State Responses to the Introduction of the National Security Law in Hong Kong: A Case of Countermeasures against Serious Breaches of *Erga Omnes (Partes)* Obligations?

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Abstract

The article explores the responses by certain States to the introduction and application of the National Security Law in Hong Kong in 2020, on the assumption that it breaches the Sino-British Joint Declaration and fundamental human rights of the population of Hong Kong. It examines the lawfulness of these responses and argues that some of them constitute retorsions, while

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others can be considered as instances of 'collective' countermeasures in response to the serious breach of *erga omnes (partes)* obligations by China.

Keywords

Sino-British Joint Declaration – suspension of treaty – fundamental change of circumstances – obligations *erga omnes / erga omnes partes* – collective or third-party countermeasures – retorsions

I. Introduction

On 30 June 2020, the Standing Committee of the National People's Congress of the People's Republic of China (PRC) passed the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law, NSL).[1] It is included in Annex III of the Basic Law of the Hong Kong Special Administrative Region (Basic Law),[2] the constitutional document for the Hong Kong Special Administrative Region (HKSAR) provided for under the Sino-British Joint Declaration on the Question of Hong Kong (Joint Declaration).[3]

The Joint Declaration was concluded between China and the United Kingdom (UK) on 19 December 1984 and was registered with the United Nations on 12 June 1985. Despite some contrary allegations by Chinese officials,[4] the UK has asserted[5] and it is generally accepted[6] that the Joint Declaration is a

1 'The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region gazetted and takes immediate effect', The Government of the HKSAR, Press Release, 30 June 2020, <https://www.info.gov.hk/gia/general/202006/30/P2020063001015.htm>, last access 10 September 2024. The text of the National Security Law is available at <https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf>, last access 17 September 2024.

2 Available at <https://www.basiclaw.gov.hk/pda/en/basiclawtext/>, last access 10 September 2024.

3 Joint Declaration on the question of Hong Kong (with annexes) of 19 December 1984, United Nations Treaty Series Vol. 1399, 33.

4 'China says Sino-British Joint Declaration on Hong Kong no Longer Has Meaning', Reuters, 30 June 2017, <https://www.reuters.com/article/us-hongkong-anniversary-china-idUSKBN19L1J1>, last access 10 September 2024.

5 Written Evidence from the Foreign and Commonwealth Office (CIR0018), January 2018, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/china-and-the-international-rulesbased-system/written/76411.html>, last access 10 September 2024.

6 See, indicatively, 'Hong Kong: G7 Statement on Electoral Changes', EU External Action, Joint Statements, 12 March 2021, <https://eeas.europa.eu/headquarters/headquarters-home

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treaty which remains in force and, therefore, is legally binding. In the Joint Declaration, the UK declared that it would transfer sovereignty over Hong Kong to the PRC with effect from 1 July 1997, the date the Basic Law came into force. On this date Hong Kong became a Special Administrative Region of the PRC. The Joint Declaration sets out, *inter alia*, the basic policies of the PRC with regard to Hong Kong. Under the important principle of 'One Country, Two Systems', the HKSAR would be directly under the authority of the PRC Government but would enjoy a high degree of autonomy – except in foreign and defence affairs which would be the responsibility of the PRC Government. Moreover, its social and economic system and life-style at the time of the signing of the Joint Declaration would remain unchanged for 50 years until 2047.[7]

The stated purposes of the NSL are 'to prevent, curb and punish crimes, namely acts of secession, subversion of state power, terrorist activities, and collusion with foreign or external forces to endanger national security; maintain prosperity and stability of the HKSAR; and protect the lawful rights and interests of HKSAR residents'.[8] However, numerous arrests and prosecutions have taken place under the NSL, usually on charges relating to illegal assembly or alleged rioting,[9] which, as will be seen,[10] breach international human rights obligations.

Several States have taken measures in response to the breaches of international obligations committed following the introduction of the NSL, and, given the continuing character of the breaches,[11] there is a risk of escalation. It is thus important to explore the legal basis of these responses in order to ascertain whether they are in accordance with international law. Although international law issues related to the introduction of the NSL have already been examined in the literature,[12] this article focuses on the legal characterisation of State responses to the breaches of international obligations committed

page/94904/hong-kong-g7-statement-electoral-changes_en>, last access 10 September 2024; analysis in Thomas D. Grant, 'Rescission of the Autonomy of Hong Kong', Chinese (Taiwan) Yearbook of International Law and Affairs 39 (2022), 1-72 (11-18); Jeremy Hill, *Aust's Modern Treaty Law and Practice* (4th edn, Cambridge University Press 2023), 38.

7 Joint Declaration (n. 3), para. 3.

8 See Press Release (n. 1).

9 'The Impact of the National Security Law on Hong Kong', Reuters, 4 June 2021, <https://www.reuters.com/world/asia-pacific/impact-national-security-law-hong-kong-2021-05-31/>, last access 10 September 2024. On the NSL and its effects see also analysis in Grant (n. 6), 28-58.

10 See Section II.

11 See Section II.

12 See Ching Leng Lim, *Treaty for a Lost City: The Sino-British Joint Declaration* (Cambridge University Press 2022); Grant (n. 6); Stefano Saluzzo, 'The Principle of Non-Intervention and the Battle Over Hong Kong', Quest. Int'l. L. 79 (2021), 27-51.

in relation to the NSL. It argues that, while some of the responses may be lawful, others can only be justified if it is accepted that they constitute an instance of 'collective' or 'third-party' countermeasures in response to serious breaches of *erga omnes (partes)* human rights obligations by China with regard to the people of Hong Kong. Such an argument assumes greater significance in view of the fact that the *erga omnes (partes)* character of the human rights obligations breached in Hong Kong is not particularly straightforward. Thus, the article provides further evidence of State practice in support of the customary international law character of countermeasures taken by States other than an injured State in response to the breach of *erga omnes* or *erga omnes partes* obligations, thereby contributing to the current debate on the topic.

Following a presentation of the breaches of international obligations committed in relation to the NSL and the responses by States thereto (Section II.), the article provides a legal evaluation of these responses (Section III.). It distinguishes in this regard between responses by the UK (which was the State individually injured by the breaches) (Section III. 1.) and by other States (Section III. 2.). Regarding the latter, it notes that while some of the responses were lawful *per se* (Section III. 2. a)), others were not (Section III. 2. b)), and it examines whether they could be justified as 'collective' countermeasures in response to serious breaches of *erga omnes (partes)* obligations. It then provides a legal evaluation of the reaction by China and Hong Kong to these responses (Section IV.). The arguments made are summarised in the conclusion (Section V.).

II. Breaches of International Obligations Committed in Relation to the NSL and Responses by States

States which have responded to the introduction of the NSL have done so on the grounds that i) it was passed in violation of Hong Kong's Basic Law and the high degree of autonomy promised for Hong Kong under the 'One Country, Two Systems' principle and, therefore, constituted a breach by China of the Joint Declaration; ii) it constituted a breach by China of its international human rights obligations with regard to the people of Hong Kong that were guaranteed by the Joint Declaration in paragraph 3(5) and in its Annex I Part XIII, which stipulates that the provisions of the International Covenant on Civil and Political Rights (ICCPR)[13] and the International

13 International Covenant on Civil and Political Rights of 19 December 1966, 999 UNTS 171.

Covenant on Economic, Social and Cultural Rights (ICESCR)[14] as applied to Hong Kong 'shall remain in force'.[15] Therefore, by virtue of Annex I Part XIII of the Joint Declaration, China has an obligation to ensure the application of the ICCPR and ICESCR to the population of Hong Kong, although China is not a party to the ICCPR.[16]

The position that China has breached international human rights obligations with regard to the people of Hong Kong finds support in observations made by UN bodies. More specifically, in July 2022, the Human Rights Committee found that the application of the NSL has unduly restricted a wide range of rights stipulated in the ICCPR,[17] such as the right to liberty and the freedom of expression, peaceful assembly and association. It thus urged Hong Kong to repeal the NSL and, in the meantime, to refrain from applying it, as well as to ensure that a new national security law fully conforms with the ICCPR.[18] More recently, in March 2023, the Committee on Economic, Social and Cultural Rights also expressed concerns with regard to the NSL and its interference with a range of rights protected in the ICESCR – such as the independence of the judiciary, trade union rights and the rights of civil society actors and others working to defend economic, social, and cultural rights – and urged Hong Kong and China to review

14 International Covenant on Economic, Social and Cultural Rights of 19 December 1966, 993 UNTS 3.

15 See, indicatively, 'The Six-Monthly Report on Hong Kong' (1 July to 31 December 2019), Foreign, Commonwealth and Development Office of the United Kingdom (FCDO), 11 June 2020, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891526/Hong_Kong_Six_Monthly_Report_1_July_to_31_December_2019.pdf>, last access 10 September 2024, 3-4; see more recently 'The Six-Monthly Report on Hong Kong' (1 July to 31 December 2023), FCDO, 15 April 2024, <https://www.gov.uk/government/publications/six-monthly-report-on-hong-kong-july-to-december-2023>, last access 10 September 2024; see Lim (n. 12), 216-38, 257 f.

16 The ICCPR and the ICESCR were applicable to Hong Kong already before the conclusion of the Joint Declaration, since Hong Kong was British territory until 1997 and the UK is a party to the two Covenants since 1976. See status of the ICCPR <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#6>, last access 10 September 2024, note 6 and status of ICESCR <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4#8>, last access 10 September 2024, note 8. See also Roda Mushkat, 'Hong Kong and Succession of Treaties', ICLQ 46 (1997), 181-201 (190-198); Johannes Chan, 'State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights', ICLQ 45 (1996), 928-946; Hill (n. 6), 387-391.

