under Articles 41 and 42 of ARIO. The EU should therefore review this agreement to ensure that neither the international organization as such, nor its member states act in violation of international law for fulfilling its obligations according to the agreement. This clearly illustrates the relation between international organizations and states, and how their respective actions may have implications for each other.

As can be concluded from the above reasoning, the acts of international organizations may affect its member states. In this analysis, it has been concluded that both its member states and the EU as an international organization might act in violation of its obligations under Articles 40 and 41 of ARSIWA and corresponding Articles 41 and 42 ARIO, with regards to the Association Agreement. As mentioned, member states and the EU are separate legal subjects, and any potential violation of their respective obligations must therefore be concluded through different assessments. However, it could be argued that a state, as a member of an international organization, cannot fulfill its obligations under Articles 40 and 41 of ARSIWA, in cases where the international organization in question is bound by an agreement which leads to the organization failing to fulfill its obligations under Articles 41 and 42 of ARIO. Therefore, despite the fact that states and international organizations are different legal entities and therefore must be assessed on their own, it may be argued that there is some connection in these situations.

Given that a certain connection in this direction can be argued, it is relevant to analyze whether it could be reasonable to argue that there is a connection the other way around as well. It will therefore be elaborated whether the acts of a state may affect the responsibility of an international organization to which the state is a member, despite the fact that they are different legal subjects. The relocation of the US embassy from Tel Aviv to Jerusalem in 2018 may be used as an example in this context. The embassy move can be considered a violation of the US obligation of non-recognition under Articles 40 and 41 of ARSIWA.[256] The US, is further a member of several international

[256] Huges 'Did the Trump Administration's Jerusalem Declaration violate international law?' (n 81).

organizations except the UN, such as the WTO[257], IMF[258] and APEC[259]. The UN reacted to this situation, by adopting a resolution condemning the decision to move the embassy.[260] However, no official statement or other reaction following the move can be found from any other of the international organizations that the US is a part of. Further, no allegations or criticism following their silence in this matter have been directed towards these organizations either. There may be several reasons for this without necessarily rejecting the idea there could be a connection between the acts of a member state and the international organization. The organization's powers may be in a particular field, in which case it cannot interfere with other matters in which states are engaged, as in this case the US foreign policy. Nevertheless, the UN did take action, but it should be noted that the UN has a broad competence and that it may thus act in several areas. The UN is further included under Articles 41 and 42 of ARIO. However, it must again be noted that states and international organizations are different legal subjects. In this case, Israel has acted in violation of a jus cogens norm and the obligations of international organizations under Article 42 are thus activated. The UN condemn the US move of its embassy, and it may therefore be argued that the UN fulfilled its obligation of non-recognition. Based on this, it is possible to argue in favor of the idea that the obligations of an international organization are somehow affected by the acts of its member states. Nevertheless, an international organization may never be held responsible for an act performed by a state, taken without any relation to the international organization, since they are their own legal subjects. However, it may be concluded that the connection between states and international organizations exist to some extent even in this direction.

It must, however, be noted that no precise conclusions can be drawn from analyzing only a few examples. However, these can still be considered examples on the relation between states and international organizations. All states are sovereign and hence have a right to make decisions and take action regarding its affairs. International organizations on the other hand, are created by agreements between states, and thus only have the powers conferred upon it by its member states. International organizations are therefore governed by its member states, while the member states govern themselves. However,

[257] World Trade Organizations, 'Members and Observers' (2025) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 31 March.
[258] International Monetary Fund, 'List of Members' (2024) <https://www.imf.org/external/np/sec/memdir/memdate.htm> accessed 31 March 2025.
[259] Office of the United States Trade Representative, 'Asia-Pacific Economic Cooperation (APEC)' <https://ustr.gov/issue-areas/trade-organizations/asia-pacific-economic-cooperation-apec> accessed 31 March 2025.
[260] United Nations Meetings Coverage and Press Releases, 'General Assembly Overwhelmingly Adopts Resolution Asking Nations Not to Locate Diplomatic Missions in Jerusalem' (2017) Meetings Coverage and Press Releases <https://press.un.org/en/2017/ga11995.doc.htm> accessed 31 March 2025.

despite this, it may be argued that the actions of one in some cases affect the obligations of the other, and in some cases the other way around.

