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Rights and Obligations of Third Parties in Armed Conflicts

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Rights and Obligations of Third Parties in Armed Conflicts*

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Abstract:

This paper will turn into a contribution to a book on community obligations in international law. It is often said that international law has developed from a legal order which is designed to protect sovereignty to a system which also promotes community interests. This shift is said to be reflected in structural changes of the legal system. The creation of rights and obligations for third parties is generally seen as a part of this perceived paradigmatic shift. Community interests can be furthered either by negative duties of abstention, by an entitlement for third states, or even by duties to take positive measures. Since the shift towards protecting community interests apparently requires some form of cooperation, positive rights and duties to protect and to promote appear to be indispensable. Authors relying on a community perspective often dismiss duties of abstention as an expression of indifference in the face of a violation of a fundamental norm. Solidarity seems to require that third states take a more proactive role in actively enforcing community interests. The paper aims to test this understanding on the basis of an analysis of rights and obligations of third states in armed conflict. In order to argue that duties of abstention of third states are a central instrument for promoting community interests in relation to armed conflicts, the paper will first trace pertinent structural changes in international law. In particular, it will question the extent to which positive rights and obligations of third states have been firmly established in international law. In a second step, this contribution will evaluate the overall tendencies in the ongoing lawmaking process for promoting community interests in relation to armed conflict.

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1. Protecting community interests: a progress narrative?

It is often said that international law has developed from a legal order which is designed to protect state sovereignty to a system which also defends and promotes community interests. This shift is said to be reflected in structural changes of the legal system.² Traditional international law has often been understood as a system of bilateral legal relations,³ in particular when it comes to self-help and reprisals against international wrongful acts. In contrast, community interests are said to be legally protected interests or values which do not (only) concern the direct relationship between two states, but which affect all members of the international legal community⁴ and require collective action for their realization. They appeal to a shared understanding of solidarity,⁵ which finds its legal expression in the creation of rights and obligations for third parties.⁶ The creation of such rights and duties is generally seen as a part of the paradigmatic shift that international law has undergone towards protecting community interests.⁷

The present contribution aims to test this understanding on the basis of an analysis of rights and obligations of third states in armed conflict. While the concept of third parties may be understood in a broad way as encompassing international organizations as well as non-state actors, the paper focuses on the role of third states because the protection of community interests in armed conflict is to a large extent an issue of law-enforcement by third states: The need for international solidarity through the collective action of third states is particularly tangible in cases of flagrant violations of the prohibition of the use of force. Where territory is illegally annexed, the state that is a victim of such an act will have to rely on the solidarity of third states lest the illegal act eventually be validated. Accordingly, the duty of non-recognition in cases of violations of the prohibition of the use of force developed simultaneously with the prohibition itself⁸ and is well established in customary international law,⁹ upheld by international courts and tribunals,¹⁰ and

² Georges Abi-Saab, 'Whither the International Community?' (1998) EJIL 248, 250; Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) Vol. 21(2) EJIL 387, 388.

³ Christine Chinkin, *Third parties in international law* (Clarendon Press 1993) 1.

⁴ Cf. Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 RdC 217, at 233; Andreas Paulus/Bruno Simma, 'The "International Community": Facing the Challenge of Globalization' (1998) EJIL 266, 268; see also Isabel Feichtner, 'Community Interest,' in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2007), para. 4 et seq.; Gleider Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) Vol. 83 No. 1 BYIL 13, 20 et seq.

⁵ Helmut Aust, *Complicity and the law of state responsibility* (CUP 2011) 24 et seq.

⁶ Cf. Simma, 'From Bilateralism to Community Interest' (n 4) 375.

⁷ Cf. Simma, 'From Bilateralism to Community Interest' (n 4) 375.

⁸ Heike Krieger, *Das Effektivitätsprinzip im Völkerrecht* (Duncker & Humblot 2000), Chapter 7; some authors restrict the duty of non-recognition to cases of the illegal annexation of territory; see Judge Kooijmans, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Separate Opinion of Judge Kooijmans) [2004] ICJ Rep 219, paras. 43 et seq.

⁹ Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation,' in: James Crawford and others (eds.), *The Law of International Responsibility* (OUP 2010) 677, 678/684.

¹⁰ In particular: *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, para. 87; see also Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or other Serious Breaches of a Jus Cogens Obligation, an Obligation without Real Substance?', in: Christian Tomuschat and others (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers 2005) 99 et seqq.

reflected in the work of the ILC.¹¹ If “all States can be held to have a legal interest in the protection”¹² of community interests, a separate category of third states might appear to be superfluous.¹³ However, the concept of third states depends on the legal context in which it is used. Rights and duties of third states in armed conflicts arise outside bilateral relationships between belligerents upon the outbreak or in the course of an armed conflict under the pertinent rules of *jus ad bellum* and *jus in bello* as well as general international law.¹⁴

The perceived structural shift which international law has undergone towards protecting community interests is often related to the concepts of *jus cogens* and *erga omnes*. Because of “the importance of the rights involved, [according to which] all States can be held to have a legal interest in their protection,”¹⁵ many community interests are identified by the *jus cogens* nature and *erga omnes* character of the rules in which they are enshrined.¹⁶ The prohibition of the use of force is the quintessential *jus cogens/erga omnes* norm. In the *Barcelona Traction* case, the Court gave the “outlawing of acts of aggression” as an example of *erga omnes* obligations.¹⁷ In international humanitarian law, Common Article 1 of the Geneva Conventions aims to protect “elementary considerations of humanity,”¹⁸ the importance of the protective rules for the human person¹⁹ or “the value of protecting human life and dignity.”²⁰ The ICRC Commentary equates the effects of Common Art. 1 GC I-IV with the effects of Art. 1 of the Genocide Convention.²¹ Common Article 1 of the Geneva Conventions is thus understood as laying down an *erga omnes (partes)* obligation which is also included in customary international law.²²

This categorization is considered to influence the way in which legal concepts and instruments promote community interests. Such interests can be furthered either by negative duties of

¹¹ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) ILC-Ybk, vol. II, Part Two, Art. 41 para. 2 ASR, 114.

¹² *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgement) [1970] ICJ Rep 3, para. 33.

¹³ Chinkin, *Third parties* (n 3) 11 for further arguments; Paolo Palchetti, ‘Consequences for Third States as a Result of an Unlawful use of Force,’ in: Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1225.

¹⁴ Chinkin, *Third parties* (n 3) 7; Palchetti, ‘Consequences for Third States,’ in: Weller (ed.), *The Oxford Handbook* (n 13) 1225; from the perspective of state responsibility, see Linos-Alexandre Sicilianos, ‘Countermeasures in Response to Grave Violations of Obligations Owed to the International Community, Ch 80,’ in: Crawford and others (eds.), *The Law of International Responsibility* (OUP 2010) 1137, 1138 who argues for a differentiation between states directly injured and those indirectly affected.

¹⁵ *Barcelona Traction (Belgium v Spain)* (Judgement) [1970] ICJ Rep, para. 33.

¹⁶ Dire Tladi, ‘First Report on *jus cogens* by Dire Tladi, Special Rapporteur’ (2 May- 10 June and 4 July- 12 August 2016) UN Doc A/CN.4/693, para. 63; Christian Tomuschat, ‘Obligations arising for States without or against their will’ (1993) 241 RdC 195, 307.

¹⁷ *Barcelona Traction (Belgium v Spain)* (Judgement) [1970] ICJ Rep, para. 34.

¹⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14, para. 218.

¹⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep, 226, para. 79: “It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ ... that the Hague and Geneva Conventions have enjoyed a broad accession.”; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn 2016), Introduction, para. 119.

²⁰ ICRC, *Commentary on the First Geneva Convention* (n 19), Introduction, para. 37.

²¹ ICRC, *Commentary on the First Geneva Convention* (n 19), Introduction, para. 119 note 2.

²² Rule 144 of the Study; on the differentiation between obligations *erga omnes* and *erga omnes partes*, see Christian Tams, *Enforcing obligations erga omnes in international law* (CUP 2007) 117-128.

abstention, by an entitlement (right) for third states, or even by duties to take positive measures. On the basis of the *jus cogens/erga omnes* character of Art. 2 para. 4 UN Charter and Art. 1 GC I-IV, rights and duties to take positive measures in the community interest have been promoted in legal discourse. Since the shift towards protecting community interests apparently requires some form of cooperation, positive rights and duties to protect and to promote appear to be indispensable.²³ At the same time, authors relying on a community perspective often dismiss duties of abstention, in particular those enshrined in the law of neutrality, as an expression of indifference in the face of a violation of a fundamental norm of the international community.²⁴ Solidarity seems to require that third states take a more proactive role in actively enforcing community interests.²⁵ In contrast, traditional Westphalian international law is said to have established negative duties of abstention to realize its purpose “to keep States peacefully apart” in order to deal with the breakup of a community in the aftermath of the European period of religious wars.²⁶ For the purpose of guaranteeing the status quo by preventing war, it appeared sufficient to mutually respect each other’s sovereignty and territory.²⁷ However, despite the perception that duties of abstention are closely related to the traditional Westphalian paradigm, this paper will argue that these duties can significantly contribute to the protection of community interests in international law. The basic aim of duties of abstention not to deepen or perpetuate the violation of such an interest but to further de-escalation forms a particularly important element in the overall protection or reestablishment of international peace in ongoing armed conflicts.

