19

Third-party countermeasures

Observations on a controversial concept

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I Introduction

It is a great honour to contribute to this *Liber Doctorandorum* for James Crawford. James is an inspirational figure in many ways, and not only in matters of international law. It is only at the end of a journey that you can truly reflect on the road travelled. In the words of T. S. Eliot, 'the end of all our exploring will be to arrive where we started . . . and know the place for the first time'.[1] I am forever indebted to James for his guidance throughout my journey of exploration.

This chapter addresses what James Crawford, as the International Law Commission's (ILC) last Special Rapporteur on State responsibility, rightly described as an 'extremely controversial' topic;[2] namely, the role of third-party countermeasures in international law. In 2000, as Special Rapporteur, he expressed his support for a regime of third-party countermeasures in the ILC Articles on State Responsibility (ASR), which were provisionally endorsed by the ILC in the same year.[3] But like the Grand Old Duke of York, having courageously and painstakingly marched his troops up to the top of the hill, he promptly marched them back down again – and for good reason.

The main explanation for this tactical retreat was the strong opposition of a handful of influential States. The pendulum ultimately swung from belief to agnosticism and a last-ditch compromise was found, expressed in the agnostic arrangement in Article 54 ASR. The sources of this controversy are manifold. This chapter briefly considers whether some

[1] T. S. Eliot, *Four Quartets* (Harcourt: New York, 1943).
[2] James Crawford, 'Fourth Report on State Responsibility', *ILC Yearbook*, 2(1) (2001), 73, para. 47.
[3] ILC Report (2000), UN Doc. A/55/10, 70–1.

of the most common criticisms of the concept are actually borne out in practice.

Perhaps the most common and potentially most effective critique is that countermeasures entail an inherent risk of abuse as their unilateral character tends to favour more powerful States. Already in 1850, the so-called *Don Pacifico* affair – involving a British naval blockade of the Greek port of Piraeus following Greece's refusal to compensate a British subject for injuries inflicted by a violent mob – provides a good example of so-called 'gunboat diplomacy' and the risk of abuse traditionally associated with unilateral coercive measures.[4] In a famous speech before the House of Commons, Lord Palmerston vigorously defended the action:

> [A]s the Roman, in days of old, held himself free from indignity, when he could say *Civis Romanus sum*; so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong.[5]

No doubt with such examples in mind, Judge Padilla Nervo stated:

> The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.[6]

Several other late-nineteenth and early-twentieth-century examples of gunboat diplomacy by powerful Western States, notably against Latin American countries, could also be mentioned.[7] As ILC Special Rapporteur on diplomatic protection, Dugard observed that the institution had been 'greatly abused' as it had in practice 'provided a justification for military intervention or gunboat diplomacy' under the guise of protection.[8] As a consequence, '[i]nevitably diplomatic protection of this kind came

[4] Wilhelm Georg Grewe, *The Epochs of International Law*, tr. Michael Byers (Berlin: Walter de Gruyter, 2000), 525–7.

[5] House of Commons Debates, 25 June 1850, vol. 112 (3rd Ser.) c. 444 (statement of Lord Palmerston).

[6] *Barcelona Traction, Light and Power Company Limited (Belgium* v. *Spain)*, Judgment, 5 February 1970, ICJ Reports (1970), 3, Sep. Op. Judge Padilla Nervo, 246.

[7] For examples see Grewe, *The Epochs of International Law*, 525–7.

[8] John Dugard, 'First Report on Diplomatic Protection', *ILC Yearbook*, 2(1) (2000), 212. See also Mohamed Bennouna, 'Preliminary Report on Diplomatic Protection', *ILC Yearbook* 2(1) (1998), 311 ('diplomatic protection has served as a pretext for intervention in the affairs of certain countries').

to be seen by developing nations, particularly in Latin America, as a discriminatory exercise of power rather than as a method of protecting the human rights of aliens'.[9]

By the turn of the last century, at the Second Hague Peace Conference, these concerns prompted the adoption of the 1907 Drago-Porter Convention.[10] Albeit limited in scope, this Convention proscribed the enforcement by armed reprisal of public debt obligations. Today, given the increasing importance attached to the notion of an international community as a repository of common values, and the evolving multilateral dimension of State responsibility, one could perhaps say that Lord Palmerston's jingoistic invocation of *Civis Romanus sum* has at least in part been replaced by a more cosmopolitan exclamation: '*Civis mundi sum!*' Indeed, around the time of Lord Palmerston's statement in the British Parliament, similar propositions had already been advanced by Heffter and Bluntschli. They both considered that, in response to a 'public danger', third States could act 'as representatives of mankind' and formally enforce obligations protecting the community interest as a way of promoting *Weltjustiz*.[11]

The basic controversy can thus be stated in simple terms: there is an inherent tension between the need for a more effective legal order notwithstanding decentralisation, and the risks of abuse relating to the allocation of enforcement authority to individual States, even if limited to the most serious illegalities. It is certainly true that the primary means of dealing with major international crises – at least when they impact on international peace and security – do not lie within the law of State responsibility. It is the main responsibility of competent international organisations, notably the United Nations (UN) and its principal political organs to deal with such matters.[12] But the primary function of the Security Council under the UN Charter (at least as originally conceived) is not to restore legal order but to restore public order. These are not necessarily identical: peace enforcement is distinct from law enforcement.[13] Still, the

[9] Dugard, 'First Report on Diplomatic Protection', 212.

[10] See Convention on the Limitation of Employment of Force for Recovery of Contract Debts (The Hague, adopted 18 October 1907, entered into force 26 January 1910), 205 CTS 250.

[11] August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (1844), 191, §110; Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (1868), 241, 263–4, §471–3 (translation supplied).

[12] James Crawford, 'Third Report on State Responsibility', *ILC Yearbook*, 2(1) (2000), 98, para. 372.