5.2 Third state and international organizations obligations vs. countermeasures

According to Article 40 of ARSIWA and Article 41 of ARIO, third states' and international organizations' obligations arise when there is a serious breach of a peremptory norm of international law.[261] Nevertheless, when it comes to countermeasures, it must, according to Article 49 of ARSIWA, be the injured state that take the countermeasure towards the wrongdoing state in response to an internationally wrongful act committed by that state. The act preceding the countermeasure must therefore only be considered 'wrongful'. Hence, the wrongfulness of an act does not have to be of a certain degree, such as for example a breach of a jus cogens norm. Further, the state taking the countermeasure must as a starting point be considered 'injured', even though some scholars debate whether Article 54 of ARSIWA permit non-injured states to take countermeasures.[262] This is different from what is stated regarding third states and international organizations obligations, as their obligations are only invoked in relation to certain kind of acts contrary to international law i.e., jus cogens norms. The third state or international organization does further not have to be injured, since its obligations relate to serious breaches of certain obligations of international law, considered so important that all states have a legal interest in their fulfillment.[263] With this in mind, it can be concluded that the premises for when third states or international organizations are obligated to take action in response to serious violations of peremptory norms of international law as opposed to when an injured state may take countermeasures, are very different. First of all, the wrongful acts invoking third states and international organizations responsibilities versus the wrongful acts giving a right to countermeasures do not have to meet the same requirements. An act may be in violation of a treaty between two parties and therefore be considered an internationally wrongful act giving rise to the injured state's right to take countermeasures. However, this act may be performed without being close to be in breach of a jus cogens norm. The scope of acts giving rise to injured states right to take countermeasures is thus way broader than the scope relating to violations of jus cogens norms of international law. Nevertheless, the fact that many scholars argue that only injured states may use countermeasures narrows the scope, in comparison to if even un-injured states were to be able to take countermeasures. It stands clear that there is no need for the third state or international organization to be

[261] Article 40 ARSIWA; Article 41 ARIO.
[262] International Law Commission, ARSIWA (n 6) 117-119.
[263] ibid 113 para 7; International Law Commission, ARIO (n 11) 82 para 2.

considered injured for its obligations in regard to a violation of a jus cogens norm to arise. Hence, the conditions required for third states' and international organizations' obligations to arise are remarkably different comparing to the conditions required for a state or international organization to have a right to take a countermeasure.

A countermeasure is an internationally wrongful act, for which wrongfulness is precluded since it constitutes a countermeasure, as stated in Article 22 of ARSIWA. As stated in Article 41 of ARSIWA and Article 42 of ARIO, states and international organizations have an obligation to cooperate to bring the unlawful actions to an end. This must however be done by lawful means.[264] An injured state may therefore perform an unlawful act as a countermeasure, while a state or international organization is only required to cooperate by lawful means. Therefore, it is not only the circumstances invoking these different concepts that differs, but also the means available under each concept.

Another major difference between these concepts that will be analyzed in light of the above, is that injured states have a right to take countermeasures in response to a wrongful act, while states and international organizations have an obligation to take certain measures in regard to a breach of a peremptory norm of international law. This can be seen from the wording of Article 49 of ARSIWA stating that injured states 'may' take countermeasures while Article 41 of ARSIWA and Article 42 of ARIO, use the word 'shall' instead. Consequently, no state may be held responsible for not taking a countermeasure, since that is an act that the state can choose to take if it wants to. At the same time, states are obligated to take certain measures in cases where a peremptory norm of general international law is violated, and they can be held responsible if they do not. Nevertheless, this might not have any major practical implications. States that have been injured by a state's wrongful actions probably have a stronger indictment to take countermeasures comparing to a non-injured state's indictment to take similar action. If a third state or international organization takes action to fulfill its obligations in response to a state's breach of a peremptory norm of international law, that will probably cause a larger political discussion comparing to if an injured state takes countermeasures. This might be a reason for why they have an obligation instead of a right, namely, to ensure their actual cooperation, non-recognition, and non-assistance. In practical terms, it is therefore reasonable to assume that the fact that two concepts are based on an obligation and the third on a right does not affect the parties' actual actions. However, no conclusion can be drawn in this matter without further information.