In order to argue that duties of abstention of third states are a central instrument for promoting community interests in relation to armed conflicts, the paper will first trace pertinent structural changes in international law. In particular, it will question the extent to which positive rights and obligations of third states have been firmly established in international law (Part II). In a second step, this contribution will evaluate the overall tendencies in the ongoing lawmaking process for promoting community interests in relation to armed conflict (Part III).

2. Community interest and law-enforcement: Positive obligations instead of duties of abstention?

Pertinent rights and obligations of third states stem not only from the general rules of state responsibility in cases of grave breaches of obligations owed to the international community as a whole (Art. 40, 41, 48, 54 ASR) or in cases of complicity (Art. 16 ASR), but also from primary law rules on the prohibition on the use of force or the principle of non-intervention under customary international law as well as treaty law in Art. 2 para. 4 UN Charter, Art. 39-51 UN Charter and Art. 2

²³ Abi Saab, ‘Whither the International Community?’ (n 2) 252; Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens 1964) 62; Villalpando, ‘The Legal Dimension of the International Community’ (n 2) 392.

²⁴ Hersch Lauterpacht, ‘Neutrality and Collective Security,’ in: Elihu Lauterpacht (ed.), *International Law, Vol.5 Collected Papers, Part XIII: Neutrality* (CUP 2004) 625.

²⁵ Palchetti, ‘Consequences for Third States,’ in: Weller (ed.), *The Oxford Handbook* (n 13) 1229.

²⁶ Abi-Saab, ‘Whither the International Community?’ (n 2) 251 quoting David Mitrany, *A Working Peace System* (Chicago Quadrangle Books, 1966) 28; Villalpando, ‘The Legal Dimension of the International Community’ (n 2), 390.

²⁷ Abi-Saab, ‘Whither the International Community?’ (n 2) 252.

para. 5 UN Charter, from specific primary law regimes, i.e., the law of neutrality, as well as from the Geneva Conventions, in particular Common Art. 1 GC I-IV.²⁸

a) Entitlement to take measures in the collective interest

The idea that states should not remain indifferent in view of a violation of a community interest forms the basis of the UN Charter collective security system. Corresponding institutions developed in order to make cooperation through collective action more effective and legitimate. This process is exemplified by the introduction of a system of collective security in the League of Nations and under the UN Charter. The preamble of the UN Charter describes the maintenance of international peace and security, which is a basic precondition for the international order, as a community interest.²⁹ By formulating the purpose “to save succeeding generations from the scourge of war,” it allows for the use of force only in the common interest.³⁰ Under the UN Charter’s collective security system, an attack on one state symbolizes an attack on all states and undermines the security of the entire international community. Thus, the protection of states and their sovereignty from military attacks is seen as a part of the community interest to protect international peace and security,³¹ the realization of which is entrusted to the Security Council which can create corresponding rights and duties not only for belligerents but also for third states.³² According to Art. 1 para. 1 UN Charter, the UN is established “to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” Sanctions which member states have to implement according to Arts. 39, 41, 42 and 25 UN Charter encompass negative duties of abstention, such as the duty of non-recognition in cases of acquisition of territory by violations of the use of force³³ as well as positive measures including economic embargos or military action.³⁴

However, in view of the Security Council’s inertia, decentralized countermeasures in the community interest are still an important instrument. Such measures include instituting proceedings before international tribunals or taking coercive measures. In both cases they “require individual States to establish that they should be entitled to defend a given community interest.”³⁵ In view of the ICJ’s definition of the *erga omnes* concept³⁶ as well as Art. 48 ARS, it is widely assumed that all states have a standing before the ICJ where the violation of an *erga omnes* norm is concerned.³⁷ In his

²⁸ This contribution does not deal with rights and duties of third states under concepts such as R2P or universal jurisdiction, because they are covered in other contributions to this volume.

²⁹ Feichtner, ‘Community Interest,’ in: Wolfrum (ed.), MPEPIL (n 4), para. 15, Villalpando, ‘The Legal Dimension of the International Community’ (n 2) para. 15.

³⁰ “... to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest ...”

³¹ Hitoshi Nasu, ‘The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System’ (2011), ANU College of Law Research Paper No. 11-28, 16, 28, available at <<http://ssrn.com/abstract=1922928>> last accessed 14 October 2016.

³² Abi-Saab, ‘Whither the International Community?’ (n 2) 257f.

³³ Ian Brownlie and James Crawford, *Brownlie's principles of public international law* (OUP 2012), 155.

³⁴ Nico Krisch, ‘Article 41,’ in: Bruno Simma and others (eds.), *The Charter of the United Nations: A commentary* (OUP 2012), para. 12-13.

³⁵ Christian Tams, ‘Individual States as Guardians of Community Interests,’ in: U Fastenrath and others (eds.), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma* (OUP 2011) 379, 381.

³⁶ *Barcelona Traction (Belgium v Spain)* (Judgement) [1970] ICJ Rep, para. 33.

³⁷ Tams, ‘Individual States,’ in: Fastenrath and others (eds.), *From Bilateralism to Community Interest* (n 35), 386.

separate opinion in the *Armed Activities* case, Judge Simma confirmed Uganda's standing as a third party on the basis of violations of international humanitarian law.³⁸ A more recent case, which is related to the wider context of armed conflicts, relates to the unsuccessful 2014 application of the Marshall Islands against India and Pakistan. The Marshall Islands based their claim, *inter alia*, on a violation of the *erga omnes* character of the customary law obligation to negotiate in good faith effective measures relating to cessation of the nuclear arms race.³⁹

In contrast, it is still strongly disputed whether states are entitled to take non-forcible coercive countermeasure in cases of a violation of a rule of an *erga omnes* character. The Articles on State Responsibility do not settle the dispute because Art. 54 ASR⁴⁰ contains a restrictive saving clause. Based on an analysis of state practice, Christian Tams has argued that all states are entitled to take countermeasures in response to "systematic and large-scale" violation of peremptory norms. He concedes, however, that there is no universal support for an entitlement to take such measures.⁴¹ A widespread criticism claims that most of the pertinent practice only concerns Western states.⁴² This is exemplified by the recent practice of the European Union, Australia, Canada, Japan, Switzerland and the United States in relation to the Russian annexation of the Ukrainian territory of Crimea.⁴³

³⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep, 168,, para. 37. Moreover, the IDI in 2005 recognized legal standing in cases of a violation of an *erga omnes* obligation, see Giorgio Gaja, 'Obligations erga omnes in international law' (2006) vol. 71(II) *Annuaire de l'Institut de droit international* 286, Art 3.

³⁹ The case was dismissed in 2016 because the applicants could not establish that a dispute existed between the parties; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* ICJ Press Release 2016/29 <<http://www.icj-cij.org/docket/files/158/19128.pdf>> accessed 13 October 2016; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* ICJ Press Release 2016/30 <<http://www.icj-cij.org/docket/files/159/19130.pdf>> accessed 13 October 2016.

⁴⁰ *Article 54. Measures taken by States other than an injured State:*

"This chapter does not prejudice the right of any State, entitled under article , 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."

⁴¹ Tams, *Enforcing obligations erga omnes* (n 22) 198-251, 311; see also Martin Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council' (2007 OUP) Vol. 77 BYIL 333, 333 et seqq.

⁴² See para 6, of the commentary to art 54 ARSIWA, ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, 139.