[13] See notably Hans Kelsen, *The Law of the United Nations* (Praeger: New York, 1950), 294.

practice of the Security Council under Chapter VII of the UN Charter (even in the post-Cold War era) indicates that it has not always taken enforcement action to restore international public order, let alone acted to restore international legality. On those numerous occasions where the Security Council has not taken enforcement action in response to serious breaches of international law, as, for instance, in the cases of Cambodia, Uganda, Rwanda, Burundi, Burma, Zimbabwe or Syria, States have traditionally only had the bilateral regime of State responsibility to fall back on in order to protect community interests in the absence of recourse to an effective treaty-mechanism. Special Rapporteur Crawford succinctly articulated the problem with the bilateral model of enforcement in the following terms:

> Older structures of bilateral State responsibility are plainly inadequate to deal with gross violations of human rights and humanitarian law, let alone situations threatening the survival of States and peoples.[14]

These concerns neatly encapsulate the basic reason for the gradual rejection of the strictly bilateral model of enforcement in modern international law.[15] At the same time, as some ILC members recognised, 'leaving it up to the . . . United Nations to react to breaches of obligations *erga omnes* bordered on cynicism'.[16] Others have suggested that to rely exclusively on institutional mechanisms would render the enforcement of *erga omnes* obligations a vacuous proposition.[17] For his part, Special Rapporteur Crawford recognised that, although the primary means of dealing with the most serious breaches of international law reside with the Security Council in the discharge of its responsibilities under Chapter VII, the law of State responsibility still had an important role to play.[18] The mere expectation that international organisations will be able to resolve the humanitarian or other crises that often arise from serious breaches of

[14] Crawford, 'Third Report on State Responsibility', 108, para. 411.
[15] See para. 4 of the commentary to Art. 1 ASR, ILC Report (2001), UN Doc. A/56/10, 33.
[16] *ILC Yearbook*, 1 (2000), 305, para. 31 (Mr Simma).
[17] See e.g. H. Fox, 'Reply of Lady Fox', *Annuaire de l'institut de droit international* 71(I) (Pedone, 2005), 158; Theodor Meron, 'International Law in the Age of Human Rights', *Recueil des Cours*, 301 (2003), 288; *ILC Yearbook*, 1 (2001), 107, para. 26 (Mr Pellet); Giorgio Gaja, 'Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts' in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin: Walter de Gruyter, 1989), 155–6; UN Doc. A/C.6/55/SR.17 (27 October 2000), 13, para. 76 (Austria).
[18] Crawford, 'Third Report on State Responsibility', 98, para. 372.

international law was plainly not enough.[19] The law of State responsibility should be able to operate independently of an ineffective Security Council by providing its own means of ensuring a more effective return to international legality in the case of serious illegalities.

Special Rapporteur Crawford also expressed the concern that, if third-party countermeasures were not allowed to enforce fundamental norms, there might be 'further pressure on States to intervene in other, perhaps less desirable ways'.[20] While there was no clear support for third-party countermeasures in international law, his conclusion was nevertheless clear:

> [I]nternational law should offer to States with a legitimate interest in compliance with such [fundamental] obligations, some means of securing compliance which does not involve the use of force [notably, humanitarian intervention] . . . The draft Articles should [therefore] allow collective countermeasures in response to a gross and well-attested breach.[21]

Other ILC members expressed support based on the same rationale:

> The Commission must not forget that it was devising a regime of non-forcible countermeasures which would help avoid situations where States claimed that they had exhausted all peaceful means and adopted the attitude which had been taken by the United Kingdom in the context of the collective measures adopted against Yugoslavia in 1998. If the Commission defined a feasible regime of pacific collective countermeasures, States would be less likely to adopt another course, such as the regrettable one taken in Kosovo.[22]

A similar line of reasoning can be traced back at least to Vattel and von Bulmerinq. For the latter, 'it has always been viewed as a main function of reprisals to prevent a greater evil, war'.[23]

These considerations have not made the concept of third-party countermeasures any less controversial. Critics maintain that the risk of abuse is simply too great. Several States emphasised this point during the lengthy debate on the ILC Articles in the Sixth Committee of the General

[19] Crawford, 'Fourth Report on State Responsibility', 18, para. 74.
[20] Crawford, 'Third Report on State Responsibility', 106, para. 405.
[21] *Ibid*., paras. 405–6. See also *ibid*., paras. 396–7, 401.
[22] *ILC Yearbook*, 1 (2000), 305, para. 33 (Mr Simma). See also *ILC Yearbook*, 1 (2001), 35, para. 4 (Mr Simma); ILC Report (2000), 60, para. 368.
[23] August von Bulmerincq, 'Die Staatstreitigkeiten und ihre Entscheidung ohne Krieg' in F. von Holtzendorff, *Handbuch des Völkerrechts: auf Grundlage Europäischer Staatspraxis*: IV, *Die Staatsstreitigkeiten und ihre Entscheidung* (1889), 84–9; Emer de Vattel, *Le Droit des gens ou principes de la loi naturelle* (1758, English translation 1916), bk II, §354.

Assembly. As Bahrain stated, 'according to one view countermeasures were the prerogative of the more powerful State, and many small States regarded the concept as synonymous with aggression or intervention'.[24] Similarly, Ecuador observed that countermeasures 'were frequently used as an instrument of intervention or aggression'.[25] Likewise, Cuba opined that 'despite the stipulation that the regime of countermeasures would exclude the use of military force, it contained the seeds of aggression because . . . political coercion and economic pressure were as much forms of aggression as was military force'.[26] According to Botswana, third-party countermeasures were 'open to abuse by powerful States against a weaker State that they might particularly dislike for other reasons'.[27] For its part, Germany sounded a note of caution: 'there was a danger that disproportional unilateral acts, which in reality were not justified by the interest they sought to protect, might be disguised countermeasures. That would threaten the credibility of the concept.'[28] In sum, in the words of Tanzania, 'it could hardly be refuted that countermeasures were a threat to small and weak States'.[29]

Other States providing comments on the ILC Articles expressed concern that unilateral third-party countermeasures would have 'disruptive effects';[30] they would be 'potentially highly destabilizing of treaty relations . . . [in particular]by creating a parallel mechanism for responding to serious breaches which lacked the coordinated, balanced and collective features of existing mechanisms'.[31] Responsibility for dealing with the most serious breaches of international law was 'better left to the Security Council' as the law of State responsibility (including third-party countermeasures) was an 'inappropriate vehicle' for such matters.[32] Yet other

[24] UN Doc. A/C.6/47/SR.26 (3 November 1992), 6, para. 18 (Bahrain).
[25] UN Doc. A/C.6/47/SR.30 (6 November 1992), 12, para. 49 (Ecuador).
[26] UN Doc. A/C.6/47/SR.29 (5 November 1992), 14, para. 59 (Cuba). See also e.g. UN Doc. A/C.6/55/SR.22 (1 November 2000), 8–9, para. 52 (Libya).
[27] UN Doc. A/C.6/55/SR.15 (24 October 2000), 10, para. 63 (Botswana).
[28] UN Doc. A/C.6/55/SR.14 (23 October 2000), 10, para. 54 (Germany).
[29] *Ibid.*, 9, para. 46 (Tanzania). Contrast Mongolia's position whose delegation 'regretted, however, that the final draft omitted the provision in the former draft article 54 [2000] for a non-injured State to take countermeasures. As a small State, Mongolia believed that the option of . . . countermeasures should have been preserved in the draft articles' (UN Doc. A/C.6/56/SR.14 (1 November 2001), 9, para. 56).
[30] UN Doc. A/CN.4/515/Add.1 (3 April 2001), 9 (Mexico).
[31] UN Docs. A/CN.4/515 (19 March 2001), 89 (United Kingdom); A/C.6/55/SR.15 (24 October 2000), 4–5, paras. 24–5 (Israel).
[32] UN Doc. A/CN.4/515 (19 March 2001), 53 (United States). See also, e.g., *ILC Yearbook*, 1 (2001), 54, para. 26 (Mr Tomka).