17 More specifically, rights stipulated in Arts 2, 4, 6, 7, 10, 12, 14, 15, 17, 18, 19, 20, 21, 22, 25, and with regard to participation in public affairs also in Arts 26 and 27.

18 UN Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Hong Kong, China', 27 July 2022, CCPR/C/CHN-HKG/CO/4, <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCHN-HKG%2FCO%2F4&Lang=en>, last access 10 September 2024, particularly paras 3-12.

the NSL.[19] Nevertheless, the violations continue[20] and there are fears that they will worsen in view of the recent introduction of a new national security law in Hong Kong under Art. 23 of the Basic Law.[21]

Furthermore, the postponement of the Legislative Council elections originally scheduled for 20 September 2020, allegedly due to COVID-19, and the changes in the electoral system of Hong Kong have been considered as undermining Hong Kong's high degree of autonomy and thus as breaches of the Joint Declaration.[22] Similar concerns were expressed regarding the selection of the Chief Executive in Hong Kong on 8 May 2022.[23]

In response to these breaches, several States took measures which consisted, *inter alia*, in the suspension of extradition agreements concluded with Hong Kong. More specifically, during the second half of 2020, Canada,[24]

19 See Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Third Periodic Report of China, Including Hong Kong, China, and Macao, China', 22 March 2023, E/C.12/CHN/CO/3, paras 100-103, 114 f.,126 f., 128 f., referring specifically to Arts 8, 13, 14 and 15 ICESCR, <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FCHN%2FCO%2F3&Lang=en>, last access 10 September 2024.

20 Office of the High Commissioner for Human Rights, 'China/Hong Kong SAR: UN Experts Concerned about Ongoing Trials and Arrest Warrants under National Security Legislation', Press Release, 9 October 2023, <https://www.ohchr.org/en/press-releases/2023/10/china hong-kong-sar-un-experts-concerned-about-ongoing-trials-and-arrest>, last access 10 September 2024; Office of the High Commissioner for Human Rights, 'Hong Kong SAR: Türk Deplores Use of National Security Laws', Press Release, 31 May 2024, <https://www.ohchr.org/en/press-releases/2024/05/hong-kong-sar-turk-deplores-use-national-security-laws>, last access 10 September 2024.

21 'Hong Kong's 'Alarming' National Security Law Comes Into Force', The Guardian, 23 March 2024, <https://www.theguardian.com/world/2024/mar/23/hong-kongs-new-national-security-law-comes-into-force#:~:text=Hong%20Kong's%20new%20national%20security, crimes%20including%20treason%20and%20insurrection>, last access 10 September 2024; 'Hong Kong National Security Proposals: UK Statement', FCDO Press Release, 28 February 2024, <https://www.gov.uk/government/news/uk-statement-on-hong-kong-national-security-proposals>, last access 10 September 2024; 'Hong Kong: Article 23 Legislation Takes Repression to "Next Level"', Amnesty International, 8 March 2024, <https://www.amnesty.org/en/latest/news/2024/03/hong-kong-article-23-legislation-takes-repression-to-next-level/>, last access 10 September 2024.

22 'G7 Foreign Ministers' Statement on Hong Kong Legislative Elections', 20 December 2021, <https://eeas.europa.eu/headquarters/headquarters-homepage/109179/g7-foreign-ministers-statement-hong-kong-legislative-elections_en>, last access 10 September 2024.

23 'Hong Kong: G7 Foreign Ministers' Statement on the Chief Executive Selection', EU External Action, 9 May 2022, <https://www.eeas.europa.eu/eeas/hong-kong-g7-foreign-ministers%E2%80%99-statement-chief-executive-selection_en>, last access 10 September 2024.

24 'Canada Takes Action Following Passage of National Security Legislation for Hong Kong', Government of Canada, Statement by the Minister of Foreign Affairs François-Philippe Champagne, 3 July 2020, <https://www.canada.ca/en/global-affairs/news/2020/07/canada-takes-action-following-passage-of-national-security-legislation-for-hong-kong.html>, last access 10 September 2024.

Australia,[25] the UK,[26] New Zealand[27] and the US[28] and, from EU Member States, Germany,[29] Ireland,[30] Finland[31] and the Netherlands[32] suspended their extradition agreements with Hong Kong. Moreover, France halted its ratification of an extradition agreement with Hong Kong.[33]

The UK and the US took further measures. The UK extended its arms embargo on mainland China to cover Hong Kong and created a new, bespoke immigration route for British Nationals (Overseas) from Hong Kong and their dependants.[34] The United States (US) set out a number of responses, which consisted of issuing and implementing Executive Order 13936 on

25 'Extradition Treaty with Hong Kong', Joint Statement of Prime Minister Scott Morrison, Minister for Foreign Affairs Marise Payne and Minister for Industrial Relations Christian Porter, 9 July 2020, <https://www.foreignminister.gov.au/minister/marise-payne/media-release/extradition-treaty-hong-kong>, last access 10 September 2024.

26 'Hong Kong and China: Foreign Secretary's Statement in Parliament', GOV.UK, 20 July 2020, <https://www.gov.uk/government/speeches/hong-kong-and-china-foreign-secretarys-statement-in-parliament>, last access 10 September 2024.

27 Rt Hon Winston Peters, 'New Zealand Suspends Extradition Treaty with Hong Kong', Beehive.govt.nz, 28 July 2020, <https://www.beehive.govt.nz/release/new-zealand-suspends-extradition-treaty-hong-kong>, last access 10 September 2024.

28 US Department of State, 'Suspension or Termination of Three Bilateral Agreements with Hong Kong', Press Statement, 19 August 2020, <https://2017-2021.state.gov/suspension-or-termination-of-three-bilateral-agreements-with-hong-kong/index.html>, last access 10 September 2024.

29 German Federal Foreign Office, 'Foreign Minister H. Maas on the Postponement of the Elections in Hong Kong', Press Release, 31 July 2020, <https://www.auswaertiges-amt.de/en/newsroom/news/maas-postponement-elections-hong-kong/2372740>, last access 10 September 2024.

30 Eoghan Moloney, 'Ireland Suspends Extradition Treaty with Hong Kong', Irish Independent, 23 October 2020, <https://www.independent.ie/breaking-news/irish-news/ireland-suspends-extradition-treaty-with-hong-kong-39660667.html>, last access 10 September 2024.

31 'Finland Suspends Extraditions to Hong Kong, Prompting Response from Beijing', Helsinki Times, 20 October 2020, <https://www.helsinkitimes.fi/finland/finland-news/domestic/18189-finland-suspends-extraditions-to-hong-kong-prompting-response-from-beijing.html>, last access 10 September 2024.

32 'Hong Kong Watch Welcomes Ireland and the Netherlands Decision to Suspend Its Extradition Treaty with Hong Kong and Calls for EU Members to Now Go Further and Suspend Extradition with China', Hong Kong Watch, 23 October 2020, <https://www.hongkongwatch.org/all-posts/2020/10/23/hong-kong-watch-welcomes-irelands-decision-to-suspend-its-extradition-treaty-with-hong-kong-and-calls-for-eu-members-to-now-go-further-and-suspend-extradition-with-china>, last access 10 September 2024.

33 Louise Guillot, 'France Halts Approval of Extradition Treaty with Hong Kong', Politico, 3 August 2020, <https://www.politico.eu/article/france-halts-approval-of-extradition-treaty-with-hong-kong/>, last access 10 September 2024.

34 'The Six-Monthly Report on Hong Kong' (1 July to 31 December 2020), FCDO, 10 June 2021, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/992734/hong-kong-six-monthly-report-48-jul-dec-2020.pdf>, last access 10 September 2024, 7.

Hong Kong Normalization,[35] including taking the position that Hong Kong no longer warrants treatment under US law in the same manner as it did before 1 July 1997, since, due to the developments related to the introduction of the NSL, Hong Kong could no longer be considered to be maintaining a high degree of autonomy from China;[36] ending exports of US origin defence equipment to Hong Kong; imposing visa restrictions and asset freezing on individuals believed to be responsible for, or complicit in, undermining Hong Kong's autonomy or undermining human rights and fundamental freedoms in Hong Kong;[37] and amending the Export Administration Regulations.[38] On 18 August 2020, it also gave the HKSAR notice[39] of the termination of two bilateral treaties.[40] Both of these terminations took place in conformity with the provisions for termination in the relevant agreements,[41] which did not require a specific ground for termination.

35 Executive Order 13936 of 14 July 2020 ('President's Executive Order on Hong Kong Normalization'), reproduced in Digest of United States Practice in International Law 2020 (2020 Digest of US Practice), 365-368.

36 See also , US Secretary of State Michael R. Pompeo, 'P.R. C. National People's Congress Proposal on Hong Kong National Security Legislation – United States Department of State'-Press Statement, 27 May 2020, <https://2017-2021.state.gov/prc-national-peoples-congress-proposal-on-hong-kong-national-security-legislation/index.html>, last access 10 September 2024.

37 See Hong Kong Autonomy Act, 14 July 2020, Public Law No. 116-149, 134 Stat. 663 and Hong Kong Human Rights and Democracy Act, 15 October 2019, H. R.3289 – 116th Congress (2019-2020). On 7 August 2020 the US imposed sanctions on ten PRC and Hong Kong officials on the basis of this Act (2020 Digest of US Practice (n. 35), 370); see also 'Update to Report on Identification of Foreign Persons Involved in the Erosion of the Obligations of China Under the Joint Declaration or the Basic Law', Report of the US Department of State, 20 December 2021, <https://www.state.gov/december-2021-update-to-report-on-identification-of-foreign-persons-involved-in-the-erosion-of-the-obligations-of-china-under-the-joint-declaration-or-the-basic-law/>, last access 10 September 2024. For some more recent measures, see US Congress, 'S.490- Hong Kong Economic and Trade Office (HKETO) Certification Act', introduced on 16 February 2023, <https://www.congress.gov/bill/118th-congress/senate-bill/490>, last access 10 September 2024.