⁴³ Statement by Australian Prime Minister Abbott, 'Expanded Sanctions Against Russia' (1 September 2014) <http://www.pm.gov.au/media/2014-09-01/expanded-sanctions-against-russia>; Government of Canada, Special Economic Measures (Russia) Regulations (SOR/2014-58) (17 March 2014) <http://laws.justice.gc.ca/eng/regulations/SOR-2014-58/FullText.html>; G 7, Ukraine/declaration by the G7 in The Hague – Communiqué issued by the Presidency of the Republic, The Hague, 25 March 2014, <http://www.ambafrance-uk.org/G7-ready-to-intensify-actions-over#ukraine-declaration-the-the-hague-communication>; 'Statement by the Minister for Foreign Affairs of Japan on the Additional Measures Imposed on Russia in Connection with the Ukraine Situation' (25 September 2014) http://www.mofa.go.jp/press/release/press4e_000445.html; Swiss Federal Council, 'Ordonnance instituant des mesures visant à empêcher le contournement de sanctions internationales en lien avec la situation en Ukraine' (27 August 2014) <http://www.admin.ch/opc/fr/classified-compilation/20142202/index.html>; US, President Obama's Executive Orders 13660-13662 of 6, 17 and 20 March 2014 (as amended on 16 July and 12 Sept. 2014); <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx>; US Department of the Treasury Press Release, 'Announcement of Additional Treasury Sanctions on Russian Financial Institutions and on a Defense Technology Entity' (29 July 2014), <http://www.treasury.gov/press-center/press-releases/Pages/jl2590.aspx>; White House Press Release, 'Statement by the President on New Sanctions Related to Russia' (11 September 2014), <http://www.whitehouse.gov/the-press-office/2014/09/11/statement-president-new-sanctions-related-russia>; US Department of the Treasury Press Release, 'Announcement of Expanded Treasury Sanctions within the Russian Financial Services, Energy and Defense or Related Materiel Sectors' (12 September 2014), <http://www.treasury.gov/press-center/press->

Apparently, non-Western states did not enact such countermeasures. In June 2016, in a “Common Declaration of the Promotion of International Law” China and Russia voiced sharp criticism of “unilateral sanctions”.⁴⁴ While other instances point to a more widespread practice, in particular in the context of apartheid,⁴⁵ many commentators still conclude that non-forcible coercive countermeasures are surrounded by legal uncertainty.⁴⁶

b) Emerging positive obligations?

While the legal entitlement to take non-forcible countermeasures is already disputed, the idea of enforcement duties is even more difficult to ground in contemporary international law. According to Art. 41 para. 1 ASR, states shall cooperate to bring to an end through lawful means any serious breach of an obligation arising under a peremptory norm. From the perspective of the protection of community interests, such duties of cooperation might be seen as a particularly important progressive development since they are intrinsically related to the notion of solidarity.⁴⁷ Cooperation guarantees collective action and counteracts the dangers of unilateral law-enforcement.⁴⁸ While the ICJ’s findings on Art. 1 of the Genocide Convention promote the idea of positive obligations to prevent genocide,⁴⁹ the status⁵⁰ and scope of a general and broad obligation to cooperate is far from clear.⁵¹ Neither state practice nor judicial findings are sufficient to support the doctrinal assumption that “where the effectiveness of measures rests on universality, States

releases/Pages/jl2629.aspx; White House Press Release, ‘Continuation of the National Emergency with Respect to Ukraine’ (2 March 2016), <http://www.whitehouse.gov/the-press-office/2016/03/02/notice-continuation-national-emergency-respect-ukraine>.

⁴⁴ China/Russia, ‘The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law’ (25 June 2016), http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698.

⁴⁵ Martin Dawidowicz, ‘Third-party countermeasures: a progressive development of international law?’ (2016) 29 QIL, 3, at 11; see cases described by Sicilianos, ‘Countermeasures in Response,’ in: Crawford and others (eds.), *The Law of International Responsibility* (n 14) 1137, 1147; Tams, *Enforcing obligations erga omnes* (n 22) 235-239; measures by the Council of the League of Arab States in the cases of Libya and Syria were taken in the institutionalized context of the League.

⁴⁶ Christian Tams, ‘Countermeasures against Multiple Responsible Actors,’ in: André Nollkaemper and others (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 312, 319; Tom Ruys, ‘Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework,’ in: Larissa van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing 2016) (Available at SSRN: <http://ssrn.com/abstract=2760853>, accessed 13 October 2016), 27; Robin Geiß, ‘Common Article 1 of the Geneva Conventions – Scope and content of the obligation to ensure respect – narrow but deep or wide and shallow?’, in: Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the Great Lakes Region* (CUP 2015) 417, 436; for a restrictive reading of the *erga omnes* effect as being confined to standing in legal proceedings, see Judge Higgins, *Legal Consequences of the Construction of a Wall* (Separate Opinion of Judge Higgins) [2004] ICJ Rep 207 paras. 154 et seq.

⁴⁷ Aust, *Complicity* (n 5) 354; Nina Joergensen, *The Responsibility of States for International Crimes* (OUP 2000) 695.

⁴⁸ Aust, *Complicity* (n 5) 364.

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) (Judgement) [1995] ICJ Rep 595, para. 31.

⁵⁰ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) ILC-Ybk, vol. II, Part Two, para. 3 is not clear whether this is a codification of general international law or a progressive development.

⁵¹ Joergensen, *The Responsibility of States* (n 47) 697.

may not claim neutrality,”⁵² at least in relation to violations of the prohibition on the use of force outside Chapter VII of the UN Charter.⁵³

A different development can be observed under Common Art. 1 GC I-IV. The understanding of the guardian function of states, which was at first restricted to their organs and to individuals under their jurisdiction, was broadened to include a duty to take positive measures and ensure compliance with the Geneva Conventions by other states and by violent non-state actors.⁵⁴ This interpretation has been developed by way of an interpretation of Common Art. 1 GC I-IV on the basis of subsequent practice: Although the Pictet Commentary of 1952 already points in the direction of an *erga omnes* effect,⁵⁵ there are no indications in the travaux préparatoires that such an understanding was already envisaged.⁵⁶ Likewise, the re-inclusion of the wording in subsequent treaties cannot be seen as pertinent subsequent agreements according to Art. 31 para. 3 lit. a) VCLT, since no explicit discussions about such an understanding took place.⁵⁷ Accordingly, there are still voices in the literature which even doubt the binding force of the provision.⁵⁸ However, starting with the Teheran Conference on Human Rights in 1968⁵⁹ and promoted by the 1970 Barcelona Traction case, corresponding state practice unfolded and was supported by further jurisprudence⁶⁰ according to Art. 31 para. 3 lit b) and Art. 32 VCLT.⁶¹ Moreover, the Security Council,⁶² the General Assembly⁶³ and the Human Rights Council⁶⁴ contributed to the development by calling upon states to ensure respect for the Geneva Conventions by other contracting states.⁶⁵

⁵² Joergensen, *The Responsibility of States* (n 47) 700.

⁵³ On the implications of the Genocide Case for Art. 41 para. 1 ASR, see Aust, *Complicity* (n 5) 358 et seqq.

⁵⁴ Geiß, ‘Common Article 1 of the Geneva Conventions,’ in: Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (n 46) 417, 428; see also ICRC, *Commentary on the First Geneva Convention* (n 19), Introduction, para. 119.

⁵⁵ Jean Pictet (ed.), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) 25.

⁵⁶ Robin Geiß, ‘The Obligation to Respect and to Ensure Respect for the Conventions,’ in: Andrew Clapham and others (eds.), *The 1949 Geneva Conventions, A Commentary* (OPU 2015), Pt I, Sec B, Sub-Sec 1 – General, 6, para. 17.

⁵⁷ Geiß, ‘Common Article 1 of the Geneva Conventions,’ in: Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (n 46) 417, 425.

⁵⁸ See on this Geiß, ‘Common Article 1 of the Geneva Conventions,’ in: Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (n 46) 417, 419 with detailed references.

⁵⁹ ‘Final Act of the International Conference on Human Rights’ (22 April to 13 May 1968) UN Doc A/CONF.32/41, Preamble Resolution XXIII: “Noting that States Parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.”

⁶⁰ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, paras. 157/159; ICTY, *Kupreškić* (Trial Judgment) IT-95-16-T (14 January 2000), para. 519.

⁶¹ Geiß, ‘Common Article 1 of the Geneva Conventions,’ in: Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (n 46) 417, 426 et seq.; for an overview of the pertinent state practice, see Geiß, ‘The Obligation to Respect,’ in: Clapham and others (eds.), *The 1949 Geneva Conventions* (n 56), para. 18; and *mutatis mutandis* ICRC, *Commentary on the First Geneva Convention* (n 19), 156.

⁶² UN Security Council Res 681 (20 December 1990) UN Doc S/Res/681, para. 5 “Calls on the high contracting parties to the Fourth Geneva Convention of 1949 to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof.”

⁶³ United Nations General Assembly Resolution 58/97 (17 December 2003) UN Doc A/Res/58/97, para. 3 “Calls upon all High Contracting Parties to the Convention, in accordance with article 1 common to the four Geneva Conventions, to continue to exert all efforts to ensure respect for its provisions by Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967”; UNGA Res 59/122 (10 December 2004) UN Doc A/RES/59/122, para. 3.