States not only expressed their preference for the traditional role of the Security Council in the maintenance of international peace and security under Chapter VII as a matter of policy, but also opined that a regime of third-party countermeasures would be legally impermissible as it would amount to an 'encroachment on the authority of the Security Council under Chapter VII of the Charter'.[33]

The same criticisms were expressed in the ILC: a regime of third-party countermeasures 'sooner or later might extend to the use of force . . . [and] was incompatible with the [UN] Charter'.[34] Moreover, it was suggested that the concept of third-party countermeasures is but a 'neologism' – a category 'completely invented' *ex post facto* – based on the highly selective and extremely inconsistent practice of a small number of mainly Western States with no evidence of *opinio juris* – not least because that practice was not always even officially designated as relating to third-party countermeasures.[35] Worse still, recognition of third-party countermeasures would constitute a '*lex horrenda*' and be 'an invitation to chaos' serving only to legitimise 'mob-justice', 'vigilantism' and 'power politics'.[36] Put simply, 'under the banner of law, chaos and violence would come to reign among states'.[37] Against this background, on the initial proposal of the United Kingdom, and in order not to jeopardise the approval of the ILC Articles as a whole, Special Rapporteur Crawford introduced a

[33] UN Doc. A/C.6/55/SR.18 (27 October 2000), 4, para. 15 (Mexico). See also UN Docs. A/C.6/56/SR.16 (2 November 2001), 7, para. 40 (Colombia); A/C.6/55/SR.15 (24 October 2000), 3, para. 17 (Iran); A/C.6/55/SR.22 (1 November 2000), 8, para. 52 (Libya); OAS Res. I on the 'Serious Situation in the South Atlantic' (28 April 1982), op. para. 6, 21 ILM (1982), 670–1.

[34] See notably *ILC Yearbook*, 1 (2001), 35, para. 2 (Mr Brownlie). See also ILC Report (2001), 36, para. 54.

[35] *ILC Yearbook*, 1 (2001), 35, paras. 2 and 5 (Mr Brownlie). See also Crawford, 'Third Report on State Responsibility', 104, para. 396(c).

[36] *ILC Yearbook*, 1 (2001), 35, paras. 2 and 5 (Mr Brownlie); Stephen McCaffrey, '*Lex Lata* or the Continuum of State Responsibility' in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin: Walter de Gruyter, 1989), 244; *ILC Yearbook*, 1 (1983), 143, paras. 27–8 (Mr McCaffrey); Krystyna Marek, 'Criminalizing State Responsibility', *Revue belge de droit international*, 14 (1978–9), 481; Eduardo Jimenez de Aréchaga, 'International Law in the Past Third of a Century', *Recueil des Cours*, 159 (1978-I), 275; Bernard Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages', *Recueil des Cours*, 185 (1984-II), 9, 68; UN Doc. A/CN.4/515 (19 March 2001), 69 (China).

[37] Prosper Weil, 'Le Droit international en quête de son identité', *Recueil des Cours* 237 (1992-VI), 9, 433.

compromise proposal that became the saving clause in Article 54 ASR.[38] A decade or so later, it now seems opportune to briefly consider whether these criticisms, as well as the great hopes and fears raised by the concept of third-party countermeasures, have been borne out in practice.

II Third-party countermeasures in practice: salient critiques and other issues

The above overview underlines the common perception that there are several major problems with the concept of third-party countermeasures. Broadly speaking, these can be summarised as follows: (1) third-party countermeasures are a neologism with no basis in international law or its progressive development; (2) third-party countermeasures are contrary to the UN Charter and, in any event, within an evolving regime, the Security Council can operate as an institutional safeguard for third-party countermeasures, the use of which is effectively constrained by the powers of the Council under Chapter VII; and (3) third-party countermeasures are inherently prone to abuse by more powerful States arising from the auto-interpretation of allegedly wrongful conduct making them a mere pretext for power politics, intervention and even aggression (in short, a *lex horrenda*). State practice in turn provides support for the three basic propositions below.

1 Practice may be somewhat obscure, but third-party countermeasures are nevertheless part of the reality of international law

The saving clause in Article 54 ASR was based in part on the conclusion that State practice on third-party countermeasures was limited, embryonic, selective and confined to only a small number of mainly Western States.[39] But the ILC underestimated the true extent, consistency and geographical spread of State practice. There is, in fact, a considerable amount of practice evidencing the gradual recognition of an entitlement of States to adopt third-party countermeasures in response to gross and

[38] See UN Doc. A/C.6/55/14 (23 October 2000), 7, para. 32 (United Kingdom); Crawford, 'Fourth Report on State Responsibility', 15, 18, paras. 60, 74; *ILC Yearbook*, 1 (2001), 110, 112–3, paras. 48 and 64–5 (Chairman of the Drafting Committee, Mr Tomka).

[39] See paras. 3 and 6 of the commentary to Art. 54 ASR, ILC Report (2001), 137, 139.

systematic breaches of communitarian norms.[40] No doubt a similar conclusion motivated the Institut de Droit International to endorse a decentralised regime of third-party countermeasures at its Krakow session in 2005.[41]

It is not the purpose of this chapter to revisit this (still very contentious) matter in any detail. It suffices here to point to the widespread support for the third-party countermeasures adopted by a large and remarkably diverse group of States against Syria in 2011. The adoption of these third-party countermeasures, which have included the freezing of internationally protected assets (such as those belonging to President Al-Assad and the Central Bank of Syria) and a prima facie unlawful membership suspension from the League of Arab States, underline their continuing relevance in the limited toolbox of communitarian law enforcement.[42]

[40] For a detailed assessment, see 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', *British Yearbook of International Law*, 77 (2006), 333–418; Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005), 207–51. See also e.g. Giorgio Gaja, 'Second Report on Obligations and Rights *Erga Omnes* in International Law', 71(1) *Annuaire de l'institut de droit international* (Pedone, 2005), 199–200; Linos-Alexandre Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 1145–8.

[41] See Art. 5 of the resolution entitled 'Obligations *Erga Omnes* in International Law', available at www.idi-iil.org.