38 2020 Digest of US Practice (n. 35), ii. For some further measures see 2020 Digest of US Practice (n. 35), 524; and Digest of United States Practice in International Law 2021, ii, 26.

39 Reproduced in 2020 Digest of US Practice (n. 35), 162.

40 Agreement for the Transfer of Sentenced Persons between the Government of Hong Kong and the Government of the United States of America of 15 April 1997, TIAS 98-121; Agreement for the Reciprocal Exemption with Respect to Taxes on Income from the International Operation of Ships of 1 August 1989, 1549 UNTS 91.

41 Art. 14(2) and para. 8 respectively.

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III. Legal Evaluation of Responses by States

The first question which arises regarding these responses is their lawfulness. The following subsection will examine whether the suspension of extradition agreements and other responses are lawful *per se*, because only if some of them are in violation of international obligations will it be necessary to examine whether they can be justified as 'collective' countermeasures.

1. Responses by the UK

When analysing responses by the UK, the extension of the arms embargo on mainland China to cover Hong Kong and the creation of a new, bespoke immigration route for British Nationals (Overseas) from Hong Kong and their dependants do not seem to violate UK's international obligations and therefore can be considered as retorsions, namely lawful measures which are unfriendly towards Hong Kong and China.[42] With regard to the suspension of the extradition agreement between the UK and Hong Kong, its legal basis is not clear. Although there is a provision for suspension in the extradition agreement between the UK and Hong Kong 'at any time by giving notice' to the other party,[43] and, therefore, the UK did not have to invoke a specific ground for the suspension (and most probably the suspension took place on the basis of this provision),[44] the UK Foreign Secretary stated that the suspen-

42 See Thomas Giegerich's analysis, 'Retorsion' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford University Press 2020). Arms embargoes are considered as characteristic example of retorsion (see Giegerich, (n. 42), para. 10). On the response by China to the introduction of the BN(O) see 'HKSAR Government Follows Up on China's Countermeasures against British Government's Handling of Issues Related to British National (Overseas) Passport', The Government of the HKSAR, Press Releases, 29 January 2021, <https://www.info.gov.hk/gia/general/202101/29/P2021012900763.htm>, last access 10 September 2024. However, it does not seem plausible that this measure constitutes a breach of the Joint Declaration by the UK, as it does not provide a right of abode in the UK (see also Manuel Casas, 'Shelter from the Storm? The International Legality of Granting Migratory Rights to Hong Kongers', EJIL: Talk!, 9 July 2020), <https://www.ejiltalk.org/shelter-from-the-storm-the-international-legality-of-granting-migratory-rights-to-hong-kongers/>, last access 10 September 2024).

43 Art. 20(2) of the Agreement between the HKSAR and the UK for the Surrender of Fugitive Offenders of 5 November 1997, <https://www.elegislation.gov.hk/hk/cap503R!en>, last access 10 September 2024.

44 The author of this article requested information from the FCDO on the notice by which the UK suspended its extradition agreement with Hong Kong (see 'Hong Kong British National (Overseas) Visa and Suspension of Extradition Treaty with Hong Kong', Statement made by the UK Secretary of State for the Home Department, 22 July 2020, <https://questions-statements.parliament.uk/written-statements/detail/2020-07-22/hcws421>, last access 10 September 2024). However, the FCDO refused disclosure on the basis of 'public interest considerations'.

sion was also a response to the enactment of the NSL, which constituted a 'clear and serious violation of the UK-China Joint Declaration'.[45] He also made an implied reference to the doctrine *rebus sic stantibus*, since he stated that the NSL had 'significantly changed key assumptions' underpinning the extradition agreement between the UK and Hong Kong, expressing concern about NSL articles which give mainland Chinese authorities the ability to assume jurisdiction over certain cases and try those cases in mainland Chinese courts, without providing legal or judicial safeguards, and about the potential reach of the extraterritorial provisions.[46] Therefore, the suspension also aimed at preventing extradition from the UK being misused under the NSL.

If the UK did not suspend its extradition agreement with Hong Kong on the basis of the relevant provision in the agreement by giving notice to Hong Kong, and given that the justification of the UK measure on the basis of the doctrine *rebus sic stantibus* would present problems,[47] the non-performance of the extradition agreement by the UK could be justified as a countermeasure. With regard to the breach of the Joint Declaration, the UK is an injured State entitled to respond, including by taking countermeasures pursuant to Arts 42(a) and 49 of the 2001 International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),[48] provided that the conditions of application of countermeasures are complied with.[49] In any event, the UK has not clearly invoked the justification of countermeasures, although, interestingly, the Foreign Secretary stated that the measures taken by the UK, including the suspension of the extradition agreement, were 'a reasonable and proportionate response' to the breach by China of its international obligations with respect to Hong Kong,[50] and proportionality is an express condition for the lawfulness of countermeasures.[51] There is a legal distinction between the suspension of the operation of a treaty and countermeasures, which is however generally not clear in State practice.[52]

45 'Hong Kong and China: Foreign Secretary's statement in Parliament' (n. 26).

46 'Hong Kong and China: Foreign Secretary's statement in Parliament' (n. 26).

47 See Section III. 2. b).

48 Articles on Responsibility of States for Internationally Wrongful Acts, (2001) ILCYB, Vol. II, Part Two.

49 See Arts 49-53 ARSIWA. The condition of proportionality pursuant to Art. 51 ARSIWA and at least the procedural requirement of Art. 52(1)(a) ARSIWA would seem to have been met.

50 'Hong Kong and China: Foreign Secretary's statement in Parliament' (n. 26).

51 *Responsabilité de l' Allemagne à raison des dommages causés dans les colonies portugaises du sud de l' Afrique (sentence sur le principe de la responsabilité)* (Portugal v. Germany) *Naulilaa* case, judgment of 31 July 1928, RIAA Vol. II, 1011-1033 (1028); Art. 51 ARSIWA.

52 See, analytically, Maria Xiouri, *The Breach of a Treaty: State Responses in International Law* (Brill 2021).

2. Responses by Other States

a) Lawful Responses

With regard to responses by States other than the UK and, more specifically, the suspensions of extradition agreements, it seems that there are differences among them. Concerning the suspensions by Canada, Ireland, New Zealand, Germany, the Netherlands, and Finland, there are in the respective extradition agreements provisions for suspension 'at any time by giving notice' to the other party, such suspension taking effect on receipt of the relevant notice.[53] No particular grounds are required for such suspensions. Therefore, the relevant suspensions were lawful measures taken in conformity with the provisions of the relevant agreements.[54] Similarly, the termination by the US of two of its agreements with Hong Kong in accordance with their provisions is a lawful measure.[55]

b) Responses Which Do Not Appear to Be Lawful *per se*: Countermeasures in Response to the Breach of *Erga Omnes (Partes)* Obligations?

In contrast to the previously analysed responses, the lawfulness of other responses by States following the introduction of the NSL is questionable. Regarding the suspension of extradition agreements, those between the US and Hong Kong and between Australia and Hong Kong contain no relevant provisions for suspension, but only for termination.[56] Presumably for this reason both States sought to base the suspension of these agreements, at least partly,[57] on the *rebus sic stantibus* doctrine. More specifically, they argued that the agreements were suspended because of the fundamental change in circumstances which had occurred due to the enactment of the NSL with

53 The relevant agreements are available at <https://www.doj.gov.hk/en/external/table4ti.html>, last access 10 September 2024.

54 See Art. 57(a) Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331 (VCLT).

55 See Art. 54(a) VCLT.

56 See Art. 20 of the Agreement between the Government of Hong Kong and the Government of the United States of America for the Surrender of Fugitive Offenders of 20 December 1996, <https://www.elegislation.gov.hk/hk/cap503F!en>, last access 10 September 2024; Art. 21 of the Agreement for the Surrender of Accused and Convicted Persons between the HKSAR and Australia of 15 November 1993, <https://www.elegislation.gov.hk/hk/cap503C!en>, last access 10 September 2024.

57 At least in the case of the US, it seems that the measures were also taken as responses to the breaches of international obligations with regard to Hong Kong (see Section III. 2. b) bb)).

regard to those existing at the time of the conclusion of the extradition agreements.[58] The question which arises is whether the conditions for the application of Art. 62 of the Vienna Convention on the Law of Treaties (VCLT) on 'Fundamental change of circumstances' were met. With regard to the US, Art. 62 VCLT is applicable to the extent that it reflects customary international law, since the US is not a party to the VCLT. Indeed, it has been accepted in international case law that Art. 62 VCLT can be considered 'in many respects' as a codification of customary international law.[59]

Art. 62(1)(b) VCLT requires that the effect of the change must radically transform the extent of obligations still to be performed under the treaty. Whether this condition is met is particularly questionable since there is a provision in the extradition agreements on the basis of which the US and Australia could refuse the extradition if there were substantial grounds for believing 'that the offence of which that person is accused or was convicted is an offence of a political character' or 'that the request for surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecution or punishment on account of […] political opinions'.[60] The existence of such a provision in the agreements would enable the US and Australia not to apply them with regard to such persons, without the need to suspend the agreements as a whole. It is accepted in international case law that the stability of treaty relations requires that Art. 62 VCLT is applied only in exceptional circumstances.[61]

With regard to other responses by the US, the position that Hong Kong no longer warrants treatment under US law in the same manner as it did before 1 July 1997 was recently found, concerning origin marking requirements, not to be in accordance with World Trade Organisation (WTO) law.[62]

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58 See relevant notice reproduced in 2020 Digest of US Practice (n. 35), 162 and n. 25. See also 'Suspension of Hong Kong Treaties', Parliament of Australia, 24 September 2020, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/SuspensionofHKtreaties/Report/section?id=committees%2Freportjnt%2F024562%2F73861>, last access 10 September 2024.