While the duty to take positive measures under Common Art. 1 GC I-IV provides for a broad margin, it nonetheless includes a basic positive obligation. The 2016 ICRC Commentary describes a broad variety of positive measures which have been used in state practice in order to comply with this duty. Such measures range from diplomatic dialogues or confidential protests over requests for a meeting of the High Contracting parties to using retorsions or adopting lawful, i.e., non-forcible, countermeasures.⁶⁶ Yet it is disputed whether Common Art. 1 GC I-IV includes such a right or duty to take countermeasures.⁶⁷ Indeed, there are no indications in state practice that Art. 1 GC I-IV is conceived in a broader way than the general rules on state responsibility in this respect. Still, the provision goes considerably further than these rules in that it is not confined to a serious violation of a peremptory norm but might relate to any breach of the Conventions.⁶⁸

The findings in the ICJ's Wall Opinion that all states parties to the Fourth Geneva Convention are obliged to ensure compliance by Israel, even by taking positive measures, has attracted criticism from Judges Higgins⁶⁹ and Kooijmans.⁷⁰ While Judge Kooijmans accepts that duties of abstention might result from Common Art. 1 GC I-IV, he criticizes that it remains unclear how to determine what positive actions are required by a state.⁷¹ The criticism of Judge Kooijmans alludes to a broader problem related to rights and duties to take positive measures in the community interest. States enjoy a broad discretion whether to act at all or what measures to take. Yet criteria to establish their responsibility for failure to act are not readily available, not least because of the dearth of court decisions. In contrast, duties of abstention are clear-cut obligations which form a comparatively precise basis for findings on state responsibility and thus further legal certainty. They circumscribe a precise level of what solidarity requires as a reaction to a violation of a peremptory norm of international law.⁷²

c) Duties of abstention

Admittedly, third states' duties of abstention might only be a relevant instrument for furthering community interests in *jus ad bellum* and *jus in bello* because these rules deal with sovereignty and inter-state relations. Therefore, they are still seen as a part of the traditional bilateral law of

⁶⁴ UN Human Rights Council Res S-9/1 (12 January 2009) UN Doc A/HRC/RES/S-9/1, preambular para. 9: "Reaffirming that each High Contracting Party to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War is under the obligation to respect and ensure the respect for the obligations arising from that Convention."

⁶⁵ Geiß, 'Common Article 1 of the Geneva Conventions,' in: Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (n 46) 417, 427; see, however, Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) Vol. 21(1) EJIL 125, 157.

⁶⁶ ICRC, *Commentary on the First Geneva Convention* (n 19), para. 181.

⁶⁷ Aust, *Complicity* (n 5) 388 et seq.; Geiß, 'The Obligation to Respect,' in: Clapham and others (eds.), *The 1949 Geneva Conventions* (n 56), para. 32 et seq.

⁶⁸ Geiß, 'Common Article 1 of the Geneva Conventions,' in: Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (n 46) 417, 432 et seq.

⁶⁹ Judge Higgins, *Legal Consequences of the Construction of a Wall* (Separate Opinion of Judge Kooijmans) [2004] ICJ Rep 219, para. 39.

⁷⁰ Judge Kooijmans, *Legal Consequences of the Construction of a Wall* (Separate Opinion of Judge Kooijmans) [2004] ICJ Rep 219, paras. 47 et seqq.

⁷¹ *Ibid*, para. 50.

⁷² Aust, *Complicity* (n 5) 424 et seq.

coordination.⁷³ However, in a decentralized order legally coordinated duties can work as a functional equivalent for an institutionalized collective security system. The parallel compliance of states with precisely determined duties of abstention serves community interests⁷⁴ probably even better than broad margins of discretion. Thus, automatic duties of abstention for third states in the law of neutrality⁷⁵ can be seen as a way of realizing community interests in a traditional form.

aa) Duties of abstention as a means to protect community interests under traditional international law

Before the First World War, the law of neutrality had developed such automatic duties of abstention for third parties in armed conflicts: While the neutral state bore a duty of nonparticipation and impartiality, it had the corollary right not to be adversely affected by the conflict. The duty of nonparticipation required the neutral state not to render any assistance to a belligerent party and forbade the treatment of belligerents in an unjustified differential manner.⁷⁶ In a war, the duties under the Hague Conventions V and VII and under customary international law were automatically applicable.⁷⁷ Therefore, the law of neutrality expressed the idea that war legally concerns all states and not only the belligerent parties.⁷⁸ It departed from the traditional bilateral paradigm in that the legal relationship was not confined to the belligerents. Instead war brought about a new legal relationship for neutral third states⁷⁹ and became a separate legal regime. For the automatic and parallel application of the rules, certain basic procedures were established, such as the duty to notify third states about the outbreak of a war.⁸⁰

Accordingly, an important aspect of rendering peace a community interest is already embodied in the law of neutrality in that it is meant to promote international stability and security.⁸¹ Whereas this legal regime also serves to protect the vital self-interests of belligerents⁸² as well as of neutral states,⁸³ it first and foremost fulfills “a conflict restraining function.”⁸⁴ It draws a distinction

⁷³ Rüdiger Wolfrum, ‘International Law,’ in: Wolfrum (ed.), MPEPIL (2006) paras. 45 et seq.

⁷⁴ Cf. Hans Kelsen, ‘Collective Security and Collective Self-Defense Under the Charter of the United Nations’ (1948) 42 AJIL 783.

⁷⁵ Aust, *Complicity* (n 5) 22.

⁷⁶ Michael Bothe, ‘Neutrality, Concept and General Rules,’ in: Wolfrum (ed.), MPEPIL (2015), paras. 1 et seqq.; Palchetti, ‘Consequences for Third States,’ in: Weller (ed.), *The Oxford Handbook* (n 13) 1225; for historical overviews, see Stephen Neff, *The Rights and Duties of Neutrals: A General History* (MUP 2000); Philip Jessup and others, *Neutrality: Its History, Economics and Law. 4 vols.*, (CUP 1935–1936).

⁷⁷ Wolff Heintschel von Heinegg, ‘“Benevolent” Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality,’ in: Michael Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflicts: Exploring the Faultlines, Essays in Honour of Yoram Dinstein* (Martinus Nijhoff Publishers 2007) 543, 558, who argues for an automatic applicability in all international armed conflicts, at 560.

⁷⁸ Stephen Neff, *War and the Law of Nations: A General History* (CUP 2005) 191.

⁷⁹ Aust, *Complicity* (n 5) 22 et seq.

⁸⁰ Article 1 and 2 of the Convention (III) Relative to the Opening of Hostilities. The Hague 18 October 1907 (adopted 18 October 1907, entered into force 16 January 1910); Neff, *War and the Law of Nations* (n 78) 192.

⁸¹ The community orientation was, however, disputed in the past: Wright, ‘The Present Status of Neutrality’ (n 85) AJIL 1940, 400; see also James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*.2 (Blackwood 1884) 1884, 126; see on the other hand: Edwin Borchard and William Potter, *Neutrality of the United States* (2nd ed. YUP 1940) 53.

⁸² Heintschel von Heinegg, ‘“Benevolent” Third States,’ in: Schmitt/Pejic (eds.), *International Law and Armed Conflicts* (n 77) 567.

⁸³ Rudolf Bindschedler, ‘Die Neutralität im modernen Völkerrecht’ (1956/57) 17 ZaöRV, 6 et seq.

⁸⁴ Bothe, ‘Neutrality,’ in: Wolfrum (ed.), MPEPIL (n 76), para. 4.

between neutral states and belligerents, promotes abstention, furthers impartiality, and thus aims to stop the conflict from escalating and spreading.⁸⁵ The law of neutrality apparently contributed to a certain stability in the international relations of that period because states did not have to fear being pulled into conflicts.⁸⁶

bb) Modifying duties of abstention

The goal of protecting community interests has not only promoted more or less successful efforts to establish positive rights and obligations in international law, but it has also modified preexisting duties of abstention. Whereas institutionalization and collectivization have prompted structural changes within existing legal regimes modifying the law of neutrality under the UN Charter, the peremptory effect of the prohibition on the use of force has influenced the standards of responsibility.

