Countermeasures

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Introduction

As used in modern practice, judicial decisions, and literature, the term “countermeasures” covers the main part of the classical subject of “reprisals,” to which the first monographs of international law were devoted in the 14th century (B. de Sassoferrato and G. de Legnano). Two features used to be attached to countermeasures: (a) they are unilateral or individual measures adopted directly and independently by a state that takes the law into its own hands as based on the state’s “subjective” qualification of another state’s prior act as illegal (“self-help” or “self-protection”); (b) the measures would be essentially illegal if not for the fundamental prerequisite of the “objective” existence of a prior wrongful act committed by the state against which the countermeasures are adopted, and for the fulfillment of other requirements, substantive limits, and procedural conditions. In legal literature sometimes countermeasures not only include these measures but also those called “retorsion”: these are unfriendly and perhaps also retaliatory but not illegal irrespective of the conduct of the state these measures are taken against. The measures of retorsion have fallen outside the scope of the International Law Commission’s (ILC’s) work on international responsibility. On the other hand, countermeasures are not always differentiated from “sanctions” (or institutionalized coercive measures), and from unilateral measures to enforce “sanctions.” The development of judicial and institutional processes for furthering compliance and enforcement in general international law has not yet excluded such unsatisfactory legal remedies, as states’ practice and *opinio juris* (or the judicial decisions) prove. Legal scholars are also practically unanimous to recognize the admissibility of law enforcement through countermeasures, whether they consider it expressly or implicitly an exception or a right/faculty (or duty) of states. And so, this recognition is extended to international organizations. The ILC has taken note of all that, having contributed to the more precise development and definition of the countermeasures’ legal regime. The debates have been mainly on the conditions and restrictions to neutralize or reduce the risk of abuse, less on the pros and cons of the codification of that regime. Concerning the legality and legitimacy of countermeasures, there are other requirements related to, inter alia, their object (law-enforcement, not punishment), necessity and proportionality, temporary and reversible character, or the other obligations where fulfillment cannot be suspended as a countermeasure, all of them addressed by the ILC’s draft articles on responsibility. Alongside the recurrent renewal of the discussion relating to the illegality of reprisals/countermeasures involving the use of force, there are probably two other controversial issues, as highlighted during ILC’s work: the interrelationship between recourse to means of dispute settlement and to countermeasures and, in relation to *erga omnes* obligations and peremptory norms, the entitlement (right or duty) of noninjured states to adopt individual countermeasures. Although the term “countermeasure” has been used since at least 1923, as a general concept, referring to domains or disciplines with little or no relation to international law (medicine, materials or electromagnetic engineering, pollution prevention, defense and weapons), in recent years some practice and several academic writings attempt to adapt existing international law, including the law governing the self-help resources available to the victim states (self-defense, retaliation, regression, and the right to take countermeasures), from the kinetic (physical) space to a new one (“the fifth domain”), namely, the cyber domain.

Introductory Works

While some authors remain skeptical about the relevance of enforcement mechanisms (“sanctions”), countermeasures must be put into a comprehensive perspective (social, political, historical, and legal) as a key piece of the foundations and legal basis of obligation of international law and the characterization of international law as a legal system (Fukatsu 1986, O’Connell 2008, Paddeu 2015), even if some authors consider that there cannot be a true system of sanctions based on interstate countermeasures (Leben 1982). Social, political, and historical context helps to explain the degree of development achieved in international law and international society relating the