59 See, indicatively, ICJ, *Fisheries Jurisdiction* (United Kingdom v. Iceland), jurisdiction of the Court, judgment of 2 February 1973, ICJ Reports 1973, 3 (para. 36); ICJ, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), judgment of 25 September 1997, ICJ Reports 1997, 7 (para. 46).

60 See Art. 6 of the extradition agreements of the HKSAR with Australia and with the US.

61 ICJ, *Fisheries Jurisdiction* (n. 59), para. 43; ICJ, *Gabčíkovo-Nagymaros Project* (n. 59), para. 104; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009), 770; Malgosia Fitzmaurice and Panos Merkouris, *Treaties in Motion, The Evolution of Treaties from Formation to Termination* (Cambridge University Press 2020), 310-312.

62 See WTO, *United States – Origin Marking Requirement*, panel report of 21 December 2022, WT/DS597/R, para. 8.1(b). For a succinct analysis, see Julien Chaisse and Kehinde Folake Olaoye, '*United States – Origin Marking Requirement*, WT/DS597/R', AJIL 117 (2023), 488-493.

Export bans or other restrictions on exports are also *prima facie* in violation of WTO law,[63] therefore at least some of the relevant US responses might be in violation of WTO obligations, since both the US and Hong Kong are WTO members.

The conclusion reached is that at least some of the State responses to the introduction of the NSL do not appear to be lawful *per se*. It appears from the various statements of State officials that these measures were also intended as a response to the breach by China of its international obligations arising from the Joint Declaration, as well as from the ICCPR and the ICESCR.[64] Thus, the question arises on which legal grounds other States, which are not parties to the Joint Declaration, could base their entitlement to take measures in response to the breaches committed under the NSL. It seems that these responses offer support for the view that with regard to certain obligations established for furthering community interests, a broader range of States, and not only injured States in the sense of Art. 42 ARSIWA, have a legal interest in invoking responsibility for their breach and respond thereto.[65]

aa) The *Erga Omnes (Partes)* Character of Breached Obligations Arising from the ICCPR and the ICESCR

Invocation of responsibility on the basis of community interest was recognised by the International Court of Justice (ICJ) in its *obiter dictum* in the *Barcelona Traction* case, in which the Court referred to obligations of an *erga omnes* character, namely obligations which 'in view of the importance of the rights involved, all States can be held to have a legal interest in their protection'.[66] The Court added that

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63 On the possibility of violation of WTO rules by export bans and restrictions see, indicatively, Iryna Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: the Impact of the Principle of Common Concern of Humankind* (Brill 2022), 139-144. It is doubtful that the US measures could be justified under WTO law as measures necessary for the protection of its essential security interests taken in time of emergency in international relations under Art. XXI(b)(iii) of the 1994 General Agreement on Tariffs and Trade, as such a justification was rejected in the above-mentioned Panel Report (*United States – Origin Marking Requirement* [8.1(c)]).

64 See, indicatively, n. 28.

65 ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts with Com-mentaries', (2001) ILCYB, Vol. II, Part Two (ARSIWA Commentary), 116 para. 2. For community interests in various areas of international law, see Eyal Benvenisti and Georg Nolte, *Community Interests Across International Law* (Oxford University Press 2018); Rüdiger Wolfrum, '*Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law*' (Brill Nijhoff 2021), 9-479.

66 ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), preliminary objections, judgment of 5 February 1970, ICJ Reports 1970, 3 (paras 33-35).

> 'Such obligations derive, for example, in contemporary international law, from the outlawing of aggression, and of genocide, as also from the principles and rules concerning the *basic rights of the human person, including protection from slavery and racial discrimination*. Some of the corresponding rights of protection have entered into the body of general international law […]; others are conferred by international instruments of a universal or quasi-universal character.'[67]

The notion of *erga omnes* obligations was also recognised in other judgments of international courts and tribunals[68] and led to the adoption of Art. 48 ARSIWA by the International Law Commission (ILC), which – supplementing Art. 42 ARSIWA on invocation of responsibility by an injured State – provides for the possibility of invocation of responsibility 'by a State other than an injured State'[69] for breach of *erga omnes* obligations (Art. 48(1)(b) ARSIWA) or of obligations 'owed to a group of States including that State, and […] established for the protection of a collective interest of the group' (Art. 48(1)(a) ARSIWA). The latter may arise from multilateral treaties and are often referred to as 'obligations *erga omnes partes*'.[70] Standing of a State other than an injured State to invoke responsibility for breach of *erga omnes partes* obligations has also been recognised in international jurisprudence.[71]

The question which arises is whether obligations stipulated in universal or quasi-universal human rights treaties such as the ICCPR and the ICESCR can be considered as *erga omnes partes* obligations, as there is no

67 ICJ, *Barcelona Traction* (n. 66), para. 34 (emphasis added).

68 For a recent presentation of this case law see Marco Longobardo, 'The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of *The Gambia v. Myanmar* and Beyond', ICLR 24 (2022), 476-506.

69 The ARSIWA terminology will be used in this article. For criticism see Brigitte Stern, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C. D. L. sur la responsabilité des États', A. F. D. I. 47 (2001), 3-44 (particularly 23-25).

70 ARSIWA Commentary to Art. 48 (n. 65), 126 para.

71 See, indicatively, Separate Opinion of Judge Simma, ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), merits, judgment of 19 December 2005, ICJ Reports 2005, 168 (para. 35); ICJ, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), merits, judgment of 20 July 2012, ICJ Reports 2012, 422 (paras 68-70); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), preliminary objections, judgment of 22 July 2022, ICJ Reports 2022, 477 (paras 93-114) (*The Gambia v. Myanmar*); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), provisional measures, order of 26 January 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>, last access 10 September 2024, (para. 33) (*South Africa v. Israel*).

express relevant reference in these treaties.[72] Recognition of the *erga omnes partes* character of obligations is particularly important for human rights treaties, as in the event of their breach 'there simply exists no *directly* injured other State because international human rights law does not protect States but rather human beings or groups directly'.[73] In order to determine whether treaties incorporate *erga omnes partes* obligations, it needs to be ascertained that there is a common interest in compliance with them, over and above any individual interests of the States concerned,[74] which implies that the obligations in question are owed by any State party to all the other States parties to the treaty, the latter having the right to invoke responsibility for their breach. This was the approach taken by the ICJ in the *Belgium v. Senegal* case, where the Court deduced such a common interest from the object and purpose of the Convention against Torture as stated in the Preamble, namely 'to make more effective the struggle against torture […] throughout the world'.[75] Similar reasoning was recently followed by the ICJ in *The Gambia v. Myanmar*[76] and in the *South Africa v. Israel* cases[77] regarding the *erga omnes partes* character of the obligations arising from the Genocide Convention.

A common interest in compliance can be ascertained in the ICCPR and ICESCR from their common Preamble, namely that

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72 Compare Art. 33 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 221 (ECHR).

73 Bruno Simma, 'From Bilateralism to Community Interest in International Law', RdC 250 (1994), 217-384 (296) (emphasis in the text).

74 See ARSIWA Commentary to Art. 48 (n. 65), 126 (para. 7). See also Special Rapporteur Fitzmaurice, Second Report on the Law of Treaties, A/ CN.4/ 107, (1957) ILCYB, Vol. II, 54, paras 125-126; for case law see, indicatively, European Commission of Human Rights, *Austria v. Italy* (*'Pfunders'* case), decision of 11 January 1961, no. 788/60, 19.

75 ICJ, *Belgium v. Senegal* (n. 71), paras 68 and 69. The Court followed in this regard its *Reservations to the Genocide Convention* advisory opinion (ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion of 28 May 1951, ICJ Reports 1951, 15 (23)). See also Human Rights Committee, 'General Comment No. 24 (52) on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant', 11 November 1994, CCPR/C/21/Rev. 1/Add. 6 para. 8. For academic literature see Pierre d'Argent, 'Les Obligations Internationales', RdC 417 (2021), 9-210 (61), who notes that whether a treaty obligation is owed *erga omnes partes* is a matter of interpretation of the relevant treaty; see also Pok Yin S. Chow, 'On Obligations Erga Omnes Partes', Geo. J. Int' l L. 52 (2021), 469-504 (492, 495-497).

76 ICJ, *The Gambia v. Myanmar* (n. 71), paras 106-114, referring to both *erga omnes* and *erga omnes partes* obligations. See however Dissenting Opinion of Judge Xue, *The Gambia v. Myanmar* (n. 71), paras 5, 8, 13-25, 39.

77 ICJ, *South Africa v. Israel* (n. 71) para. 33. Interestingly, Israel did not challenge the standing of South Africa and the ICJ judges were unanimous in upholding South Africa's standing.

> '[…] the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic social and cultural rights.'