While it is generally acknowledged that a state can still declare its neutrality under the UN Charter,⁸⁷ the system of collective security restricts this discretion in the interest of international peace and security at least in two ways: the duty to comply with a sanction regime imposed by the Security Council under Chapter VII (Arts. 41, 42, 43, and 48 UN Charter) excludes a neutral stance.⁸⁸ A case in point was the economic sanction regime in the armed conflict between Iraq and Kuwait.⁸⁹ Likewise, a UN member state cannot invoke neutrality when the Security Council has determined the aggressor in a binding resolution under Chapter VII. In such a situation a member state must not support the aggressor⁹⁰ while it can supply support to the state attacked⁹¹ but is not required to do so.⁹² Correspondingly, Art. 2 para. 5 UN Charter states that states shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

In relation to the rules on the use of force, its peremptory nature has promoted stricter standards of responsibility than third-party duties under the more general standards of the law of state responsibility. As a primary law rule, there is a particularly strict standard for a duty of abstention included in Art. 3 lit. f of the 1974 Definition of Aggression which provides for an objective standard of responsibility and does not require any subjective element on the side of the third state.⁹³ It will therefore qualify as an act of aggression if a state allows its territory “which it has placed at the

⁸⁵ *Ibid.*, para. 4; Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory, and Case Studies* (Kluwer Law International 2002), 1; Quincy Wright, ‘The Present Status of Neutrality’ (1940) AJIL 1940 391, 395.

⁸⁶ Aust, *Complicity* (n 5) 21 with further references.

⁸⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 89; see also UK Ministry of Defence (ed.), *The Manual of the Law of Armed Conflict* (Oxford 2004) para. 1.43; Bothe, ‘Neutrality,’ in: Wolfrum (ed.), MPEPIL (n 76), para. 9; Heintschel von Heinegg, ‘“Benevolent” Third States,’ in: Schmitt/Pejic (eds.), *International Law and Armed Conflicts* (n 77) 556 et seq.; Palchetti, ‘Consequences for Third States,’ in: Weller (ed.), *The Oxford Handbook* (n 13) 1227 et seq.

⁸⁸ Heintschel von Heinegg, ‘“Benevolent” Third States,’ in: Schmitt/Pejic (eds.), *International Law and Armed Conflicts* (n 77) 557.

⁸⁹ UNSC Res 661 (6 August 1990) Un Doc S/RES/661; Michael Bothe, ‘The Law of Neutrality,’ in: Dieter Felck and Michael Bothe (eds.), *The Handbook of International Humanitarian Law* (OUP 2008) para. 1103.

⁹⁰ Bothe, ‘Neutrality,’ in: Wolfrum (ed.), MPEPIL (n 76) para. 13.

⁹¹ Neff, *War and the Law of Nations* (n 78) 320.

⁹² Bothe, ‘Neutrality,’ in: Fleck/Bothe (eds.), *The Handbook of International Humanitarian Law* (n 89) para. 1103 et seq.

⁹³ Aust, *Complicity* (n 5) 381.

disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.” Moreover, on the level of the rules on state responsibility, Art. 41 para. 2 ASR includes a duty not to render aid or assistance in maintaining a situation created by a serious breach of a peremptory norm.⁹⁴ This article also provides for a stricter standard on complicity in comparison to Art. 16 ASR,⁹⁵ which includes the general rule on aid and assistance. The standard is rendered stricter by a modification of the subjective element of knowledge or intent.⁹⁶ Although one might argue that the simple reason for such a modification lies in the fact that a grave violation of the use of force or prohibition of aggression will not go unnoticed and will be subject to widespread assessments of its lawfulness, it is also conceivable that the character of the prohibition as embodying a community interest promotes the stricter standard.⁹⁷ In particular, in traditional cases of the violation of the use of force where territorial acquisition is involved, the rationale behind such a modification of standards aims at preventing any form of prescription through acquiescence lest legal effects be accorded to an illegal act of particular gravity.⁹⁸

Common Art. 1 GC I-IV as an autonomous primary obligation also entails stricter standards of responsibility than the secondary rules on state responsibility under Art. 16 ASR, insofar as a mere encouragement of violations of international humanitarian law is sufficient to violate the rule, while in general international law incitement or encouragement does not entail responsibility.⁹⁹ According to some views in the literature and according to the ICRC, the requirement of a subjective element is also modified.¹⁰⁰ The argument is based on the wording of Common Art. 1 GC I-IV: the states parties have subscribed to a more specific and thus stricter legal duty to ensure respect, *inter alia*, by using the word “undertake.” On the basis of the 2007 ICJ Genocide case,¹⁰¹ the word “to undertake” is considered to be “not merely hortatory and purposive.”¹⁰²

⁹⁴ For how to distinguish between the duty of non-recognition and the duty of non-assistance, see Aust, *Complicity* (n 5) 326-337.

⁹⁵ Art. 16: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

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

⁹⁶ Aust, *Complicity* (n 5) 341; see also ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) vol. II(2) ILC-Ybk para. 11.

⁹⁷ Cf. Aust, *Complicity* (n 5) 341 et seq./347.

⁹⁸ See Krieger, *Das Effektivitätsprinzip* (n 8) Chapter 7; cf. Aust, *Complicity* (n 5), 348 for arguments extending this rationale beyond the violation of the prohibition on the use of force.

⁹⁹ *Military and Paramilitary Activities (Nicaragua v U.S.)* (Merits) (Judgment) [1986] ICJ Rep 14, para. 220; Jean-Marie Henckaerts and Carolin Alvermann (eds.), *ICRC, Customary International Humanitarian Law, Volume I: Rules* (CUP 2005), Rule 144; ICRC, 30th International Conference 2007: Resolution 3, ‘Reaffirmation and Implementation of International Humanitarian Law: Preserving Human Life and Dignity in Armed Conflict,’ available at <<https://www.icrc.org/eng/resources/documents/resolution/30-international-conference-resolution-3-2007.htm>> last accessed 14 October 2016; Aust, *Complicity* (n 5), 388 et seq.; Geiß, ‘The Obligation to Respect,’ in: Clapham and others (eds.), *The 1949 Geneva Conventions* (n 56), para. 39; ICRC, *Commentary on the First Geneva Convention* (n 19) para. 158 et seqq.

¹⁰⁰ ICRC, *Commentary on the First Geneva Convention* (n 19) para. 159.

¹⁰¹ Geiß, ‘The Obligation to Respect,’ in: Clapham and others (eds.), *The 1949 Geneva Conventions* (n 56), para. 40.

¹⁰² *Application of the Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para. 162.

cc) Tendencies of erosion

Moreover, duties of abstention are not necessarily an expression of indifference and sovereignty-based understandings of non-interference, but help to protect peace by aiming to contain war and its effects in a decentralized system: the violation of the prohibition on the use of force or violations of international humanitarian law may be subject to widespread assessments of their lawfulness. Nonetheless, there may be significant disagreement about legally permissible justifications or about legal attribution of the wrongful act. Conflicting community interests may have to be balanced and the prioritization of one community interest over another may be abused or might appear to be abused for covering more self-interested policy aims. In particular, in non-international armed conflict, the risk of abuse by intervening states is high where military aid is given to rebels which aim to overthrow a government.¹⁰³ Moreover, empirical research suggests that support for all sides of an armed conflict prolongs the conflict.¹⁰⁴

An important duty of abstention stipulates that third states must not supply arms to rebel groups. This duty has been stated in the ICJ's Nicaragua Judgment¹⁰⁵ and the Armed Activities Case¹⁰⁶ as well as in the Friendly Relations Declaration.¹⁰⁷ Such an arms transfer violates both the prohibition on the use of force and the duty of non-intervention.¹⁰⁸ Moreover, Common Art. 1 GC I-IV prohibits the transfer of weapons to state parties or armed groups, which have violated international humanitarian law.¹⁰⁹

These well-established duties of third parties to abstain from certain forms of intervention have been challenged in recent armed conflicts. In the Libyan conflict, France, Qatar and the UK have delivered weapons to armed opposition groups. In the Syrian conflict,¹¹⁰ Saudi Arabia and Qatar¹¹¹ as well as France, the UK, the U.S. and probably Croatia have delivered weapons to armed opposition groups which have reportedly violated international humanitarian law.¹¹² Also, the EU at

¹⁰³ Michael Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels' (2014) 7 Journal of National Security Law and Policy 139, 158.

¹⁰⁴ Edward Newman and Karl DeRouen (eds.), *Routledge Handbook of Civil Wars* (Taylor and Francis 2014) 320.

¹⁰⁵ Military and Paramilitary Activities (Nicaragua v U.S.) (Merits) [1986] ICJ Rep 14, paras. 191, 192, 195, 247, 251.

¹⁰⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, para. 164.

¹⁰⁷ UNGA Resolution 2625 (1970) UN Doc A/RES/25/2625.

¹⁰⁸ Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" - Issues Surrounding Third State Intervention in the Syrian Civil War' (2014) 13 Chinese JIL 13, 32.

¹⁰⁹ ICRC Commentary, para. 160; *ibid*, 27 et seq. This obligation has been confirmed by a UK statement that Russia might from the moment of its intervention onwards be held responsible for IHL violations committed by the Syrian army, in particular the barrel bombing, see Julian Borger, 'Russia may share criminal responsibility for Assad's use of barrel bombs, UK says' (30 September 2015), *The Guardian*, <<https://www.theguardian.com/world/2015/sep/30/russia-syria-barrel-bombing-international-law-uk>> accessed 14 October 2016.