[42] See e.g. 'Syria's Assad Hit by EU Sanctions', *The Guardian*, 23 May 2011, available at www.guardian.co.uk/world/2011/may/23/syria-assad-eu-sanctions; 'US to freeze assets of Syrian president Bashar al-Assad and senior officials', *The Guardian*, 18 May 2011, www.guardian.co.uk/world/2011/may/18/bashar-al-assad-syria-us-sanctions; 'Syria Suspended from Arab League', *The Guardian*, 12 November 2011, available at www.guardian.co.uk/world/2011/nov/12/syria-suspended-arab-league; 'Syria Isolated after Unprecedented Arab League Sanctions', *The Telegraph*, 27 November 2011, www.telegraph.co.uk/news/worldnews/middleeast/syria/8919029/Syria-isolated-after-unprecedented-Arab-League-sanctions.html; 'Turkey Imposes Sanctions on Syria', *The Guardian*, 30 November 2011, available at www.guardian.co.uk/world/2011/nov/30/turkey-imposes-sanctions-on-syria; 'Swiss Freeze $53 Million in Syrian Funds', *Reuters*, 23 December 2011, available at www.reuters.com/article/2011/12/23/swiss-banks-assad-idUSL6E7NN0IT20111223; Australian Department of Foreign Affairs and Trade, 'Australia's Autonomous Sanctions: Syria', 13 May 2011, available at www.dfat.gov.au/un/unsc_sanctions/syria_autonomous_sanctions.html; Canadian Department of Foreign Affairs, Trade and Development, 'Syria: Latest Developments', 24 May 2011, available at www.international.gc.ca/sanctions/syria-syrie.aspx; Ministry of Foreign Affairs of Japan, 'Implementation of Measures to Freeze the Assets of President Bashar Al-Assad and his Related Individuals and Entities in Syria', 9 September 2011, available at www.mofa.go.jp/announce/announce/2011/9/0909_02.html.

In February 2012, on the proposal of then French President Sarkozy, the so-called 'Group of Friends of the Syrian People' was created.[43] This is a large and diverse diplomatic coalition of States and international organisations, which was created as a direct response to the Security Council's inability to take resolute action on Syria.[44] In April 2012, the 'Friends of the Syrian People International Working Group on Sanctions' (The Working Group) was formed:

> in order to achieve greater effectiveness in the enforcement of the restrictive measures already put in force by states or international organizations including the measures [such as the freezing of assets of senior Syrian regime officials] stipulated in the Chairman's Conclusions of the first meeting of the Friends' Group.[45]

At a meeting in September 2012, sixty Member States of the Working Group 'welcomed the increasing pressure placed on the [Syrian] regime by the wide range of sanctions [e.g. the freezing of State and Head of State assets] adopted by different states and organisations' and observed that they had 'seriously affected the Syrian regime and have reduced its ability to crack down on the Syrian people'.[46] They added that 'the members of the Group have adopted effective, proportional and coordinated sanctions . . . [and] urge[d] other countries to follow suit'.[47] More specifically:

> [T]he Group called upon all states to take steps to harmonise national and regional sanctions regimes by imposing, at a minimum, an asset freeze on senior Syrian regime officials involved in the repression, as well as an asset freeze on and restrictions on transactions with the Central Bank of Syria, the Commercial Bank of Syria and the Syrian International Islamic Bank to ensure their isolation from the international financial system.[48]

[43] See 'Sarkozy: France, Partners Plan Syria Crisis Group', *The Jerusalem Post*, 4 February 2012, available at www.jpost.com/Middle-East/Sarkozy-France-partners-plan-Syria-crisis-group.

[44] See, however, SC Res. 2118, 27 September 2013.

[45] See Chairman's Conclusions, 2nd Conference of the Group of Friends of the Syrian People (Istanbul, 1 April 2012), para. 18, available at www.mfa.gov.tr/chairman_s-conclusions-second-conference-of-the-group-of-friends-of-the-syrian-people_-1-april-2012_-istanbul.en.mfa; Chairman's Conclusions of the International Conference of the Group of Friends of the Syrian People (Tunis, 24 February 2012), available at www.state.gov/r/pa/prs/ps/2012/02/184642.htm.

[46] See Statement by the Friends of the Syrian People International Working Group on Sanctions (The Hague, 20 September 2012), available at www.government.nl/documents-and-publications/reports.

[47] *Ibid.* [48] *Ibid.*

The Working Group has reaffirmed the same point in several subsequent meetings.[49] As a minimum, these repeated statements, at least insofar as they relate to the freezing of assets belonging to President Al-Assad and the Central Bank of Syria, are indicative of a willingness of a very large number of States to adopt prima facie unlawful unilateral coercive measures for which the justification can seemingly only be explained in legal terms by the concept of third-party countermeasures.

A few comments about practice of a more general nature are also warranted. The evaluation of State practice on third-party countermeasures admittedly raises some difficult questions. One such difficulty concerns the relative obscurity of practice; the primary evidence in the form of statements from States is rarely conclusive. If a State often provides some form of explanation (however brief and perfunctory) for its adoption of a unilateral coercive measure it rarely provides a clear statement to explain which of the sometimes many possible unilateral coercive measures it actually relies upon in a given case to justify its action in legal terms. Then ILC member Opertti Badan alluded to this difficulty when he observed that the concept of third-party countermeasures belongs to 'an area in which the borderline between international law *per se* and foreign relations [is] fairly indistinct'.[50] It is true that relevant examples from practice were 'not always officially designated as [third-party] countermeasures'.[51] Indeed, as Special Rapporteur Crawford has observed, States appear to have an 'implied preference for other concepts'.[52] The fact that foreign policy considerations – and the concomitant sensitivities surrounding the use of non-forcible coercion by individual States – appear to play a prominent role in this area helps to explain the relative obscurity of practice on third-party countermeasures and the considerable complexities involved in assessing it. These complexities are evident in the apparent unwillingness of States to rely expressly on the concept of third-party countermeasures in practice; this is a factor that has significantly clouded the legal issues involved and sometimes led to confusion in the analysis of *opinio juris*.

These problems are compounded in those situations where States have strongly supported third-party countermeasures in their practice, yet opposed them in the Sixth Committee of the General Assembly

[49] See e.g. Communiqué by the Friends of the Syrian People International Working Group on Sanctions (Sofia, 26 February 2013), available at www.government.nl/documents-and-publications/publications.

[50] *ILC Yearbook*, 1 (2000), 296, para. 46 (Mr Opertti Badan).

[51] *ILC Yearbook*, 1 (2001), 35, para. 2 (Mr Brownlie).