The human rights obligations which seem to have been breached under the NSL are incorporated in the ICCPR and ICESCR[78] and all States parties have a common interest in compliance with these obligations, therefore at least some of these obligations are owed by any State party to all the other States parties to the Covenants.[79] This does not necessarily mean that all obligations incorporated in such treaties are *erga omnes partes*, however the question as to whether an obligation incorporated in a human rights treaty is devoid of an *erga omnes partes* character should be approached with great caution[80] given the importance of using all available legal means in order to ensure greatest possible compliance with human rights obligations.

There has been some recognition in international jurisprudence and in pleadings of States before international courts and tribunals of the *erga omnes partes* character of obligations stipulated in the ICCPR. Notable is the Separate Opinion of Judge Simma in the *DRC v. Uganda* case,[81] referring specifically to obligations arising from human rights protected in the ICCPR, such as the right to liberty.[82] Furthermore, in the *Arctic Sunrise* arbitration, the Netherlands claimed that it was entitled to invoke the international responsibility of Russia for breaches of *erga omnes (partes)* obligations, such as those arising from the freedom of expression under the ICCPR, since the

78 See Section II.

79 See also with regard to the ICCPR the Human Rights Committee, General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 29 March 2004, CCPR/C/21/Rev.1/Add. 13 para. 2; ARSIWA Commentary to Art. 48 (n. 65) para. 7; Simma (n. 73), 370; Giorgio Gaja, 'The Protection of General Interests in the International Community' (General Course on Public International Law), RdC 364 (2011), 9-185 (62); Erika de Wet, '*Jus Cogens* and Obligations *Erga Omnes*' in: Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013), 541-561 (553-555). Support for the *erga omnes partes* character of obligations stipulated under the ICCPR can be inferred from Art. 41(1) ICCPR.

80 See also Declaration of Judge Kress, *The Gambia v. Myanmar* (n. 71) para. 16.

81 Separate Opinion of Judge Simma, ICJ, *Armed Activities on the Territory of the Congo* (n. 71) para. 35. See also *Armed Activities* (n. 71), para. 39: '[…] *at least* the core of the obligations deriving from the rules of international humanitarian and human rights law are valid *erga omnes*' (emphasis added).

82 *Armed Activities* (n. 71), para. 31; more specifically he referred to the following ICCPR Articles: Art. 7 on the prohibition of torture, Art. 9(1) on the right to liberty, Art. 10(1) on humane treatment of prisoners and Art. 12(1), (2) on right to liberty of movement.

Netherlands is party to the Convention.[83] The Arbitral Tribunal did not address this claim, as it had already decided that the Netherlands was entitled to bring claims against Russia by virtue of its status as an injured flag State.[84]

On the question as to whether the ICCPR and the ICESCR incorporate also *erga omnes* obligations, part of the academic literature has expressed the view that all human rights obligations are *erga omnes* obligations.[85] However, at least for some of the ICCPR and ICESCR obligations allegedly breached in Hong Kong, there currently does not seem to exist clear support in international law for their *erga omnes* character. It is true that the ICJ in the *Barcelona Traction* judgment stated that *erga omnes* obligations may arise from 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'[86], the word 'including' indicating that there may be also other basic human rights which could be considered as having *erga omnes* character. This remark is corroborated by the next sentence where it is stated that 'some of the corresponding rights of protection […] are conferred by international instruments of a universal or quasi-universal character', which could be considered as including the ICCPR and the ICESCR. Moreover, the ICJ subsequently noted in the same judgment that human rights to which it had referred 'include protection against denial of justice'.[87] However, from the reference to 'basic' human rights it can also be inferred that the Court in that judgment was not prepared, at that time, to admit the *erga omnes* character to all human rights.[88]

Nevertheless, the distinction between obligations *erga omnes partes* and obligations *erga omnes* may not be clear in human rights treaties, as they may incorporate obligations under general international law owed to the interna-

83 Permanent Court of Arbitration (PCA), Memorial of the Kingdom of the Netherlands, *Arctic Sunrise Arbitration* (Netherlands v. Russia), PCA, Award on the Merits of 14 August 2015, paras 116-35.

84 PCA, *Arctic Sunrise Arbitration* (n. 83), paras 185-186.

85 Institut de Droit International, Resolution 'The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States', Session of Santiago de Compostela 1989, Art. 1 (IDI 1989 Resolution); Yoram Dinstein 'The erga omnes Applicability of Human Rights', AVR 30 (1992), 16-21; Ian D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia 2001), 129. See however Dinah Shelton, 'Are There Differentiations Among Human Rights? *Jus Cogens*, Core Human Rights, Obligations *Erga Omnes* and Non-Derogability' in: *The Status of International Treaties on Human Rights* (Council of Europe Publishing 2006), 159-186 (174).

86 ICJ, *Barcelona Traction* (n. 66), para. 34.

87 ICJ, *Barcelona Traction* (n. 66), para. 91.

88 Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 138; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 1997), 140.

tional community as a whole.[89] Moreover, the distinction between 'basic' or 'fundamental' and other human rights is difficult to make and has been criticized in the literature.[90] In fact, there seems to be some, admittedly limited, support offered by international courts and United Nations (UN) human rights bodies for the view that human rights obligations other than the prohibition of genocide, slavery, racial discrimination, and torture[91] are *erga omnes* obligations.[92] Thus, at least some ICCPR obligations breached following the introduction of the NSL, such as the prohibition of arbitrary deprivation of liberty, may also be considered as having an *erga omnes* character, if it is accepted that they exist also under customary international law and that 'in view of the importance of the rights involved, all States can be held to have a legal interest in their protection'.

As mentioned previously, of all the measures taken by States in response to the breaches committed under the NSL, specifically the lawfulness of certain measures taken by the US and Australia is questionable. These two States are not injured by the breach of human rights obligations committed under the NSL in the sense of Art. 42 ARSIWA, therefore they could only invoke

89 See ICJ, *Barcelona Traction* (n. 66), para. 34; Special Rapporteur Crawford, Third Report on State Responsibility, A/ CN.4/ 507, 34 (para. 106) and Crawford (n. 89), 32, note 185; Linos-Alexander Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in: James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds), *The Law of International Responsibility* (Oxford University Press 2010), 1137-1148 (1136).

90 In the context of the ILC work on State responsibility it has been noted that the notion of 'fundamental human rights' has no settled meaning (see Special Rapporteur Crawford, Fourth Report on State Responsibility, A/CN.4/517, 16 (para. 64)). Dinstein (n. 85), 17 rejects the distinction between basic and other human rights, interestingly referring to the freedom of expression as giving rise to *erga omnes* obligations (Dinstein (n. 85), 18). See also criticism of the distinction in Theodor Meron, 'On a Hierarchy of International Human Rights', AJIL 80 (1986), 1-23.

91 With regard to torture see International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anto Furundžija*, IT-95-17/1, judgment of 10 December 1998, paras 151-152.

92 See UN Human Rights Committee, General Comment No. 29: 'Article 4: Derogations During a State of Emergency', 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11, from which it can be inferred that the CCPR considers that the prohibition of arbitrary deprivations of liberty or deviations from fundamental principles of fair trial, including the presumption of innocence, give rise to obligations *erga omnes*. For international case law see IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, advisory opinion of 17 September 2003, OC-18/03, 113 para. 5 of the *dispositive*, with regard to the 'fundamental principle of equality and non-discrimination'; IACtHR, *Mapiripán Massacre v. Colombia*, judgment of 15 September 2005, paras 109-115, 123, 178, where there seems to be recognition of the *erga omnes* character of various rights under the American Convention, including rights to life, to humane treatment and to personal liberty; similarly in the Separate Opinion of Judge Cançado Trindade (IACtHR, *Mapiripán Massacre* (n. 92), paras 17-29). See also Judge Robinson in his Separate Opinion, ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion of 25 February 2019, ICJ Reports 2019, 95, para. 107, who seems to consider Art. 12 ICCPR on liberty of movement as giving rise to *erga omnes* obligations.

China's responsibility for breaches of its international obligation with regard to Hong Kong if it is accepted that the obligations breached are obligations *erga omnes* or *erga omnes partes*. With regard to obligations under the ICCPR, since China (although it has an obligation to ensure compliance with them with regard to Hong Kong) is not a party thereto, Australia and the US are entitled to invoke responsibility for their breach if it is accepted that at least some of the obligations breached under the NSL, such as the prohibition of arbitrary deprivation of liberty, are obligations *erga omnes*. With regard to obligations under the ICESCR, to which China is a party, Australia (and not the US, since it is not a party thereto) could also invoke responsibility for their breach if it is accepted that at least some of the ICESCR obligations breached are *erga omnes partes*.

bb) The Justification of Countermeasures in the General Interest in Response to Breach of *Erga Omnes (Partes)* Obligations by China in Hong Kong

Having ascertained that at least some of the human rights obligations breached by China can be considered as *erga omnes (partes)*, the question which arises more specifically is whether States other than the injured State, namely the UK, can take measures in response to the breach of collective obligations in the sense of Art. 48 ARSIWA, which are incorporated in the ICCPR or ICESCR. This question remains controversial with regard to the taking of countermeasures; there has been support in the literature for such countermeasures, which are usually referred to as 'collective' or 'third-party' countermeasures.[93] The term 'collective' does not mean that such measures cannot be taken by one State,[94] although they are often taken by a group of States;[95]

93 See, indicatively, Michael Akehurst, 'Reprisals by Third States', BYIL 44 (1970), 1-18; D. N. Hutchinson, 'Solidarity and Breaches of Multilateral Treaties', BYIL 59 (1988), 151-215; Jonathan I. Charney, 'Third State Remedies in International Law', Mich. J. Int'l L. 10 (1998), 57-101; Linos-Alexandre Sicilianos, *Les Réactions Décentralisées à l' Illicite: Des Contre-mesures à la Légitime Défense* (Librairie Générale de Droit et de Jurisprudence 1990), 155-157; Jochen A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', RdC 248 (1994), 349-437 (405-433); Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' BYIL 72 (2001), 337-356; Tams (n. 88), 198-251; Elena Katselli Proukaki, *The Problem of Enforcement in International Law* (Routledge 2010); Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017); more reserved Nigel D. White and Ademola Abass, 'Countermeasures and Sanctions' in: Malcolm D. Evans (ed.) *International Law* (5th edn, Oxford University Press 2018), 521-547 (531-534). See, however, Surya P. Subedi, 'Conclusions: The Current Law on Unilateral Sanctions, Remedies against Unlawful Use of such Sanctions and Recommendations' in: Surya P. Subedi (ed.), *Unilateral Sanctions in International Law* (Hart Publishing 2021), 327-342, who seems to argue against 'unilateral sanctions'.