¹¹⁰ For a detailed report on the relevant practice, see Ruys, 'Of Arms, Funding and "Non-Lethal Assistance"' (n 108) 114 et seqq.

¹¹¹ Mark Mazetti and others, 'Taking Outsize Role in Syria, Qatar Funnels Arms to Rebels' (29 June 2013) <<http://www.nytimes.com/2013/06/30/world/middleeast/sending-missiles-to-syrian-rebels-qatar-muscles-in.html?pagewanted=all>> accessed 14 October 2016 ; Rania Abouzeid, 'Arming Syria's Rebellion: How Libyan Weapons and Know-How Reach Anti-Assad Fighters' (29 May 2013) <<http://world.time.com/2013/05/29/libyans-arming-syrian-rebels/>> accessed 14 October 2016.

¹¹² UN Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (16 August 2013) UN Doc A/ HCR/ 24/ 46, Summary.

the request of France and the UK changed its position and started to allow such weapon supplies to armed groups.¹¹³

Legal justifications for these activities are not readily available.¹¹⁴ It has been argued in the case of Libya that any justification cannot rely on an implicit interpretation of the pertinent Security Council resolution because the explicit prohibition on arming rebels and an explicit authorization are lacking.¹¹⁵ In the case of Syria, it is doubtful whether the supply of weapons to violent non-state actors could be justified by an argument *a maiore ad minus* even if one acknowledges that humanitarian intervention is a valid exception to the prohibition of the use of force. Likewise, neither authorization by the Security Council nor self-defense or the concept of forcible countermeasures can be used as a justification,¹¹⁶ and it cannot be assumed that the Syrian Opposition Council has validly been recognized as the new *de jure* government.¹¹⁷ Finally, in both conflicts rebel forces also breached international humanitarian law so that any delivery of weapons would not be in line with the obligation to ensure respect under the Geneva Conventions and their Additional Protocols.¹¹⁸

The strong call for protecting the individual in R2P situations, such as in Libya or Syria, seems to push governments to send weapons to armed opposition groups, thereby eroding well established rules on the prohibition on the use of force and non-intervention. For instance, the French supply of weapons to Libyan opposition groups was politically justified as a means of protecting civilians.¹¹⁹ British and U.S. justifications also relied on civilian protection.¹²⁰ After diplomatic pressure from the UK and France, the EU amended its blanket EU arms embargo to all parties to the conflict in Syria and justified its activities by the intent to enable protection of civilians.¹²¹

Of course, the mere violation of a customary international law rule, let alone a treaty rule, does not per se trigger its derogation, but if there is a scarcity of state protests, a negligent attitude by states can potentially lead to a modification of applicable customary international law rules on the basis of acquiescence.¹²² In the Syrian conflict, at least, Austria voiced concern¹²³ and there was

¹¹³ Council of the EU, 'Council Declaration on Syria, 3241st Foreign Affairs Council Meeting' (Brussels 27 May 2013).

¹¹⁴ Ruys, 'Of Arms, Funding and "Non-Lethal Assistance"' (n 108) 34 et seq.; Christian Schaller, 'Siding with Rebels: Recognition of Opposition Groups and the Provision of Military Assistance in Libya and Syria (2011-2014)', in: Hans-Joachim Heintze and Pierre Thielbörger (eds.), *From Cold War to Cyber War: The Evolution of the International Law of Peace and Armed Conflict over the last 25 Years* (Springer International Publishing Switzerland 2016) 251, 252; Schmitt, 'Legitimacy versus Legality Redux' (n 103) 158 et seq.

¹¹⁵ Olivier Corten and Vaïos Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of jus contra bellum and jus in bello' (2013) Vol. 18 No. 1 Journal of Conflict & Security Law 59, 65,74.

¹¹⁶ Schmitt, 'Legitimacy versus Legality Redux' (n 114) 158.

¹¹⁷ Ruys, 'Of Arms, Funding and "Non-Lethal Assistance"' (n 108) 37.

¹¹⁸ Corten/Koutroulis, 'The Illegality of Military Support' (n 115) 91; Schmitt, 'Legitimacy versus Legality Redux' (n 104) 158.

¹¹⁹ BBC, 'Libya conflict: France air-dropped arms to rebels' (29 June 2011) <<http://www.bbc.com/news/world-africa-13955751>> accessed 14 October 2016.

¹²⁰ Jonathan Marcus, 'French Arming of Libya's Rebels Strategic' (29 June 2011) <<http://www.bbc.com/news/world-africa-13966976>> accessed 14 October 2016.

¹²¹ Jonathan Marcus, 'Syria arms embargo: EU divided despite consensus' (28 May 2013) BBC News <http://www.bbc.com/news/world-europe-22688997> accessed 14 October 2016.

¹²² Malcolm Shaw, *International Law* (7th edn. CUP 2014) 63 et seqq.

¹²³ Julian Borger, 'Austria Says UK Push to Arm Syrian Rebels Would Violate International Law' (14 May 2013) The Guardian <<https://www.theguardian.com/world/julian-borger-global-security-blog/2013/may/14/austria-eu-syria-arms-embargo>> accessed 14 October 2014.

strong protest from Russia,¹²⁴ but criticism is mainly articulated by academia and NGOs.¹²⁵ While it would be too early to draw the conclusion that the pertinent prohibitions have fallen into desuetude,¹²⁶ the example demonstrates that disagreements about the prioritization of community interests (peace through containment of conflicts v. human rights protection by civilian protection) threaten to undermine well established duties of abstention. What might appear to be a sound political compromise could also turn out to bear considerable adverse effects. In a multipolar world, Western states should only engage in norm dilution of duties of abstention if they are prepared to accept that other powers will support rebels in other civil wars according to their political preferences or perceptions of a hierarchy of community interests.

3. Community interests and the progressive development of third-party rights and duties in armed conflict

Strictly speaking, the lawmaking process on third-party rights and duties has stagnated. While duties of abstention, above all the duty of non-recognition and non-assistance, are well established, more far-reaching rights and duties to take positive measures are still tentative or at least disputed. Priority shifts even suggest tendencies of regression. There is still a dearth of conclusive state practice and only few decisions of the ICJ or other international tribunals exist. As long as states remain too reluctant or too cautious to defend community interests by instituting legal proceedings on armed conflicts before international courts,¹²⁷ their competence to do so will be disputed and it is unlikely that further positive obligations of third states will be developed. What are the reasons for the lack of a more decisive development of the law in the community interest?

a) Competing guardians of community interests: States, the ICJ and the ICRC

Given that the ICJ has fostered the *erga omnes* concept in the Barcelona Traction case and described the “outlawing of acts of aggression” as an example of *erga omnes* obligations,¹²⁸ many authors expect the court to act as a decisive guardian of community interests also in the realm of armed conflict. After all, the ICJ is – so far – the only or at least the most important court to judge on issues of *jus ad bellum* and *jus in bello* alike. Yet the Court appears to act very cautiously in cases concerning armed conflicts. It has so far not explicitly¹²⁹ determined the *jus cogens*

¹²⁴ News Wire, ‘Arming Syrian Rebels a Breach of International Law, Russia Says’ (13 March 2013) France 24 <<http://www.france24.com/en/20130313-russia-foreign-minister-arm-syria-rebels-breach-international-law>> accessed 14 October 2016; Luke Harding, ‘Russia Warns UK Against Arming Syrian Rebels’ (13 March 2013) The Guardian <<https://www.theguardian.com/uk/2013/mar/13/russia-warns-uk-syrian-rebels>> accessed 14 October 2016.

¹²⁵ Oxfam Report, ‘A Fairer Deal for Syrians’ (9 September 2014) 190 Oxfam Briefing Paper <https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp190-fairer-deal-syrians-090914-en.pdf><https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp190-fairer-deal-syrians-090914-en.pdf> accessed 14 October 2016.

¹²⁶ For an arguable case of law-development, see: Schmitt, ‘Legitimacy versus Legality Redux’ (n 114) 159.

¹²⁷ Tams, ‘Individual States,’ in: Fastenrath and others (eds.), *From Bilateralism to Community Interest* (n 37), 379, 388.

¹²⁸ *Barcelona Traction (Belgium v Spain)* (Judgement) [1970] ICJ Rep, para. 34; *Military and Paramilitary Activities (Nicaragua v U.S.)* (Merits) (Judgment) [1986] ICJ Rep 14, para. 190#; see also Yearbook of the International Law Commission, 2001, vol. II (2), 112.