noncompliance of legal rules, as different from moral, social, and other kinds of rules. It is common to remark that the mechanisms conceived for furthering compliance and enforcement of international law are those that mainly justify to considering international law as a legal order more imperfect or primitive, or less developed, than the domestic laws. In the same way, the international society compared to national societies. Being a manifestation of private justice, like reprisals (Ruffert 2012), countermeasures bear the risk of being more destructive for the international legal order than the alleged prior international wrongful act itself. Moreover, one should realize the increasing significance of alternatives to state-centered enforcement (Damrosch 1997). So institutional mechanisms (through political but also arbitral or judicial processes) are increasingly an alternative to these unilateral or individual countermeasures. Sometimes institutional mechanisms impose the adoption of coercive measures or authorize those measures. Ultimately, arbitral tribunal awards or judicial decisions might have to be enforced by coercive measures. But institutional mechanisms may fail, and decentralized reactions will be justified (Sicilianos 1990). On the other hand, countermeasures must be defined vis-à-vis reprisals, retorsion, reciprocity, and sanctions (Alland 2010). Indeed, the International Law Commission (ILC) has concluded that (institutionalized) sanctions, which an international organization may be entitled to adopt against its members (states or other international organizations) according to its rules, are per se lawful measures and cannot be assimilated to countermeasures. Hence, there are theoretical and practical issues concerning the distinction between (institutionalized) sanctions and (unilateral) countermeasures, namely because the problem of legitimacy and legality assessment (Gowland-Debbas, et al. 2001; Picchio Forlati and Sicilianos 2004). States or international organizations might adopt countermeasures to react against a “wrongful” sanction adopted by an international organization (Tzanakopoulos 2011). Having been examined in relation to the international responsibility of states and international organizations, the study of the role of countermeasures has yet to treat in-depth the process of international responsibility allocated among multiple states, international organizations, and other actors (SHARES).

Alland, Denis. “The Definition of Countermeasures.” In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 1127–1136. Oxford: Oxford University Press, 2010.

Alland undertakes an attempt to determine the contours of the possible meanings vis-à-vis reprisals, retorsion, reciprocity, and sanctions and to evaluate which definition better reflects practice, since the ILC Articles of 2001 do not contain any definition. The author comments on the unilateral character of countermeasures, its pacific character, intrinsic unlawfulness and state control, and the differentiation from the challenge of treaties.

Damrosch, Lori Fisler. “Enforcing International Law through Non-forcible Measures.” *Recueil des Cours: Collected Courses of The Hague Academy of International Law* 269 (1997): 9–250.

Poses conceptual questions concerning compliance and enforcement. The author deals with unilateral economic “sanctions” and measures in multilateral context, inside and outside formal institutional frameworks (illustrated basically through US practice), civil actions in national courts, and criminal actions in national and international tribunals.

Fukatsu, Ei’ichi. “Coercion and the Theory of Sanctions in International Law.” In *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory*. Edited by Ronald St. J. Macdonald and Douglas M. Johnston, 1187–1205. Dordrecht, The Netherlands: Martinus Nijhoff, 1986.

Fukatsu goes over the common elements to “sanctions” in general (moral, social, ethical, and legal) and considers international law as enforced by the reaction and interaction of states, that is, expectations, feelings of the essential importance of the pattern of conduct and coercion (diplomatic, economic, and military) exercised by individual states, a group of states, or international organizations.

Gowland-Debbas, Vera, Mariano García Rubio, and Hassiba Hadj-Sahraouira, eds. *United Nations Sanctions and International Law*. The Hague: Kluwer Law International, 2001.

A collection of essays to reevaluate “sanctions” and the broader peace maintenance function of the Security Council in the light of current community concerns (human rights and humanitarian law, legal rights of implementing states and private rights). Part 1 is devoted to theoretical issues and addresses disputes concerning the definition of sanctions, including the analysis of “unilateral” countermeasures.

Leben, Charles. "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société international." *Annuaire Française du Droit International* 28 (1982): 9–77.

Uses the term "countermeasures" to include both reprisals and retorsion and considers the countermeasures to be sanctions. He poses a question: can there be a true system of sanctions based on the resort to nonarmed countermeasures in interstate decentralized society? His answer is "no," because of the unilateral character, the self-judging, etc.

O'Connell, Mary Ellen. *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement*. Oxford: Oxford University Press, 2008.

O'Connell advocates the "power" (i.e., the ultimate legal authority) of international law and its reality and relevance, focusing on the role and availability of "sanctions" (including countermeasures, as peaceful "sanctions," unilateral or collective) in international law. She revisits the legal literature and the international practice and legal rules.