94 ARSIWA Commentary to Art. 54 (n. 65), 137 para. 2.

95 See, for instance, ARSIWA Commentary to Art. 54 (n. 65), 137-139.

moreover, the term 'third-party' countermeasures might be misunderstood as implying that the States taking such countermeasures are not affected by the internationally wrongful act.[96] The term 'countermeasures in the general interest' has also been suggested,[97] which might be clearer.

The ILC, when examining the issue, considered, *inter alia*, that State practice in support of such countermeasures was limited[98] and eventually opted for a saving clause incorporated in Art. 54 ARSIWA, which leaves the resolution of the matter to the further development of international law.[99] This saving clause stipulates that the chapter of the ARSIWA on countermeasures

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

It is still disputed whether 'collective' countermeasures constitute customary international law, in particular whether the relevant State practice is general (namely sufficiently widespread and representative, as well as consistent)[100] and it is accepted as law (*opinio juris*).[101] Regarding the first element,

96 See also in this regard Frowein (n. 93), 392; Sicilianos (n. 89), 1138-1139.

97 See the use of the expression 'countermeasures taken in the general or collective interest', ARSIWA Commentary to Art. 54 (n. 65), 139 para. 6; Denis Alland, 'Countermeasures of General Interest' EJIL 13 (2002), 1221-1239; Miles Jackson and Federica I. Paddeu, 'The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?' AJIL 118 (2024), 231-274 (239-240).

98 ARSIWA Commentary to Art. 54 (n. 65), 137 para. 3. On the danger that such countermeasures might impinge upon the powers of Security Council under Chapter VII of the UN Charter, which has not materialised, see Daniel Franchini, 'Extraterritorial Sanctions in Response to Global Security Challenges: Countermeasures as Gap-Fillers in the United Nations Collective Security System', Cambridge International Law Journal 12 (2023), 129-148.

99 ARSIWA Commentary to Art. 54 (n. 65), 139 para. 6.

100 See ILC Draft Conclusions on Identification of Customary International Law, with Commentaries, (2018) ILCYB, Vol. II, Part Two, Conclusion 8.

101 ILC Draft Conclusions (n. 100), Conclusion 9. On the two elements of customary international law see ICJ, *North Sea Continental Shelf cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), judgment of 20 February 1969, ICJ Reports 1969, 3 (para. 77). On the view that the practice is not accompanied by the required *opinio juris* see, indicatively, Tom Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', in: Larissa J. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2017), 19-51 (47); Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?', Chinese Journal of International Law 16 (2017), 175-214, who notes in this regard a divide between 'developed' and 'developing' States by examining UNGA Resolutions and also the work of the Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures>, last access 11 September 2024.

it should be noted that there is a significant number of instances of State practice where countermeasures were taken by States other than an injured State in response to a serious breach of *erga omnes* and/or *erga omnes partes* obligations.[102] It is true that mostly Western States have resorted to such countermeasures, however the relevant practice is not limited to them alone.[103] The element of *opinio juris* presents more problems, as States normally do not expressly refer to the notion of 'collective' or 'third-party' countermeasures when they resort to such countermeasures; moreover, State positions on the matter as expressed in the Sixth Committee during the ILC work on State responsibility have been inconclusive, although there has been support for the notion.[104] Nevertheless, scholars have inferred *opinio juris* to some extent from State practice on the basis that, in the absence of specific indications to the contrary, the conduct of States will be based, at least partly, on the conviction that their conduct is accepted as law and was not only based on extra-legal considerations:[105] besides, such measures have been adopted 'based on an explicit legal rationale; namely, the enforcement of obligations *erga omnes (partes)*'.[106] On the basis of this State practice the concept of 'collective' countermeasures was endorsed by the *Institut de Droit International* in 2005.[107]

Although the question of countermeasures by States other than an injured State was posed initially with regard to serious breaches of *erga omnes* obligations, in view of the above-mentioned State practice and the fact that Art. 54 ARSIWA refers to Art. 48(1) ARSIWA,[108] which encompasses, apart from *erga omnes*, also *erga omnes partes* obligations, it can be argued that such countermeasures can also be taken by States other than the injured State (s) which are parties to treaties incorporating *erga omnes partes* obligations in case of a serious breach of such obligations.[109]

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102 For analysis of this State practice see Sicilianos (n. 89), 155-177; Tams (n. 88), 207-227, 241-249 and for evaluation of this practice (Tams (n. 88), 228-241); Katselli Proukaki (n. 93), 109-209; Dawidowicz (n. 93), 72-110, 111-238, 243; Yoshifumi Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', NILR 68 (2021), 1-33 (18 f.). A more recent example from State practice are the unilateral 'sanctions' imposed on Russia in response to its invasion of Ukraine in 2022.

103 Sicilianos (n. 89), 1145-1148; Tams (n. 88), 236 f.; Dawidowicz (n. 93), 243.

104 Dawidowicz (n. 93), 72-110.

105 Tams (n. 88), 237-239; Katselli Proukaki (n. 93), 204; Dawidowicz (n. 93), 250-255. See in this regard ILC Draft Conclusions (n. 100), Commentary to Conclusion 9, para. 3.

106 Dawidowicz (n. 93), 252.

107 Institut de Droit International, Resolution 'Les obligations et les droits *erga omnes* en droit international', Cracow Session (2005) (IDI 2005 Resolution), Art. 5(c).

108 See also Dawidowicz (n. 93), 109.

109 See also Sicilianos (n. 89), 1144-1145; note also IDI 2005 Resolution (n. 107), which in Art. 1 characterises *erga omnes partes* obligations as *erga omnes*.

Although it is not clear in the ARSIWA commentary,[110] the taking of lawful measures such as retorsions in response to an internationally wrongful act can also be considered as a form of invocation of responsibility.[111] At the same time, if any responses are found to be in violation of international obligations of the State resorting to them – and it is true that the distinction between retorsions and countermeasures is not always clear, particularly since both are often referred to in practice as 'sanctions'[112] – they could be justified as countermeasures in the general interest[113] in response to the breach of *erga omnes (partes)* human rights obligations,[114] if it is accepted that countermeasures in response to serious breaches of *erga omnes (partes)* obligations constitute customary international law.[115] Treaty-based monitoring/implementation mechanisms in universal or quasi-universal human rights treaties arguably do not preclude resort to countermeasures in case of their serious breach, particularly to the extent that such mechanisms are not effective.[116]

110 ARSIWA Commentary (n. 65), 117.

111 ARSIWA Commentary (n. 65), 128; Gaja (n. 79), 101. This does not mean that retorsions can only be resorted to in response to an internationally wrongful act; being lawful measures, they can be a response to a merely unfriendly act by a State (see Giegerich (n. 42), paras 1 and 2).

112 See analytically White and Abass (n. 93), 521. On the notion of sanctions see also Alain Pellet and Alina Miron, 'Sanctions' in: Rüdiger Wolfrum (ed.), MPEPIL (online edn, Oxford University Press 2013). Regardless, retorsions and countermeasures are often used simultaneously in response to the breach of *erga omnes (partes)* obligations (Dawidowicz (n. 93), 29).

113 Of course, the problem which arises in such a case is whether, as required by Art. 54 ARSIWA, the relevant measures were taken against the responsible State, which is China: many of the relevant measures were taken against Hong Kong, which is not a State, but a special administrative region of China. It could be considered that since these measures are taken against a special administrative region of a State, they are indirectly taken against that State. Moreover, in this way the responses had a closer connection to the breaches against which they were taken; a contrary solution might present a more serious danger for escalation of the dispute.

114 See also IDI 1989 Resolution (n. 85) Arts 1, 2 and 6; Dinstein (n. 85), 19-20, given also the absence of compulsory jurisdiction for breaches of human rights treaties; Christian Hillgruber, 'The Right of Third States to Take Countermeasures, in: Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006), 265-293 (273-278).

115 Grant (n. 6), 60-64, refers to the relevant obligations as *erga omnes* obligations, although he seems to mean *erga omnes partes* (see note 311 of his article, where he refers to the *Belgium v. Senegal* case). In any event, he does not put forward a justification of State responses to the NSL as 'collective' countermeasures. Lim also uses the terms 'unilateral sanctions' or 'countermeasures' with regard to such measures, without however examining their collective or third-party character in response to the breach of *erga omnes (partes)* obligations (Lim (n. 12), 246-248) and considering that such unilateral sanctions only have 'a semblance of legal justification'.