¹²⁹ For indirect references, see *Military and Paramilitary Activities (Nicaragua v U.S.)* (Merits) (Judgment) [1986] ICJ Rep 14, para. 190; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para. 81; for avoidance, see *Oil Platforms (Islamic*

character¹³⁰ or *erga omnes* effect of the broader prohibition on using force, even though in the Nicaragua case both parties had accepted its peremptory nature.¹³¹ Likewise, in the Oil Platforms case the Court shunned any such pronouncement.¹³² While a simple reason for this might be seen in the existence of a specific regime for countermeasures with the collective right of self-defense under Art. 51 UN-Charter,¹³³ contemporary literature criticizes that in cases concerning community interests “the Court is anything but most reticent to engage in any project to translate a conception of the common good or of a universal conscience into law.”¹³⁴ The Court is seen to keep an ambiguous and inconsequential attitude towards peremptory norms and the concept of the international community.¹³⁵ Peremptory norms promoting community interest “remain at best a juridical fiction channelling the traditional processes of international law-formation.” Thus, some authors denounce a role for the ICJ in the progressive development of international law.¹³⁶

However, the Court faces the task of balancing its juridical functions with the primary function of states in lawmaking. While a court does not create law, it has an important role in the lawmaking process through applying the law to new situations and thereby developing it. By stating that a certain practice has crystallized into a rule of customary international law, it also contributes to the creation of that rule.¹³⁷ Still, not least in the interest of its legitimacy, the Court needs to acknowledge the role of states and of the political organs of the UN.¹³⁸ This not only concerns legal policy considerations of judicial activism or judicial self-restraint, but signifies a search for an appropriate form of balance of power within a legal system. Thereby the Court also tries to ensure compliance with its judgments. Recent contestations of certain decisions of international courts by their member states¹³⁹ underline that these courts are under constant pressure to get the balance right. While the ICJ has gone through different periods in that balancing process,¹⁴⁰ it presently seems to adopt a careful attitude. For instance, in the Wall Opinion the ICJ has determined that there is a duty of non-recognition, of not rendering aid and assistance, and to ensure respect for

Republic of Iran v United States of America) (Judgement) [2003] ICJ Rep 161, para. 182; see also Gleider Hernández, ‘A Reluctant Guardian’ (n 4) 13.

¹³⁰ For criticism, see: Judge Simma, *Oil Platforms (Islamic Republic of Iran v United States of America)* (Separate Opinion Judge Simma) [2003] ICJ Rep 324, 329.

¹³¹ *Military and Paramilitary Activities (Nicaragua v U.S.)* (Merits) (Judgment) [1986] ICJ Rep 14, 100 et seq. and 119.

¹³² *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgement) [2003] ICJ Rep 161, para. 42 and Judge Simma, *Oil Platforms (Islamic Republic of Iran v United States of America)* (Separate Opinion Judge Simma) [2003] ICJ Rep 324, 324.

¹³³ Claus Kreß, ‘The ICJ and the “Principle of on-Use of Force,”’ in: Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law* (OUP 2015) 561, 571.

¹³⁴ Hernández, ‘A Reluctant Guardian’ (n 4) 58.

¹³⁵ Hernández, ‘A Reluctant Guardian’ (n 4) 58-59.

¹³⁶ Hernández, ‘A Reluctant Guardian’ (n 4) 59.

¹³⁷ Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 268; 2 Higgins, ‘Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.’ (1970-1971) 11 *Virginia J Intl L* 327, 341.

¹³⁸ Edward McWhinney, ‘The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Antinomy’ (2006) Vol. 5(1) *Chinese JIL* 1, 13.

¹³⁹ Karen Alter and others, ‘Backlash against International Courts in West, East and Southern Africa: Causes and Consequences’ (2016) Vol. 27(2) *EJIL* 293, 293 et seqq.

¹⁴⁰ Edward McWhinney, ‘The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Antinomy’ (2006) Vol. 5(1) *Chinese JIL* 1 et seqq.

the Geneva Conventions.¹⁴¹ Still, it did not make any pronouncement on the scope of the obligations involved. The Court apparently left this task to the political organs of the UN:

Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.¹⁴²

A comparable hesitation to easily accept the role of non-state actors as promoters of new obligations in the community interest lies beneath the Separate Opinions of Judges Higgins¹⁴³ and Kooijmans. Judge Kooijmans refuses to accept the ICRC's role in interpreting Art. 1 GC I-IV, pointing to a lack of corresponding state practice.¹⁴⁴ Indeed, the ICRC has taken a more pronounced role in the lawmaking process, which has apparently prompted the inclusion of positive obligations under Common Art. 1 GC I-IV according to a widespread reading of the article.

Such a progressive development is, at first sight, surprising. Apart from Security Council measures, centralized institutions are lacking in international humanitarian law. The Geneva Conventions do not provide for any kind of binding inter-state dispute mechanism¹⁴⁵ and existing mechanisms which could play a role are not in function, such as the Fact-Finding Commission under Art. 90 AP I. Moreover, international humanitarian law is not only directed at protecting a community interest but also regulates fundamental security interests of states.¹⁴⁶ However, the guardian function of the ICRC seems to promote law-development in the public interest.

The ICRC can claim a formal, legally acknowledged role based on Article 5(2)(c) of the Statutes of the International Red Cross and Red Crescent Movement. In promoting the "faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law," the ICRC needs to interpret international humanitarian law and thus contributes to the lawmaking process. Moreover, Art. 5(2)(g) of the Statutes explicitly recognizes the role of the ICRC in preparing any development of international humanitarian law. By acknowledging this role in the Statutes, the state parties to the Geneva Conventions themselves established the lawmaking function of the ICRC.¹⁴⁷ Expressions of these efforts are the Customary International Law Study,¹⁴⁸ the Interpretative Guidance on Direct

¹⁴¹ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, para. 159.

¹⁴² *Ibid*, para. 160; see Dawidowicz, 'The Obligation of Non-Recognition,' in: Crawford and others (eds.), *The Law of International Responsibility* (n 9) 677, 685.

¹⁴³ Judge Higgins, *Legal Consequences of the Construction of a Wall* (Separate Opinion of Judge Higgins) [2004] ICJ Rep 207, para. 39.

¹⁴⁴ Judge Kooijmans, *Legal Consequences of the Construction of a Wall* (Separate Opinion of Judge Kooijmans) [2004] ICJ Rep 219, para. 48.

¹⁴⁵ Tams, 'Individual States,' in: Fastenrath and others (eds.), *From Bilateralism to Community Interest* (n 37), 379, 383.

¹⁴⁶ Robin Geiß/Andreas Zimmermann, 'The International Committee of the Red Cross – A unique actor in the field of International Humanitarian Law creation and progressive development,' in Robin Geiß et al. (eds.), forthcoming; see for community interests and international humanitarian law the contribution by Janina Dill in this volume.

¹⁴⁷ Robin Geiß/Andreas Zimmermann, 'The International Committee of the Red Cross – A unique actor in the field of International Humanitarian Law creation and progressive development,' in Robin Geiß et al. (eds.), forthcoming.

¹⁴⁸ Jean-Marie Henckaerts and Carolin Alvermann (eds.), *ICRC, Customary International Humanitarian Law, Volume I: Rules; Vol. 2 – Practice* (CUP 2005).

Participation in Hostilities,¹⁴⁹ and the new edition of the commentaries on the Geneva Conventions.¹⁵⁰ In particular, the 1952 ICRC Commentary on Common Art. 1 GC I-IV has determined the interpretative debate,¹⁵¹ while the new edition aims to settle it.

However, the ICRC's strong engagement in the progressive development of international humanitarian law has raised severe criticism from state parties, which have called into question the ICRC's mandate, method and expertise, in particular in relation to the Customary International Law Study and the Interpretative Guidance on Direct Participation in Hostilities.¹⁵² Recent initiatives to further develop mechanisms for improving compliance with international humanitarian law have seen an even stronger pushback by states irrespective of the community interests implied. After the 2011 International Conference of the Red Cross and the Red Crescent, the ICRC together with Switzerland promoted a process to strengthen compliance. The process was deliberately not turned into a draft for a binding international agreement because the ICRC and some member states already anticipated that a negotiating process would fail, or that "the level of ambition" in such negotiations would be reduced. But even the turn to informal standards did not save the process from failing. In view of strong opposition from Russia and India, the adopted resolution¹⁵³ represented a compromise that remained far behind the expectations. It was not possible to introduce a meaningful compliance mechanism with reporting duties. Instead the resolution focuses on a state-driven process and sidelines the ICRC. This development seems to reflect a distrust of some states towards the ICRC. It repeats an ongoing reluctance of states to subject themselves to any enforcement mechanism which gives third states a forum to investigate, evaluate or just discuss the behavior of parties to an armed conflict.