[52] Crawford, 'Third Report on State Responsibility', 104, para. 396.

during the ILC's work on State responsibility. As an illustration, the United States and the United Kingdom opposed the concept of third-party countermeasures in the Sixth Committee as an 'inappropriate vehicle' and as a 'highly destabilizing' means of enforcing fundamental norms, yet they have both on numerous occasions resorted to third-party countermeasures in practice.[53] For its part, Tanzania opposed third-party countermeasures by asserting before the Sixth Committee that 'it could hardly be refuted that [third-party] countermeasures were a threat to small and weak States'.[54] And yet Tanzania has itself adopted third-party countermeasures against South Africa, Nigeria, Burundi and Zimbabwe.[55] Likewise, Botswana, another ardent critic in the Sixth Committee,[56] expressed support in the Security Council for the third-party countermeasures adopted against Burundi by certain African States which in that instance at least 'deserve[d] the commendation of the international community'.[57]

While some hesitation may be understandable in accepting the relevance of the mentioned practice to the development of the law on third-party countermeasures, this appears to be an inevitable consequence of the complex interplay between law and politics in this area. Special Rapporteur Riphagen may have been right to observe that 'the more serious the breach of an international obligation, the less likely it is to find an objective legal appraisal of the allowable responses to such a breach'.[58] Still, in the final analysis, as States have relied on the rationale of the concept and no other justifications have been available, the concept of third-party countermeasures is needed to explain the practice of States in legal terms.[59] In short, third-party countermeasures cannot be described as a 'neologism' – a category 'completely invented' by *ex post facto* rationalisations of practice.[60] If the matter was still in doubt a decade ago, third-party countermeasures are today part of the reality of international law.

[53] See UN Doc. A/CN.4/515 (19 March 2001), 53 and 89 (United States and United Kingdom).

[54] UN Doc. A/C.6/55/SR.14 (23 October 2000), 9, para. 46 (Tanzania).

[55] See Dawidowicz, 'Public Law Enforcement without Public Law Safeguards?', 352–4, 386–90, 394–6.

[56] See text above accompanying n. 27 above.

[57] UN Doc. S/PV.3692 (28 August 1996), 16–7 (Botswana).

[58] Willem Riphagen, 'Preliminary Report on State Responsibility', *ILC Yearbook*, 2(1) (1980), 128–9, para. 97.

[59] Dawidowicz, 'Public Law Enforcement without Public Law Safeguards?', 350, 414–5. See also to similar effect Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, 2011), 188.

[60] *ILC Yearbook*, 1 (2001), 35, paras. 2 and 5 (Mr Brownlie).

2 Third-party countermeasures and UN Charter Chapter VII enforcement measures are distinct and may operate in parallel

The influential view in the ILC and the Sixth Committee, already noted above, that a decentralised regime of third-party countermeasures would be contrary to the UN Charter as it would encroach on the powers of the Security Council under Chapter VII, does not withstand scrutiny. At least in part, it is a view initially informed by Special Rapporteur Ago's conclusion from the 1970s that, as a matter of *lex lata*, obligations *erga omnes* were not enforceable by a decentralised regime of third-party countermeasures; but by the organised international community, in the form of the competent organs of the UN, notably the Security Council.[61] From historical experience, in which countermeasures 'were frequently used as an instrument of intervention or aggression',[62] it was not possible to underestimate the risks of abuse involved in pressing recognition of the concept of unilateral third-party countermeasures and the introduction of another circumstance precluding wrongfulness, which 'sooner or later might extend to the use of force'.[63] During the debate on the ILC Articles in the Sixth Committee, several States insisted in categorical terms that third-party countermeasures could only be adopted within the UN framework.[64] Cameroon's position aptly sums up these concerns. It stated:

> [D]raft article 54 [2000] . . . might lead to the taking of multilateral or collective countermeasures simultaneously with other measures taken by the competent United Nations bodies; the [ILC] draft articles must not be allowed to create overlapping legal regimes that could weaken the Organization as a whole or marginalize the Security Council, particularly in the light of the recent and disturbing tendency of some States to take action, including armed intervention, without the Council's consent. The situations envisaged in draft article 54 [2000] were adequately dealt with under Articles 39 to 41 of the Charter of the United Nations, which was the best expression of the will of the community of States.[65]

[61] Roberto Ago, 'Eighth Report on State Responsibility', *ILC Yearbook*, 2(1) (1979), 43, paras. 91–2. See also paras. 12–3 of the commentary to Art. 30 [1996], *ILC Yearbook*, 2(2) (1979), 118–9.

[62] UN Doc. A/C.6/47/SR.30 (6 November 1992), 12, para. 49 (Ecuador).

[63] *ILC Yearbook*, 1 (2001), 35, para. 2 (Mr. Brownlie).

[64] See e.g. UN Docs. A/C.6/55/SR.15 (24 October 2000), 3, para. 17 (Iran); A/C.6/55/SR.22 (1 November 2000), 8, para. 52 (Libya); A/C.6/56/SR.16 (2 November 2001), 7, para. 40 (Colombia); A/CN.4/515/Add.1 (3 April 2001), 9–12 (Mexico); A/C.6/55/SR.18 (27 October 2000), 11, paras. 59–62 (Cuba).

[65] UN Doc. A/C.6/55/SR.24 (3 November 2000), 11, para. 64 (Cameroon).

It was against the background of these concerns that much of the debate in the ILC and Sixth Committee on third-party countermeasures came to focus on the potential role of the Security Council as an institutional safeguard against abuse. But these concerns are not reflected in State practice; and in addition, they conflate the analytical distinction between enforcement measures under Chapter VII of the UN Charter and third-party countermeasures.

A striking feature of the very substantial amount of State practice in the UN period is that third-party countermeasures have largely been adopted without any intervention of the Security Council whatsoever. In fact, in several cases, such as those involving Argentina, Iraq, Burundi, Yugoslavia and Sudan, third-party countermeasures have even been adopted while the Security Council has been actively seized of these matters.[66] Likewise, the third-party countermeasures adopted against Syria in 2011 continue (without much controversy)[67] to operate in parallel with the action taken against it by the Security Council in September 2013.[68] The practice accumulated over several decades provides a strong indication that third-party countermeasures do not contradict the UN Charter, nor unduly encroach on the powers of the Security Council.

The preferred policy option of the Special Rapporteurs on first reading had nevertheless been to link the law of collective security to the law of State responsibility. As it happened, this approach, in its various forms,[69] was overwhelmingly rejected as incompatible with the existing powers of the Security Council under the UN Charter.[70] In any event, the ILC deemed such an institutional safeguard unnecessary given the likely involvement of the Security Council in addressing the most serious illegalities.[71] Ultimately, the complex relationship between

[66] See Dawidowicz, 'Public Law Enforcement without Public Law Safeguards?', 368–74, 384–6, 389–91, 393–4.

[67] For Russia's protest see e.g. UN Doc. S/PV/6627 (4 October 2011), 5 (Russia).

[68] See above n. 44. Previous draft resolutions against Syria had been vetoed by China and Russia: see UN Docs. S/2011/612 (4 October 2011); S/2012/77 (4 February 2012).

[69] Willem Riphagen, 'Fifth Report on State Responsibility', *ILC Yearbook*, 2(1) (1984), 3–4; Willem Riphagen, 'Sixth Report on State Responsibility', *ILC Yearbook*, 2(1) (1985), 5–8, 11, 13–14 (for his draft Arts. 5(e), 9 and 14(3)); Gaetano Arangio-Ruiz, 'Seventh Report on State Responsibility', *ILC Yearbook*, 2(1) (1995), 29–30 (for his draft Arts. 17 and 19).