[264] International Law Commission, ARSIWA (n 6) 114 para 3.

5.3 Third state and international organizations obligations vs. third-party countermeasures

There are some articles in ARSIWA regulating third-party countermeasures, even though the mere existence of this as a part of the concept of countermeasures is debated in the international legal discussion.[265] According to Article 54 of ARSIWA, nothing in Chapter II part three of ARSIWA, preclude the right of a state, as concluded in Article 48 of ARSIWA, to take legal measures directed towards the responsible state to ensure cessation of the wrongful act and reparation in the interest of the injured state or the beneficiaries for the violated obligation.[266] A state invoking responsibility of a wrongdoing state based on this premises does that as a member of a group to which the obligation breached is owed, or as a member of the international community as a whole.[267] As can be seen from this and thus only through a brief overview of the regulation in ARSIWA, the idea of third-party countermeasures is significantly more similar to third states' and international organizations' obligations in response to a breach of a peremptory norm, comparing to the idea of countermeasures performed by an injured state.

It may, however, not be argued that the obligations under Articles 40 and 41 of ARSIWA impose an obligation on third states to take countermeasures. The ICJ's Advisory Opinion of July 19, 2024, may be used as an example to illustrate this. The Court found Israel's ongoing existence in the occupied Palestinian territory illegal[268] and further concluded that Israel violated the Palestinian people's right to self-determination, its obligation following the prohibition of use of force in order to concur certain territory and several other obligations according to international humanitarian law and internal human rights law, constituting obligations erga omnes which in situations of foreign occupation is considered a peremptory norm of international law.[269] Therefore, a wrongful act has undoubtedly occurred and it is imaginable that third party countermeasures could be discussed. However, the court does not mention countermeasures, focusing on the legal consequences for other states as stated in Articles 40 and 41 of ARSIWA and corresponding Articles 41 and 42 of ARIO, instead.

Article 48 of ARSIWA further elaborate the thought of certain obligations protecting the international community as a whole, drawing parallels to the reasoning in the Barcelona Traction Case, namely obligations erga omnes but

[265] Dawidowics, 'Third-party countermeasures: A progressive development of international law (n 20).
[266] International Law Commission, ARSIWA (n 6) 137.
[267] ibid 126 para 1.
[268] ICJ Advisory Opinion July 19, 2024 (n 1) para 285.
[269] ibid, para 233 and 274.

also obligations erga omnes partes.[270] Erga omnes obligations are thus obligations owed to the 'international community as a whole'[271], while obligations erga omnes partes are obligations owed to a specific group of states but with the aim of protecting a collective interest.[272] Despite the fact that obligations erga omnes were discussed in relation to the creation of third states and international organizations obligations, the ILC finally concluded that the relevant chapter in ARSIWA, and thus the corresponding in ARIO, is applicable in cases where there is a breach of a jus cogens norm.[273] However, the Court does not bring any further clarity regarding this matter in its Advisory Opinion of July 19, 2024, in which it frequently refers to the erga omnes character of the obligations breached. But despite this, Judge Tladi still argue, in his separate opinion, that it is the peremptory norms of the obligations breached that give rise to the legal consequences of third states.[274] Based on this, it is possible to assume that there is in fact a difference between jus cogens norms and obligations erga omnes in currently existing law. It may thus be concluded that the acts triggering third states' and international organizations' obligations comparing to third-party countermeasures differ, even though the distinction between them is complicated and, in many cases, unclear. The concept of erga omnes obligations is broader and hence leading to more acts of internationally wrongful behavior potentially resulting in third parties' possible use of countermeasures, compared to those that trigger the obligations of third states and international organizations in cases of violations of jus cogens norms.