Apparently, states are reclaiming their role as norm-makers in international humanitarian law more vigorously than during the past decade. They seem to oppose – at least to some extent – the increasing autonomy of other actors who might contribute to a progressive development of the law of armed conflict. But does this imply that states fail their responsibility for developing the law in the community interest?

b) Duties of abstention as a moderate yet stable way to further community interests in armed conflict

From a structural perspective, the right to institute proceedings before a court, or to take non-forcible countermeasures, is usually conceived as being discretionary. Even where positive duties exist as under Common Art. 1 GC I-IV, there is a broad discretion as to what measures states must take.¹⁵⁴ Such a margin leaves room for vital policy considerations. In situations of armed conflict,

¹⁴⁹ Nils Melzer, ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 14 October 2016.

¹⁵⁰ ICRC, *Commentary on the First Geneva Convention* (n 19).

¹⁵¹ Geiß, 'Common Article 1 of the Geneva Conventions,' in: Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (n 46) 417, 426.

¹⁵² Robin Geiß/Andreas Zimmermann, 'The International Committee of the Red Cross – A unique actor in the field of International Humanitarian Law creation and progressive development,' in Robin Geiss et al. (eds.), forthcoming.

¹⁵³ ICRC, 32nd International Conference of the Red Cross and Red Crescent 8-10 September 2015 'Strengthening compliance with international humanitarian law' 32IC/15/R2.

¹⁵⁴ Tams, 'Individual States,' in: Fastenrath and others (eds.), *From Bilateralism to Community Interest* (n 37), 379, 400 et seq.

diverging community interests as well as relevant national interests will have to be balanced against one another. The Syrian example demonstrates the adverse effects that a balancing exercise between efforts to provide for civilian protection and efforts to prevent the escalation and perpetuation of an armed conflict can provoke. Escalation of conflicts, prospects and progress of negotiations and peace deals, and the political symbolism of taking countermeasures against any particular actor are among the interests to be considered. Such interests do not reflect individual “selfish” interests of states but are themselves more or less directly related to the community interests involved. Taking measures which are not effective will in general imply higher political costs than complying with a duty of abstention.¹⁵⁵ In cases concerning the use of force, states will be reluctant to bring their allies before an international court and it is highly unlikely that they will use non-forcible countermeasures against them. Thus, while the legality of U.S. unilateralism in Iraq and one-sided interpretations of UN Security Council resolutions regarding NATO interventions in Libya were disputed among NATO allies, they did not lead to enforcement measures by Western states. This in turn had an eroding impact on international reactions to the illegal annexation of the Ukrainian territory of Crimea. The General Assembly resolution¹⁵⁶ denouncing the annexation as a violation of international law was only passed with 100 yes-votes, 11 no-votes and 58 abstentions. Apparently Brazil, India, and South Africa were motivated to abstain from voting due to Western states’ behavior in Iraq and Libya and the allegation of applying double standards.¹⁵⁷

A discretionary approach to decentralized countermeasures heightens the impression of selectivity and double standards and may even negatively reflect on the centralized system of collective security under the UN Charter. Unilateral countermeasures continue to suffer from a legitimacy deficit. Far-reaching rights and duties to take positive measures depend on centralized institutions or institutional mechanisms for claiming sufficient legitimacy.¹⁵⁸ While the Security Council could be and has partly been a central organ for defending community interests via third party obligations in armed conflicts, its recent and recurring failures have provoked decentralized unilateral measures whose legality is doubtful. The case of weapons delivery to Syrian rebels is a case in point. Because of their perceived selectivity, such measures undermine the basis of good faith and trust. Good faith and trust, however, build an indispensable precondition for any concept of international solidarity.

4. Unilateralism and positive duties in a changing global order

The idea of decentralized enforcement of community interests gained strong momentum after the adoption of the Articles of State Responsibility contemporaneously with the heyday of the R2P debate. Both concepts – R2P and non-forcible rights and duties to protect community interests – share structural parallels.¹⁵⁹ The risk implied in countermeasures was framed in terms of finding the right balance between the “effective protection of community values and the need to prevent

¹⁵⁵ In cases of military interventions, see Stephen Hopgood, ‘The Last Rites for Humanitarian Intervention – Darfur, Sri Lanka and R2P’ (2014) 6 *Global Responsibility to Protect* 181, 194.

¹⁵⁶ UNGA Res 68/262 (27 March 2013) UN Doc. A/RES/68/262.

¹⁵⁷ Andreas Zumach, *Globales Chaos - machtlose UNO: Ist die Weltorganisation überflüssig geworden?* (Rotpunktverlag 2015) 109; Representatives of Nicaragua (27 March 2013) UN Doc A/PV. 80, 12; Bolivia (27 March 2013) UN Doc A/PV. 80, 13; Saint-Vincent and the Grenadines (27 March 2013) UN Doc A/PV. 80, 15 et seq.

¹⁵⁸ Kelsen, ‘Collective Security’ (n 74) 785, 792; Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) Vol. 107:295, 314.

¹⁵⁹ On community interests and R2P, see the contribution in this volume.

abuse” by powerful states claiming to act on behalf of the international community.¹⁶⁰ It was thus closely linked to an American-led liberal international system¹⁶¹ because it concerned a balancing exercise between enforcement of a liberal perception of community interests and the dangers of power abuse in a unipolar world order. Not without reason, Western states were seen as being the major proponents of a right to take countermeasures. However, in that period Western states apparently did not manage to establish what standards of legality and legitimacy apply regarding such actions.¹⁶² Of course, one might read the continuing debates as “witness to the slow establishment of the concept of community.”¹⁶³ But in an alternative reading, the push for unilateral ways to prioritize humanitarian community interests over more sovereign-related ones has contributed to undermining existing rules, while new rules have not been able to evolve with sufficient clarity. Recent tendencies of erosion of the duty not to support rebels, for instance, are not matched by a rise of well-established new rules for deciding how to prioritize conflicting community interests in the face of ongoing armed conflicts. Such a development contributes to an increase of normative uncertainty in the regime on the use of force¹⁶⁴ and thus to a perception of crisis or even failure.¹⁶⁵

In contrast, duties of abstention further community interests by aiming to contain the effects of a violation of such a rule. An approach emphasizing duties of abstention is informed by the idea that immediate reactions to wrongful acts by abstention might help to prevent escalation of conflicts at an early stage¹⁶⁶ – a stage where according to empirical studies third-party intervention in non-international armed conflicts tends to prolong the duration of the conflict.¹⁶⁷ The involvement of third states increases the complexity of conflicts and will thus make any peaceful solution even more difficult to attain. Especially in view of the interrelatedness of states in a globalized world, duties of abstention can be an efficient means. Abstaining from certain interactions will affect perpetrating states more severely than it did in previous times.¹⁶⁸ A way forward for promoting community interests through third-party obligations might thus lie in refocusing on de-escalation through the more traditional means of containing war: duties of neutrality, abstention and nonintervention for third states.

¹⁶⁰ Tams, ‘Individual States,’ in: Fastenrath and others (eds.), *From Bilateralism to Community Interest* (n 37), 379, 382.

¹⁶¹ John Ikenberry, ‘The Liberal International Order and Its Discontents,’ in: Rebekka Friedman and others (eds.), *After Liberalism?* (Palgrave Macmillan 2013) 91, 98.

¹⁶² Cf. Ikenberry, ‘The Liberal International Order,’ in: Friedman and others (eds.), *After Liberalism?* (n 161), 98.

¹⁶³ Alain Pellet and Alina Miron, ‘Sanctions,’ in: Wolfrum (ed.), *MEPIL* (2013) para. 61.

¹⁶⁴ Rein Müllerson, ‘Ideology, Geopolitics and International Law’ (2016) Vol. 15(1) *Chinese Journal of Intl L* 47, 68, para. 38.

¹⁶⁵ Tom Ruys, ‘Of Arms, Funding and “Non-lethal Assistance”—Issues Surrounding Third-State Intervention in the Syrian Civil War’ (2014) Vol. 13 *Chinese Journal of Intl L* 13, 51 et seq.

¹⁶⁶ Aust, *Complicity* (n 5) 426: “Against this backdrop, and given that in times of armed conflict even ‘minor’ violations of the Geneva Conventions by one party can quickly lead to an escalatory spiral of more and ever graver violations.” Geiß, ‘Common Article 1 of the Geneva Conventions,’ in: Krieger (ed.), *Inducing Compliance with International Humanitarian Law* (n 46) 417, 433.

¹⁶⁷ Patrick Regan, ‘Conditions of successful third-party intervention in intrastate conflicts’ (1996) Vol. 40 (2) *Journal of Conflict Resolution* 336, 345 et seq.

¹⁶⁸ Cf. Aust, *Complicity* (n 5) 425 et seq.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.