[70] See para. 9 of the commentary to Art. 40 ASR, ILC Report (2001), 113.

[71] *Ibid.* Other last-minute proposals (compatible with the UN Charter) to subordinate the use of third-party countermeasures to action duly taken under Chapter VII of the UN Charter were not considered. See further Crawford, 'Fourth Report on State Responsibility', 18, para. 73; *ILC Yearbook*, 1 (2001), 40, para. 41 (Mr Economides); *ILC Yearbook*, 1 (2000), 328, para. 49 (Mr Opertti Badan); UN Doc. A/C.6/55/SR.17 (27 October 2000), 14, para. 85 (Greece); A/CN.4/515, 87 (the Netherlands). To similar effect: UN Docs.

third-party countermeasures and the Security Council is safeguarded by Article 59 ASR, which is based on what could perhaps be described as the principles of co-existence and co-ordination.

The principle of co-existence is based on the premise of two distinct spheres of application: the Security Council deals with the political aspects of maintaining or restoring international peace and security, whereas the law of State responsibility (including third-party countermeasures) deals with the legal aspects of serious breaches.[72] As Jordan explained before the Sixth Committee:

> [C]ountermeasures should not be interpreted as an encroachment on the authority of the Security Council under Chapter VII of the Charter. Draft article 59 should provide the necessary guarantees in that respect to those who considered that there was an overlap between the two regimes of measures. Countermeasures could in fact be necessary to ensure that the State committing the internationally wrongful act ceased its action and made reparation for the damage caused.[73]

The principle of co-existence, that is to say, the seemingly clear-cut distinction between the law of State responsibility and the law of collective security,[74] appears to have been the source of some confusion among a number of States in the ILC's work on State responsibility; almost by definition, the Security Council cannot resort to third-party countermeasures. As Spain emphasised before the Sixth Committee:

> [W]hile the Security Council is authorized to take 'enforcement action' under Chapter VII, such measures are not subordinated to the general regime of countermeasures, since they do not necessarily respond to the commission of internationally wrongful acts . . . [T]he Council is not a judicial body, but a political body . . .[75]

A/C.6/55/SR.15 (24 October 2000), 3, para. 17 (Iran); A/C.6/56/SR.11 (29 October 2001), 7, para. 39 (Morocco).

[72] See e.g. ILC Report (1998), UN Doc. A/53/10, 70–1, para. 286; Vera Gowland-Debbas, 'Responsibility and the United Nations Charter' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 116.

[73] UN Doc. A/C.6/55/SR.18 (27 October 2000), 4, para. 15 (Jordan). See also the topical summary of governments' views, in UN Doc. A/CN.4/513 (15 February 2001), 35, para. 189.

[74] See Kelsen, *The Law of the United Nations*, 294 ('the purpose of the enforcement action under Article 39 [of the UN Charter] is not to maintain or restore the law, but to maintain or restore peace, which is not necessarily identical with the law').

[75] UN Doc. A/CN.4/515 (19 March 2001), 92 (Spain).

In the ILC debate, Simma observed that 'it seemed not entirely clear to some States' that third-party countermeasures and enforcement measures under Chapter VII of the UN Charter could not be assimilated.[76] Put simply, there is no *a priori* role for the Security Council in a regime of third-party countermeasures.

A reason for the apparent confusion could be found, as Special Rapporteur Crawford suggested, in what France termed the ILC's 'ambiguous'[77] definition of countermeasures on first reading.[78] It gave the unfortunate impression of including within its definition both institutional (that is, Chapter VII of the UN Charter) and decentralised forms of coercive measures, as opposed to clearly spelling out the critical distinction of a previous wrongful act that separates Chapter VII enforcement measures from countermeasures. As Crawford explained, 'collective responses of that sort were not countermeasures; they were measures authorized by a competent international organization and did not belong in the framework of article 30 [1996] [defining countermeasures on first reading]'.[79] France (followed by Crawford and Simma) indeed articulated the need for this issue to be clarified on second reading, but the matter was not taken further.[80] The ambiguity, then, essentially remains the same in Article 22 ASR.[81] Still, the basic point of distinction remains intact. Countermeasures are a separate genus from Security Council action; they perform different functions and can therefore, in principle, co-exist autonomously in response to the same wrongful conduct. Third-party countermeasures cannot be said to encroach on the (distinct) powers of the Security Council, let alone contravene the UN Charter in any *a priori* sense. That said, even where conceptual boundaries are clearly demarcated in theory, functional ones may not be in practice. This brings us to the more complex principle of co-ordination.

In reality, it is not uncommon for the Security Council – in the maintenance or restoration of international peace and security under Chapter VII of the UN Charter – to adopt enforcement measures aimed at ensuring the cessation of wrongful conduct and/or reparation for injury. In these

[76] *ILC Yearbook*, 1 (1999), 162, para. 79 (Mr Simma).
[77] See UN Doc. A/CN.4/488 (25 March 1998), 82 (France).
[78] *ILC Yearbook*, 1 (1999), 161–2, para. 75 (Mr Crawford). See also *ibid.*, 161, para. 73 (Mr Tomka).
[79] *ILC Yearbook*, 1 (1999), 139, para. 16 (Mr Crawford).
[80] UN Doc. A/CN.4/488, 82 (France); *ILC Yearbook*, 1 (1999), 162, para. 75 (Mr Crawford); *ibid.*, 162, para. 79 (Mr Simma).
[81] See para. 3 of the commentary to Art. 22 ASR, ILC Report (2001), 75.

situations, there is inevitably a point of convergence with the law of State responsibility and, in particular, with the law of countermeasures. The ILC recognised this fact by pointing out that at least '[cessation] is frequently demanded not only by States but also by . . . the Security Council in the face of serious breaches of international law'.[82] It follows that enforcement measures under Chapter VII of the UN Charter, such as various forms of asset freezes, embargoes or other suspensions of treaty rights – to the extent that they overlap with the law of State responsibility – may act either as a complement to the possible concurrent use of third-party countermeasures or operate to constrain such use in a given case.

The extent of the actual interplay or co-ordination between the law of State responsibility (including countermeasures) and the law of collective security raises questions of considerable complexity with no obvious answers from practice. As a general matter, it can be observed that the UN Charter is not a self-contained regime. It can therefore be argued that third-party countermeasures will remain available (subject to overall compliance with its safeguards regime, notably proportionality)[83] to the extent that the Security Council is ineffective; or their use has not been proscribed by the specific language of a given Security Council Resolution; or would otherwise contradict Charter obligations in the circumstances.