However, the mere existence of third-party countermeasures in international law as well as its potential legality is contested. Some argue that it is of essential importance to protect and promote the fulfillment of all obligations erga omnes.[275] This line of argumentation reoccurs in the discussion of third parties and international organizations obligations, not at least by the ICJ in its Advisory Opinion of July 19, 2024.[276] Judging from this, a major similarity between these legal constructions can be seen. All of these legal constructions could be seen to have a somewhat larger purpose, namely, to protect certain high moral values in international law. It cannot be denied that the scope of these values somewhat differs depending on whether it is an erga omnes obligation or a norm jus cogens, but these merge in several aspects. The mere existence of these obligations and norms thus indicates the existence of a common goal of the legislator of current frameworks in international law. It

[270] International Law Commission, ARSIWA (n 6) 126 para 2.
[271] ibid 127 para 8; *Barcelona Traction Case* (n 9) para 33.
[272] International Law Commission, ARSIWA (n 6) 126 para 6.
[273] ibid 112 para 2; International Law Commission, ARIO (n 11) 82 para 2; Tams (n 47) 149-150.
[274] Diakonia, 'Summary of the ICJ's Advisory Opinion of 19 July 2024' (n 102) 23.
[275] Dawidowicz, *Third-Party Countermeasures in International Law* (n 32) 11.
[276] ICJ Advisory Opinion July 19, 2024 (n 1) paras 273-279.

may therefore be concluded that there are certain rights, so important that third parties are allowed to interfere to ensure their protection.

Similar to what was concluded in the comparison and analysis between countermeasures performed by an injured state and third states' and international organizations' obligations, it should be noted that if third-part countermeasures do exist, it is a right and not a duty. Third parties 'is entitled to invoke the responsibility' of a wrongdoing state according to Article 48 of ARSIWA. Meanwhile, third states 'shall' take certain measures according to Articles 40 and 41 of ARSIWA and corresponding Articles 41 and 42 of ARIO. When all parts are non-injured, this distinction might have a more practical impact than in the case of countermeasures performed by an injured state comparing to third-state and international organizations obligations. When no part is injured, it is possible that the state violating an erga omnes obligation or a norm jus cogens does not have any relation at all with the wrongdoing state. In this case, it does matter whether a state has a right to take measures, or if the state is obligated to take measures. Taking certain measures directed against a wrongdoing state, when the party taking action has not been injured itself, is a matter with political implications potentially exceeding the strictly legal ones.

The discussion regarding sanctions also becomes relevant in this context. A sanction is usually viewed as a punishment or penalty[277] which distinguish it from what is expressly stated regarding countermeasures, namely that a countermeasure is not to be considered a punishment.[278] Despite this, some scholars refer to sanctions as third-party countermeasures in cases where it is used in response to an internationally wrongful act of erga omnes character.[279]

The EU sanctions against Russia may be used as an example for this analysis. The first sanction package towards Russia was implemented as a consequence of the Russian annexation of Crimea in 2014.[280] After Russia's full-scale invasion of Ukraine, the sanctions were intensified and the EU has adopted several sanctions packages ever since.[281] In this case, Russia's action in violation of the prohibition of the use or the threat of use of force results in a violation of an erga omnes obligation[282], as well as a norm jus cogens.[283] Hence, it may be argued that the EU sanctions against Russia not only constitutes a third-part countermeasure, but also a mean for the EU to fulfill its obligations under

[277] Richard, Michael, and Cornell (n 22) 1.
[278] International Law Commission, ARSIWA (n 6) 130 para 3.
[279] Dawidowicz, *Third-Party Countermeasures in International Law* (n 32) 22.
[280] ibid 233.
[281] European Commission, 'Sanctions adopted following Russia's military aggression against Ukraine' (n 224).
[282] Hayashi and Yamaguchi (n 23) 93.
[283] Ragazzi (n 48) 50.