116 Support for this view can be inferred from UN Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to

In fact, there have been instances in State practice where such countermeasures were taken in response to the serious violation of civil and political rights which are not generally considered as giving rise to 'core' *erga omnes* obligations, such as the right to life, fair trial guarantees, freedom of expression, or the freedom from arbitrary detention,[117] some of which have been breached in Hong Kong under the NSL. Examples include the suspension of financial assistance to Greece given under Protocol 19 to the 1961 Association Agreement between Greece and the EEC because of the human rights abuses committed by the military junta against the Greek people;[118] certain responses by the US and several Western European States against Poland and the Soviet Union in 1981, on the ground that the latter, among others, shared the responsibility for the breaches of human rights obligations under the ICCPR and ICESCR which were committed in Poland (particularly of the right to liberty and trade union rights);[119] certain responses by European and Commonwealth States (such as the suspension of Nigeria's membership in the Commonwealth) against Nigeria in 1995/1996, in response to serious violations of civil and political rights committed there from 1993 to 1995;[120] certain responses in 2000 by EU Member States – later followed by other States including Switzerland, the United States, Australia and Canada – against Burma/Myanmar, such as the freezing of assets belonging to senior members of the military regime and an export and import embargo on specific

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the Covenant', CCPR/C/21/Rev.1/Add. 13, 29 March 2004, para. 2; see also 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the ILC, finalised by Martti Koskenniemi, A/ CN.4/ L.682, 13 April 2006, paras 137-152; Tams (n. 88), 188 f., 271, 277. Anja Seibert-Fohr, 'The International Covenant on Civil and Political Rights: Moving from Coexistence to Cooperation and Solidarity' in: Holger P. Hestermeyer et al (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Nijhoff 2012), 521-552 (549-552) is positive, however emphasizes the need to strengthen collective enforcement mechanisms. Also for this reason, *Barcelona Traction* (n. 66), para. 91 ('However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality') does not seem in principle to preclude this entitlement (see Simma (n. 73), 296; Frowein (n. 93), 406). Similarly with regard to the ICJ's statement in the *Nicaragua* case (ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US), merits, judgment of 27 June 1986, ICJ Reports 1986, 14 (para. 267)) Tams (n. 88), 188 f., 271.

117 Tams (n. 88), 233, who, however, considers that these obligations 'count among the candidates most likely to have acquired *erga omnes* status'; Dawidowicz (n. 93), 263 f.

118 See analysis in Tams (n. 88), 90 f.

119 See Tams (n. 88), 213-215; Katselli Proukaki (n. 93), 151 f. and analytically Dawidowicz (n. 93), 133-139, 274.

120 See analysis in Tams (n. 88), 220-221; Dawidowicz (n. 93), 162-168.

products;[121] some of the measures since 2002 by European Union (EU) Member States, the US and Canada against Zimbabwe, such as the freezing of assets of members of the government and its suspension from the Commonwealth, in response to serious violations of human rights such as the freedom of speech, assembly and association;[122] since 2016, certain US measures such as freezing of assets of top leaders and entities associated with human rights abuses or censorship by the regime in North Korea;[123] certain responses since 2017 by the US, Canada and the EU consisting in freezing assets of Venezuelan government officials and entities responsible for violations of human rights such as the right to liberty and freedom of expression;[124] certain measures by the US and Canada since 2018 consisting in import and export controls and in the freezing of assets of Nicaraguan government officials in response to serious violations of human rights, including the rights to life, freedom of expression and freedom of assembly;[125] measures by the US, UK, EU and Canada and Japan since 2021 including export bans and asset freezing against Belarusian government officials, including the President of Belarus, *inter alia*, in response to serious violations of human rights obligations, including violence against peaceful protestors, activists and journalists and arbitrary detentions;[126] and, lastly, since 2022, measures against government officials in Iran, including freezing of their assets, due to serious violations of the freedom of expression and assembly.[127] Taking into account that the responding States in these examples were not always parties to the ICCPR, this State practice may constitute evidence of the *erga omnes* character of at least some of the above-mentioned human rights obligations.[128]

121 See analysis in Dawidowicz (n. 93), 193-203, 274.

122 Dawidowicz (n. 93), 203-211.

123 Digest of US Practice in International Law 2016, 629.

124 Digest of US Practice in International Law 2018, 548-553; 'Canada Sanctions Related to Venezuela', <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/venezuela.aspx?lang=eng>, last access 11 September 2024; 'UK Sanctions Relating to Venezuela', <https://www.gov.uk/government/collections/uk-sanctions-on-venezuela>, last access 11 September 2024; 'EU Response to the Crisis in Venezuela', <https://www.consilium.europa.eu/en/policies/venezuela/>, last access 11 September 2024.

125 See 'Canadian Sanctions Related to Nicaragua', <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/nicaragua.aspx?lang=eng>, last access 11 September 2024; Digest of US Practice in International Law 2018, 614-616.

126 Digest of US Practice in International Law 2021, 623-30; 'EU Sanctions against Belarus', <https://www.consilium.europa.eu/en/policies/sanctions-against-belarus/>, last access 11 September 2024.

127 Digest of US Practice in International Law 2022, 625-628.

128 Dawidowicz (n. 93), 273-275; Katselli Proukaki (n. 93), 148.

Besides, the US Global Magnitsky Act,[129] the UK Global Human Rights Sanctions Regime[130] and similar domestic legislation in other States permit the taking of unilateral measures in response to, among others, serious breaches of international human rights obligations.

Though not expressly required in the ARSIWA, it can be argued that the breach of the *erga omnes (partes)* obligations must be serious in order for such 'collective' countermeasures to be taken.[131] The violations of fundamental human rights of the people of Hong Kong, at least the prohibition of arbitrary deprivation of liberty, can be deemed as serious enough.[132] Moreover, the conditions of application of countermeasures,[133] such as the principle of proportionality[134] and procedural conditions,[135] apply also to 'collective' countermeasures.

That the above-mentioned measures in response to violations committed under the NSL were taken also in the general interest can be inferred from

129 USA, Global Magnitsky Human Rights Accountability Act 2016, Public Law 114-328. See, for instance, the freezing of assets of Saudi and Turkish officials involved in the killing of journalist Jamal Khashoggi (Digest of US Practice in International Law 2018, 606, 610 f.).

130 UK, Global Human Rights Sanctions Regulations 2020 (S. I. 2020/680), which however only lists human rights which have the status of peremptory rule of international law.

131 See support for this view in ARSIWA Commentary to Art. 40 (n. 65), 113 para. 7, though not specifically for collective countermeasures; Crawford, Third Report (n. 89), paras 402, 406; IDI 1989 Resolution (n. 85), Art. 2; IDI 2005 Resolution (n. 107), Art. 5. For literature see Frowein (n. 93), 400; Sicilianos (n. 89), 1140 f.; Gaja (n. 79), 131; Dawidowicz (n. 93), 66, 95, 266, 268-270, 294, based on examples from State practice.

132 See Section II.

133 Arts 49-53 ARSIWA. See IDI 2005 Resolution (n. 107), Art. 5(c).

134 Art. 51 ARSIWA. See, indicatively, IDI 1989 Resolution (n. 85), Art. 4(2), (4); Crawford, Third Report (n. 89), paras 402, 406; Sicilianos (n. 89), 1144; Tams (n. 88), 199; Dawidowicz (n. 93), 346-364. See also extensive analysis of the condition of proportionality with regard to 'collective' countermeasures in Katselli Proukaki (n. 93), 248-280, who also observes (Katselli Proukaki (n. 93), 263) that in this way the risk of abuse is reduced. With regard to the applicability of the principle of proportionality also to retorsions see ILC Report (1992), UN Doc. A/47/10, 23, para. 150; White and Abass (n. 93), 528 f.; more reserved Oscar Schachter, 'International Law in Theory and Practice' (General Course on Public International Law), RdC 178 (1982), 185-187; Giegerich (n. 42), para. 14. It could be argued that proportionality, as a general principle of law applicable in various areas of international law and not only in the context of State responsibility, applies also to retorsions.

135 See Art. 52 ARSIWA. At least Art. 52(1)(a) ARSIWA reflects customary international law (see ARSIWA Commentary to Art. 52 (n. 65), 136 para. 3; *Air Service Agreement of 27 March 1946* (United States of America v. France), arbitral award of 9 December 1978, 54 ILR 304 (1979), para. 17; *Gabčíkovo-Nagymaros Project* (n. 59), para. 84). With regard to the application of procedural conditions of countermeasures to 'collective' countermeasures see IDI 1989 Resolution (n. 85), Art. 4(1); James Crawford, *State Responsibility: The General Part* (Oxford University Press 2013), 704. It seems that States which resorted to such 'collective' countermeasures complied with procedural obligations for the taking of countermeasures under customary international law.

various official statements accompanying them. For instance, the Canadian Minister of Foreign Affairs stated that Canada would 'continue to work with partners to protect human rights and the rule of law around the world';[136] Germany emphasised when taking measures its 'expectation that China abide by its obligations under international law';[137] New Zealand stated that by taking measures it 'responds proportionately and deliberately to the passage of the national security law';[138] and the US referred to the measures it took as 'responses to Beijing's actions'.[139] Thus, if they are considered to be responses to breaches of *erga omnes (partes)* obligations, measures whose lawfulness might be disputed could be justified as countermeasures, even if the States taking such measures have not expressly invoked this justification.