3 There is no requirement of a 'widely acknowledged breach', although in practice joint statements on alleged serious illegalities limit the risk of abuse

The major and potentially most effective criticism of countermeasures undoubtedly concerns the inherent risk of abuse associated with the auto-interpretation of allegedly wrongful conduct. It is a risk exacerbated by the factual inequalities between States. As the arbitral tribunal in the *Naulilaa* case was careful to emphasise, 'the first requirement – *sine qua non* – of the right to take reprisals is a motive furnished by an earlier act contrary to the law of nations'.[84] Likewise, the ILC stressed that the

[82] See para. 4 of the commentary to Art. 30 ASR, ILC Report (2001), 89.

[83] The safeguards regime is essentially analogous to the one applicable to bilateral countermeasures. See further Arts. 49–53 ASR, ILC Report (2001), 129–37; Art. 5 of the resolution 'Obligations and Rights *Erga Omnes* in International Law'.

[84] *Responsabilité de l'Allemagne a raison des dommages causés dans les colonies portugaises du sud de l'Afrique* (*Portugal* v. *Germany*) (*Naulilaa* case), Reports of International Arbitral Awards, vol. II (1928), 1027. See further Art. 49 ASR and the commentary thereto, ILC Report (2001), 129–31.

existence of a prior breach of international law entitling a State to invoke the responsibility of the wrongdoing State is a 'fundamental prerequisite' of any lawful countermeasure; its establishment 'presupposes an objective standard'.[85] A State that resorts to countermeasures in the erroneous belief that a breach has occurred does so at its own peril – *caveat actor*.[86] Still, in an essentially decentralised system, 'each State establishes for itself its legal situation vis-à-vis other States'.[87] This raises the spectre that any number of States could individually resort to third-party countermeasures contrary to the obligations incumbent upon them on the basis of the mere assertion or claim of wrongful conduct.

These concerns are understandable and help explain the 'extreme sensitivity'[88] of the topic. A decentralised regime of third-party countermeasures is an institution that affects the very foundations of international law; and, at least in theory, poses a threat of some seriousness to sovereignty and the freedom of action of States within the law (the *domaine réservé*). The fear that a future incarnation of Lord Palmerston might abusively exclaim '*Civis mundi sum!*' as mere pretext for 'power politics'[89] underlies the deep-rooted concern among some States (especially – but by no means limited to – developing States) that a regime of decentralised and self-assessed third-party countermeasures would be 'used as an instrument of intervention and aggression'.[90] In short, on this view, the concept of third-party countermeasures merely 'provided a superficial legitimacy for the bullying of small States on the *claim* that human rights must be respected'.[91]

The proposed solution favoured by the ILC Special Rapporteurs on first reading was therefore to involve the United Nations in the 'objective' prior determination of breach. For his part, Special Rapporteur Riphagen's proposal to involve the Security Council in this process was based on his belief that:

> [T]here is little chance that States generally will accept [a regime of third-party countermeasures] without a legal guarantee that they will not be charged by any or all other States of having committed an international crime, and be faced with demands and countermeasures of any or all other

[85] See paras. 2 and 3 of the commentary to Art. 49 ASR, ILC Report (2001), 130. [86] *Ibid.*
[87] *Air Services Agreement of 27 March 1946 (United States* v. *France)*, Reports of International Arbitral Awards, vol. XVIII, 416 (1979), 443, para. 81.
[88] Crawford, 'Fourth Report on State Responsibility', 14, para. 55.
[89] UN Doc. A/CN.4/515 (19 March 2001), 69 (China).
[90] UN Doc. A/C.6/47/SR.30 (6 Nov. 1992), 12, para. 49 (Ecuador); James Crawford, 'Fourth Report on State Responsibility', 18, para. 71.
[91] *ILC Yearbook*, 1 (2001), 35, para. 2 (Mr Brownlie) (emphasis added).

> States *without an independent and authoritative establishment of the facts and the applicable law*.[92]

In a similar vein, as already alluded to above, Special Rapporteur Arangio-Ruiz proposed a far more elaborate and ambitious institutional safeguards regime for third-party countermeasures informed by the 'indispensable role of international institutions'.[93] In essence, his scheme was based on a two-phase procedure in which the General Assembly or the Security Council would first make a political determination (under Chapter VI of the UN Charter), and the International Court of Justice (ICJ) would later make a decisive legal determination concerning the possible existence of a serious breach.[94] However, this regime was resoundingly rejected in both the ILC and Sixth Committee as inconsistent with the UN Charter; it was simply unrealistic – far removed from States' conception of international law as a decentralised system of law[95] – and, in any event, woefully ineffective. By the time the ICJ would finally authorise the use of individual third-party countermeasures any serious breach (such as genocide) would likely already have been consummated.[96]

On second reading, Special Rapporteur Crawford identified the risk of abuse posed by auto-interpretation as an important 'due process'[97] issue for the target State, but his proposed solution was more attuned to what remained a fundamentally decentralised system of international law enforcement. In the absence of a prior judicial determination of the existence of a previous wrongful act, it is often difficult to assess with confidence whether there has indeed been a violation of international law, let alone a serious violation. As Crawford explained:

> Exactly where the threshold should be set for countermeasures to be taken by individual States, acting not in their own but in the collective interest, is a difficult question. There is an issue of 'due process' so far as concerns

[92] Willem Riphagen, 'Fourth Report on State Responsibility', *ILC Yearbook*, 2(1) (1983), 12, para. 65 (emphasis added).

[93] Gaetano Arangio-Ruiz, 'Seventh Report on State Responsibility', *ILC Yearbook*, 2(1) (1995), 17, para. 70.

[94] *Ibid.*, 17–29, paras. 70–138.

[95] A particularly staunch critic dismissed the proposed regime as a 'castle in the sky', *ILC Yearbook*, 1 (1995), 113, para. 26 (Mr Rosenstock). See also ILC Report (1995), UN Doc. A/50/10, 47, 55–6, paras. 250, 305–7. For a summary of the (mostly) critical views expressed by governments in the 6th Committee debate, see UN Doc. A/CN.4/472/Add.1 (10 January 1996), 25–7, paras. 86–97.

[96] See e.g. *ILC Yearbook*, 1 (1995), 97, paras. 8–9 (Mr Pellet); *ibid.*, 94, para. 51 (Mr Bowett); *ibid.*, 100–1, paras. 20 and 34 (Mr Mahiou); *ibid.*, 118–9, paras. 66–7 (Mr Thiam).

[97] Crawford, 'Third Report on State Responsibility', 37, para. 115.