Articles 41 and 42 of ARIO. According to an international organization's obligation to 'cooperate to bring to an end through lawful means', any serious violation falling under Article 41 of ARIO must be addressed. Not all measures of the sanctions package are illegal[284], and these parts could therefore be seen as the EU, in its capacity of an international organization, fulfilling its obligations under international law. It may, however, be questioned whether this means that each individual member state has fulfilled its obligations under Articles 40 and 41 of ARSIWA, by simply being a member of the EU, that has taken these measures consisting of sanctions. It could be argued that at least the state's obligations to cooperate as stated in Article 41 (1) of ARSIWA are complied with. The cooperation in this case, would be performed within the EU between its member states. The assessment regarding each state's obligation of non-recognition and non-assistance might not be as clear.

However, it should be noted that not all aspects of trade and cooperation between the EU member states and Russia are included under the sanctions. Member states may therefore still cooperate with Russia in certain areas outside the scope affected by sanctions. One example is Hungary, an EU member state still cooperating with Russia in the energy sector, using energy from Russia in Hungary.[285] According to the obligation of non-recognition, states should refrain from recognizing as lawful any situation arising from a serious breach of a peremptory norm of general international law.[286] The fact that this trade is ongoing makes is possible to further argue that Hungary might be acting in breach of its obligation of non-recognition in this case. Cooperation with Russia in any way gives financial profits for both parties, thus including Russia, and may therefore be argued to support the Russian war economy and hence contribute to its aggression. Continued trade with a state acting in breach of a peremptory norm of general international law could therefore be considered a form of recognition. The same reasoning could be applied regarding the obligation of non-assistance. This illustrates that despite the sanctions imposed by the EU on Russia, individual member states may still make their own decisions in certain areas. Therefore, states do not automatically fulfill their obligations according to Articles 40 and 41 of ARSIWA, just by

[284] Hayashi and Yamaguchi (n 23) 89.
[285] BNE Intellinews, 'Hungaru to expand energy cooperation with Russia, foreign minister says in live stream from Red Square' (2025) <https://www.intellinews.com/hungary-to-expand-energy-cooperation-with-russia-foreign-minister-says-in-live-stream-from-red-square-373757/?utm_source=chatgpt.com> accessed 2 April; Financial Times, 'Hungarys largest oil group attack western 'hyposity' over Russian energy' (2024) Financial Times <https://www.ft.com/content/1515df8f-1ef6-4e4f-9c1c78d5e1a13725?utm_source=chatgpt.com> accessed 2 April.
[286] International Law Commission, ARSIWA (n 6) 114 para 5.

being part of an international organization that fulfills its obligations under Articles 41 and 42 of ARIO.

The above analysis relates to the 'unfriendly' part of the sanctions, and as it seems here, the concept of obligations of third states and international organizations may find some common ground with third state countermeasures. Third states and international organizations have an obligation to take lawful measures, just as third states may have a right to take lawful measures. The illegal part of the sanctions therefore falls outside this context and cannot be included under the concept of third states and international organizations obligations nor third party countermeasures. Countermeasures performed by an injured state may persist of actions precluded from wrongfulness and thus a wrongful measure may be taken as a countermeasure by an injured state. However, as stated in Article 54 of ARSIWA, when it comes to third party countermeasures, only lawful measures may be taken. It may thus be argued that the illegal measures included under the term sanctions still somehow relate to and work towards a common goal as these other concepts. The EU sanctions towards Russia may be used to illustrate this somehow vague relationship. The EU never expressly referred to countermeasures in regard to its sanctions, nor did it refer to its obligations under Articles 41 and 42 of ARIO. However, it may be argued that some of the measures included in the sanction's packages could be viewed as countermeasures or an international organization fulfilling its obligations under Articles 41 and 42 of ARIO, but not all. It thus seems like these concepts have been used in combination, without any clear distinction being drawn between them.