This argument is strengthened by the fact that there seems to have been a coordinated reaction on the part of States to the breaches of human rights obligations by China, which is an indication that these obligations serve the collective interest.[140] There are various relevant joint statements of the Foreign Ministers of Australia, Canada, New Zealand and the United Kingdom and the United States Secretary of State[141] or statements in the context of G7.[142] Moreover, with regard to EU Member States, such collective responses were decided in the context of the EU. On 28 July 2020, the Foreign Affairs Council of the EU took the view that the NSL breached the Joint Declaration[143] and, as an initial response, the EU decided to endorse a coordinated package of measures.[144] It was stated that the purpose of the various measures was 'to express political support for Hong Kong's autonomy under the "One Country, Two Systems" principle, and *solidarity* for the people of Hong Kong' and that the EU would be '*co-ordinating*

136 See n. 24.

137 See n. 29.

138 See n. 27.

139 See, indicatively, n. 28.

140 On countermeasures taken through coordinated action see Jackson and Paddeu (n. 97), 249, 268.

141 See 'Joint Statement on the Erosion of Rights in Hong Kong', US State Department, 9 August 2020, <https://2017-2021.state.gov/joint-statement-on-the-erosion-of-rights-in-hong-kong/index.html>, last access 11 September 2024.

142 See, indicatively, n. 36; 'G7 Foreign Ministers' Meeting communiqué', 19 April 2024, <https://www.gov.uk/government/publications/g7-foreign-ministers-meeting-communiques-april-2024/g7-foreign-ministers-meeting-communique-capri-19-april-2024-addressing-global-challenges-fostering-partnerships>, last access 11 September 2024.

143 'Hong Kong: Council Expresses Grave Concern Over National Security Law', Council of the EU, Press Release, 28 July 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/07/28/hong-kong-council-expresses-grave-concern-over-national-security-law/>, last access 11 September 2024.

144 'Hong Kong: Council Expresses Grave Concern Over National Security Law' (n. 143).

with international partners'.[145] These measures remain in force[146] and further measures have been proposed.[147] The practice of unilateral responses by the EU to the breach of, *inter alia*, international human rights obligations is well established, as exemplified by measures taken against Venezuela, Nicaragua, Iran and Syria.[148] Particularly interesting in this regard is the Global Human Rights Sanctions Regime adopted by the EU in 2020,[149] 'concerning restrictive measures against serious human rights violations and abuses', which pursuant to its Art. 1(1) applies, among others, to a list of serious human rights violations, including arbitrary arrests or detentions, as well as to 'other human rights violations or abuses[…] in so far as those violations or abuses are widespread, systematic or are otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU', including violations of the freedom of peaceful assembly and of association and of the freedom of opinion and expression. It is clear that this list goes beyond the list of human rights which give – according to the prevailing view – rise to *erga omnes* obligations.[150] The article is quite broadly formulated; it seems that in this regard the EU purports to develop international law regarding unilateral responses to breaches, on the basis of the idea that human rights are indivisible and interdependent.[151] The idea in its essence is correct, however to what extent

145 'Hong Kong: Council Expresses Grave Concern Over National Security Law' (n. 143), (emphasis added).

146 See 'EP Plenary: Speech by High Representative/Vice President Josep Borrell on the Destruction of Judicial Independence and the Persecution of Democrats in Hong Kong', 22 November 2023, <https://www.eeas.europa.eu/eeas/ep-plenary-speech-high-representative vice-president-josep-borrell-destruction-judicial-independence_en?s=239>, last access 11 September 2024.

147 European Parliament Resolution, 'Violations of Fundamental Freedoms in Hong Kong', 20 January 2022, 2022/2503(RSP), <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0011_EN.html>, last access 11 September 2024; European Parliament Resolution, 'The New Security Law in Hong Kong and the Cases of Andy Li and Joseph John', 25 April 2024, 2024/2700(RSP), <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0371_EN.html>, last access 11 September 2024.

148 For succinct analyses of the legal regime of responses by the EU see Charlotte Beaucillon, 'The European Union's Position and Practice with Regard to Unilateral and Extraterritorial Sanctions' in: Charlotte Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar 2021), 110-129 (112, 119 f.); Marco Gestri, 'Sanctions, Collective Countermeasures and the EU', Italian Yearbook of International Law 32 (2022), 67-92 (83-89).

149 Council Regulation (EU) 2020/1998/EU of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 1.

150 For insightful remarks on this Regulation see Gestri (n. 148), 86-89; Nathanael Tilahun, 'The EU Global Human Rights Sanctions Regime: Between Self Help and Global Governance', ICLR 25 (2023), 3-35 (18-23, 29-34).

151 Gestri (n. 148), 88, 91.

such development can take place in the current state of international law requires careful evaluation.

IV. The Reaction by China and Hong Kong

For their part, China and the HKSAR Government have consistently denied that there has been a violation of the Joint Declaration or violations of human rights in Hong Kong.[152] They have claimed that any restrictions of human rights were in the interest of public order and public safety; they have reiterated their commitment to the 'One Country, Two Systems' principle of the Basic Law and they have accused foreign governments of interference in the internal affairs of Hong Kong.[153]

Nevertheless, it is doubtful that the responses to breaches by China constitute a violation of the principle of non-intervention into its internal affairs.[154] According to the 1970 Friendly Relations Declaration,[155]

> 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State […] No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'

Therefore, the prohibited intervention consists of coercion bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely; in other words on matters constituting the *domaine réservé*

152 See, more recently, 'HKSAR Government Strongly Condemns and Rejects UK Six-Monthly Report on Hong Kong', The Government of the HKSAR, 16 April 2024, <https://www.info.gov.hk/gia/general/202404/16/P2024041600010.htm>, last access 11 September 2024.

153 Government of the HKSAR (n. 152) Regarding the Reaction by Hong Kong, see also 'Suspension of Agreement on Mutual Legal Assistance in Criminal Matters Between Hong Kong and Canada, Australia and United Kingdom' , The Government of the HKSAR, Press Releases, 28 July 2020, <https://www.info.gov.hk/gia/general/202007/28/P2020072800594.htm>, last access 11 September 2024.

154 See analysis by Saluzzo (n. 12), 27. On the principle of non-intervention, see analytically Marco Roscini, *International Law and the Principle of Non-Intervention: History, Theory and Interaction with Other Principles* (Oxford University Press 2024), who seems to accept the possibility of adopting countermeasures in response to the breach of *erga omnes (partes)* obligations in Hong Kong (Roscini (n. 154), 243 f.).

155 'Declaration on Principles of International Law on Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations', Resolution of 24 October 1970, A/Res/2625(XXV). See also Art. 2(7) UN Charter of 26 June 1945.

of States.[156] The measures taken so far do not seem to constitute prohibited interventions, since matters in which a State can decide freely do not include the respect of human rights obligations of that State.[157] Moreover, even if some of the responses constitute breaches of international obligations of the States resorting to them, if it is accepted that 'lawful measures' under Art. 54 ARSIWA have come to include, as a matter of customary international law, the entitlement of States other than an injured State to resort to countermeasures in response to breaches of *erga omnes (partes)* obligations, such responses are permissible to the extent that they aim at inducing the breaching State to comply with its obligations under international law and not at intervening in its internal affairs and that they are in accordance with the principle of proportionality. Even if such countermeasures are not necessarily effective enough,[158] they put some pressure on the responsible State and therefore they remain a possible means of enforcement of international obligations in the present, still decentralised, international legal system. Furthermore, State practice shows that the use of such measures, though certainly selective to some extent, cannot overall be described as abusive.[159] Of course, the establishment of effective enforcement mechanisms for obligations stipulated in human rights treaties would be a preferable solution and must be the goal towards which the international community must direct its efforts. Nevertheless, until such mechanisms are established, the resort to collective responses – including countermeasures – by States against serious breaches of human rights obligations in other States cannot reasonably be excluded in international law.

V. Conclusion

The responses by States to breaches of international obligations committed following the introduction of the NSL in Hong Kong are significant from an international law perspective. Apart from the responses by the UK as an injured State to the breach of the Joint Declaration by China, this article has

156 See also ICJ, *Nicaragua* (n. 116), para. 205. On coercion see Marko Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law', AJIL 117 (2023), 601-650.

157 ICJ, *Nicaragua* (n. 116), para. 258. See also IDI 1989 Resolution (n. 85), particularly Art. 2; Saluzzo (n. 12), 36; Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention', LJIL 22 (2009), 345-381 (375-377).

158 Dawidowicz (n. 93), 277. For criticism of unilateral coercive measures see, indicatively, Alexandra Hofer, 'The "Curiouser and Curiouser" Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia', Journal of Conflict & Security Law 23 (2018), 75-104.

159 See also Gaja (n. 79), 100.

argued that some of the responses by other States can be legally justified if they are considered as a case of countermeasures by States other than the injured State in response to the serious breach of *erga omnes (partes)* human rights obligations stipulated in the ICCPR and the ICESCR. More specifically, it has been identified that serious breaches of such obligations have taken place in Hong Kong following the introduction of the NSL and that several States have responded by taking a range of measures, several of which were in accordance with international law and, therefore, constituted retorsions. Such measures mainly consisted in the suspension of the extradition agreements of these States with Hong Kong on the basis of relevant provisions in these treaties. Although some of these suspensions were based on the doctrine *rebus sic stantibus*, from the statements of State officials it is clear that they constituted part of a coordinated response by States, also in the context of the EU, to China's breach of its international obligations arising from human rights treaties. If some of the responses were found to be in breach of international obligations of the States resorting to them, they could be justified as countermeasures by non-individually injured States in response to the serious breach of *erga omnes (partes)* obligations contained in the ICCPR and the ICESCR, provided that it is accepted that such countermeasures have come to be permitted under customary international law. In fact, these responses constitute further State practice in support of the customary international law character of countermeasures in the general interest.

Collective responses by States to serious breaches of *erga omnes (partes)* obligations can be a means of ensuring respect for such obligations, for as long as there is a lack of effective centralised enforcement mechanisms in international law. Of course, resort to such responses should not be selective and the principle of proportionality should always be respected in order to avoid escalation of international disputes.

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