> the target State, since at the time collective countermeasures are taken, its responsibility for the breach may be merely asserted, not demonstrated, and issues of fact and possible justifications are likely to have been raised and left unresolved.[98]

He concluded that for decentralised third-party countermeasures to be permissible, 'some formula such as a "gross and reliably attested breach" was called for', alternatively formulated as 'gross and well-attested breach' or 'serious and manifest breach'.[99] Ultimately, the ILC left the formula for the prior ascertainment of breach open by the agnostic arrangement embodied in Article 54 ASR. Still, the ILC did make clear that an institutional procedure for the prior ascertainment of breach would contradict the UN Charter and, in any event, be unnecessary given the likely involvement of the main UN political organs in addressing serious breaches.[100]

Finally, in its Krakow Resolution of 2005, the Institut de Droit International proposed its solution to the problem of auto-interpretation. On Rapporteur Gaja's proposal, it concluded that:

> [C]ountermeasures may be taken by States other than those injured *only if there is widespread acknowledgment within the international community of the existence of a breach.*[101]

The Institut explained that 'the reference to the wide acknowledgment of the existence of a breach is designed to limit the risk of unilateral assessment . . . diminish the risk of abuses and ensure that States genuinely seek to protect an interest of the international community'.[102] Importantly, this position found support in practice on third-party countermeasures which has 'generally related to infringements of obligations *erga omnes* that were indeed widely acknowledged'.[103]

Indeed, resort to third-party countermeasures is often preceded by joint statements adopted by States as part of a process of multilateral diplomacy in international fora.[104] As part of this (often lengthy) diplomatic process, the responsible State will normally have been publicly requested in a joint statement to comply with its secondary obligations and will have

[98] *Ibid.* [99] *Ibid.*

[100] See para. 9 of the commentary to Art. 40 ASR, ILC Report (2001), 113.

[101] Giorgio Gaja, 'First Report on Obligations and Rights *Erga Omnes* in International Law', 71(I) *Annuaire de l'institut de droit international* (Pedone, 2005), 148 (emphasis added).

[102] *Ibid.*, 149, 199. [103] *Ibid.*, 200.

[104] See generally, Dawidowicz, 'Public Law Enforcement without Public Law Safeguards?', 333–418.

been notified of the possible imminent adoption of third-party countermeasures against it in the event that it does not promptly return to international legality. Still, practice does not seem to indicate that States have co-operated in this way out of a sense of legal obligation. Instead, these joint statements appear predominantly motivated by an overriding practical imperative: co-ordinating an effective response to the most serious breaches of international law. Two separate considerations appear to bear out this conclusion.

First, as the ILC itself has recognised, it is 'open to question'[105] whether general international law at present entails a positive duty of co-operation in response to serious breaches. The prevalence of the phenomenon of co-operation in response to serious breaches of community norms, especially in the context of international organisations, does not diminish the force of this conclusion. Quite simply, such co-operation is 'often the only way of providing for an effective remedy'.[106] Secondly, a duty of co-operation would seemingly be inconsistent with the instrumental function of countermeasures. As a minimum, States have an individual or autonomous entitlement to claim cessation of breaches of *erga omnes* obligations within the meaning of Article 48 ASR. A requirement of a joint statement, by which a breach must first be 'widely acknowledged', would be inconsistent with the autonomous entitlement of States to at least claim cessation for serious breaches under general international law, a claim *par excellence* enforced by third-party countermeasures. In the absence of clear *opinio juris* to the contrary, it can be presumed that practical considerations of effectiveness have predominantly influenced practice in this field. In principle, then, a State may lawfully resort to third-party countermeasures (assuming a relevant breach has actually occurred) even in those rare circumstances where the breach is not 'widely acknowledged'. Perhaps most importantly, practice also indicates that third-party countermeasures – whatever the mode of establishment of the individual breach – have overall not been adopted in an abusive manner but on the well-founded belief of a serious infringement of a community norm.

III Concluding observations

Third-party countermeasures may still be a controversial topic but they can neither be dismissed in simplistic terms as a '*lex horrenda*'[107] nor

[105] See para. 3 of the commentary to Art. 41 ASR, ILC Report (2001), 114. [106] *Ibid.*
[107] *ILC Yearbook*, 1 (2001), 35, para. 2 (Mr Brownlie).

hailed as a 'saving grace for international law'.[108] In reality, the use of third-party countermeasures has so far proved neither as abusive as many had feared nor as effective as many others had hoped. But the fact is that they are nevertheless an important tool in a limited international law enforcement toolbox. Third-party countermeasures are rarely adopted in isolation. They are almost invariably accompanied by other forms of coercive measures against the target State, such as diplomatic pressure (retorsion) or action by international organisations at both regional and universal levels. It is within the context of such concerted and deliberative action that the discrete and incremental role of third-party countermeasures in a fundamentally decentralised system of community law enforcement is best understood.

Third-party countermeasures are less decentralised than is often assumed. Though they are not legally required, the existence of a serious breach is almost always established and 'widely acknowledged' within international organisations prior to the concerted adoption of third-party countermeasures. States will not normally ascertain the existence of a breach of a community norm in splendid isolation but in concert with other States acting through a deliberative process of multilateral diplomacy. For example, the many serious breaches of international law that triggered the adoption of third-party countermeasures against Syria in 2011 have been 'widely acknowledged' on multiple occasions, including by the Security Council, the General Assembly, the Human Rights Council, the League of Arab States, the Organisation of Islamic Cooperation and the EU. Whatever reasons might justifiably exist to oppose an evolving regime of third-party countermeasures, the specific concern of 'auto-interpretation' appears to be one of limited significance in practice. Moreover, States are reluctant to openly rely on the concept and are more inclined to use it cautiously, being sensitive to accusations of vigilantism, intervention and excessive human rights policing. In fact, as Simma has observed, 'far from obsessively policing human rights violations across the world, the attitude of States towards human rights violations is all too often characterized by a remarkable lack of vigour to counter such breaches'.[109] In short, 'States have hardly shown the excessive human

[108] David Bederman, 'Counterintuiting Countermeasures', *American Journal of International Law*, 96 (2002), 831.

[109] Bruno Simma and Dirk Pulkowski, '*Leges speciales* and Self-contained Regimes' in James Crawford, Alain Pellet and Simon Olleson (eds.), *Handbook of International Responsibility* (Oxford University Press, 2010), 162.

rights "vigilantism" dreaded by some.'[110] These factors may help explain why third-party countermeasures have proved remarkably uncontroversial in international practice – including where issues pertaining to the legitimate powers of the Security Council under the UN Charter have been involved. As James Crawford concluded in his last report as Special Rapporteur:

> While it can be hoped that international organizations will be able to resolve the humanitarian or other crises that often arise from serious breaches of international law, States have not abdicated their powers of individual action.[111]

This appears to be so because States consider that third-party countermeasures perform an important function within a limited law enforcement toolbox and as such cautiously welcome them as a progressive development of international law.

[110] *Ibid.* For the same conclusion see also James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in Ulrich Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), 236; Gaja, 'First Report on Obligations and Rights *Erga Omnes* in International Law', 150–1.

[111] Crawford, 'Fourth Report on State Responsibility', 18, para. 74.