6 Concluding remarks

This thesis aimed to clarify the practical implications of the concept of third states' obligations under Articles 40 and 41 of ARSIWA, the concept of obligations of international organizations under Articles 41 and 42 of ARIO and the concept of countermeasures and compare how these concepts relate to each other. To achieve this purpose, each of the three concepts has been given its own section of the thesis, in which it has been clarified, followed by a chapter in which they were compared and analyzed. Articles 40 and 41 of ARSIWA have been elaborated with help from the ILC comments published with the articles. The legal discussion regarding these articles, alongside with the ICJ Advisory Opinion of July 19, 2024, has further been examined. The same procedure has been used to clarify the responsibility of international organizations following Articles 41 and 42 of ARIO. Even the concept of countermeasures has been largely based on the ILC comments to ARSIWA and ARIO. The discussion on third-party countermeasures has also been elaborated. Lastly, these concepts have been compared and analyzed in relation to each other, making it possible to draw several conclusions, answering the thesis research questions.

Articles 40 and 41 of ARSIWA impose obligations on third states to cooperate and refrain from recognizing or providing aid or assistance in cases of a serious breach by a state of an obligation arising under a peremptory norm of general international law. The only one of these obligations that impose a positive obligation is the obligation of cooperation. The obligation of non-recognition and non-assistance, however, might be positive, depending on the relation between a state and the wrongdoing state. In case a state does not have any trade relation, etc., with the wrongdoing state, it just has to remain that, and thus not take any measures that could be considered recognizing or assisting the wrongdoing state in its illegal actions. However, states must still take action through cooperation. If states do have relations with the wrongdoing state, it must evaluate these to ensure that they fulfill their obligations under these Articles. A clear example of assistance could be direct forms of support such as military supplements traded to an occupying state that may use it in the occupied area. These obligations in practice therefore indirectly impose an obligation on states to be aware of how countries that they have relations with behave and adjust its own actions thereafter.

Articles 41 and 42 of ARIO state that all states and international organizations shall cooperate and not recognize nor assist the wrongdoing state in case of a serious breach by an international organization of an obligation arising under a peremptory norm of general international law. These obligations are thus similar to the corresponding ones in ARSIWA. Despite the fact that Article 41 of ARIO state, that the obligations only refer to wrongdoing by

international organizations, the ILC conclude in its comments that this obligation exists in relation to the wrongdoing of states as well. Therefore, the same goes for international organizations as for states, namely, that the only direct positive obligation is the one of cooperation. This may be quite simple to fulfill since international organizations is built on cooperation between states. They therefore fulfill this obligation by just doing what international organizations does, provided that the international organization address the issue and discuss within its members states what it may do to cease the wrongful actions. Regarding the obligation of non-recognition and non-assistance, this again will be relevant mainly in cases where the international organization have relations to the wrongdoing state. One example can be found in the ICJ Advisory Opinion of July 19, 2024, in which the Court state that Israel's acts in violation of several obligations is in breach of peremptory norms of international law. The EU should, following this Advisory Opinion, review its Association Agreement with Israel to ensure that nothing in their relation following the agreement led to EU's recognition or assistance to Israel's wrongful behavior. They must ensure this in order to comply with its obligations under these articles.

As a starting point, only an injured state may take countermeasures according to Article 49 of ARSIWA. An area lacking similar consensus, however, is the area concerning third-party countermeasures and it is frequently discussed if and when non injured states may take countermeasures. Article 48 of ARSIWA provides that states, other than the injured one, are entitled to take measures if the obligation breached is owed to a group of states including the state in question, or if the obligation breached is owed to the international community as a whole. Whether this can go under the concept of countermeasure is, however, unclear. There is a lack of practice in this area, making it hard to draw any well justified conclusions. States rarely refer to countermeasures when they take action in response to other states wrongful behavior, instead they use the term 'sanctions'. When assessing practice regarding third-party countermeasures it must therefore be seen to cases where states use sanctions in response to international wrongful acts. Seen to the last years increased use of non-military enforcement measures, and the lack of separate legal regulations, it is possible to argue that this legal measure has developed through state behavior. Judging from the ILC's original acceptance of the existence of this concept, it may be concluded that even though it might not be a strict part of the concept of countermeasures, it does exist somewhere in the grey zone surrounding the concept.

To compare these concepts with each other, it should be noted that the relation between third states and international organizations responsibility relating to violations of peremptory norms of general international law is very special. These concepts are partly interlinked, yet very different. Both the

responsibility of third states as well as the corresponding responsibility of international organizations is activated when a state act in violation of a peremptory norm of general international law. However, the relation between these entities and their respective obligations is complicated and differs within every international organization and its member states, making the drawing of conclusions applicable for all states and international organizations impossible. Taking the EU and its member states as an example, it may however, be concluded that the international organization and its member states are closely linked through, among other things, joint legislation in certain areas. If the EU acts in violation of its obligations under Articles 41 and 42 of ARIO, it may be possible that its member states also fail to fulfill their obligations under Articles 40 and 41 of ARSIWA, despite the fact that they are different legal subjective. This however, judging from the international response to the US embassy move from Tel Aviv to Jerusalem in 2018, does not always apply the other way around. International organizations may still have some responsibility for its member states, which can be seen from the UN resolution condemning the move. However, international organizations are regulated by their mandate and may thus not act in all areas.

When comparing third states' and international organizations' obligations to countermeasures, it can be concluded that some measures constituting countermeasures may be the same as when states or international organizations act to fulfill its obligations under Articles 40 and 41 of ARSIWA or Articles 41 and 42 of ARIO. If the parties are, for example, bound to a treaty, one part may if injured withdraw from the agreement or at least temporarily suspend it. This may also be done by an international organization in order to fulfill its obligations of cooperation, non-recognition, and non-assistance. For instance, it has been said that the EU should review its Association Agreement with Israel following the ICJ Advisory Opinion of July 19, 2024. If the EU was to withdraw or suspend the agreement, this is an act that could be taken as a countermeasure by an injured party. However, there are several things distinguishing countermeasures from international organizations' obligations in this case. First of all, the EU is not individually injured by Israel's wrongful actions and therefore, it may not take countermeasures. Secondly, it is not a countermeasure since it is not an international wrongful act assuming the suspension is based on the human rights clause included in the specific treaty. So even if the specific actions might be similar and sometimes hard to place in one concept or another, they are still very different. The distinction is necessary to understand which part that might take a certain measure and further what specific measures might be taken.

Despite the fact that the measures are sometimes very similar and hard to place, the concepts of third states' and international organizations' obligations and the concept of countermeasures are different in several aspects. When it

comes to third states and international organizations responsibility compared to countermeasures, the more differences can be found. First of all, third states or international organizations does not have to be injured by the wrongdoing act, for their obligation to be invoked. Secondly, countermeasures may be taken when a state commit an international wrongful act, hence the wrongdoing does not have to be as serious as it has to be for the third states and international organizations' obligations to be applicable. Further, countermeasures are wrongful acts, precluded from wrongfulness, while third states and international organizations are obligated to use legal measures in its cooperation to cease the unlawful acts. Taking countermeasures is a right of an injured state, while acting as a third state or international organization in response to a state's violation of a peremptory norm of international law is an obligation. These concepts are thus different to the core.

However, when it comes to third states' and international organizations' obligations when states act in violation of peremptory norms comparing to third-party countermeasures, more similarities can be found. It must be noted that third-party countermeasures become relevant when states act in violation of obligations erga omnes, while third states and international organizations obligations shall be performed when states act in violation of a jus cogens norm of international law. The scope for when third states and international organizations obligations shall be performed is therefore narrower compared to third-party countermeasures. However, the distinction between obligations erga omnes and norms jus cogens remain somewhat unclear. The ability of third-party countermeasures is a right, while states and international organizations responsibility in response to a violation of a peremptory norm is an obligation.

To conclude, there are several differences as well as similarities between the three concepts elaborated throughout this thesis. Even though they might be hard to distinguish from each other at times, they share the same overall goal, namely, to ensure the maintenance of international law.

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