Paddeu, Federica I. "Countermeasures." In *Max Planck Encyclopedia of Public International Law*. Edited by Rüdiger Wolfrum and Margrét Sólveigardóttir. New York: Oxford University Press, 2015.

Not included neither in the Bernhardt's Encyclopedia (1981–1990) nor in the print edition of the Wolfrum's Max Planck Encyclopedia (2012, 2013), this entry synthesizes the history and development of countermeasures and restates its current regulation, dealing with specific issues.

Picchio Forlati, Laura, and Linos-Alexander Sicilianos, eds. *Economic Sanctions in International Law*. Leiden, The Netherlands: Martinus Nijhoff, 2004.

Presents the current state of research and a selection of the research of some of the participants in the 2000 session of the Center for Studies and Research of the Academy of International Law of The Hague. "Sanctions" include institutional sanctions and decentralized countermeasures, as well as the often inextricable intertwining between these two levels.

Ruffert, Matthias. "Reprisals." In *Max Planck Encyclopedia of Public International Law*. Vol. 8. 2d ed. Edited by Rüdiger Wolfrum, 927. Oxford: Oxford University Press, 2012.

The author completely rewrites K. J. Partsch, "Reprisals," in *Encyclopedia of Public International Law*, Vol. 9, *International Relations and Legal Cooperation in General Diplomacy and Consular Relations*, edited by Rudolf Bernhardt (Amsterdam: North-Holland, 1986), pp. 330–335, dealing with historical evolution and current concept, definition, and legal situation of reprisals as countermeasures in times of war. Available online by subscription, last updated September 2015.

SHARES.

Research Project of the Amsterdam Center for International Law, led by André Nollkaemper, and funded by the European Research Council. SHARES examines the nature and extent of the problem of sharing responsibility allocated among multiple states and other actors in an increasingly interdependent and heterogeneous legal order. The project offers new concepts, principles, and perspectives for understanding how the international legal order deals with shared responsibility.

Sicilianos, Linos-Alexander. *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense*. Paris: Librairie Générale de Droit et Jurisprudence, 1990.

Attempting to theorize on the failure of UN law, the author analyzes the principle (circumstances that back the right of states to react) and the substance (conditions to be observed for the reaction being in accordance with international law) of the decentralized (re)actions to prior wrongful acts.

Tzanakopoulos, Antonios. *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*. New York: Oxford University Press, 2011.

Examines how the UN Security Council, in exercising its power to impose sanctions under Article 41 of the UN Charter, may violate the charter itself and general international law. The author posits that the international responsibility of the UN may be implemented through countermeasures.

General Overviews

Traces of individual or collective self-protection may be identified and found in every age and every people. With the disintegration of the Roman Empire and the consequent absence of a central authority, the tendency to retaliate widened more and more in the European Middle Ages and the Early Modern period: first as an instrument for private persons (private reprisals) but increasingly dependent on the states (public reprisals). As an early sign of the building of a European system of states, the states accepted licensing privateers as a prerogative of recognized states and only these states, as was the case with the prerogative of resorting to war. So reprisals were connected to private vessels (privateers or "(re)prize-takers") acting under a commission issued by the sovereign of a state (called "letter of marquee and reprisal"). Notwithstanding, the contemporary practice, as well as legal scholars' opinions and judicial decisions, shape reprisals not just as a means of redress that avoids war but also as means of law enforcement. The most outstanding change in the legal regime during the first half of the 20th century was the distinction between belligerent reprisals and reprisals in a time of peace, as well as the subsequent prohibition of reprisals involving the use of force in times of peace: this was in the spirit of the Hague Conventions of 1899 and 1907, the League of Nations, and certain other developments in that period. Certainly, the only treaty outlawing (armed) reprisals was the Hague Convention, prohibiting the use of force for the recovery of public debt (1907), and the unlawfulness of (armed) reprisals under the League of Nations was controversial. But it is generally recognized that (armed) reprisals were finally outlawed as a result of Article 2(4) of the UN Charter. Other substantive limits and procedural conditions fulfill the contemporary legal regime of reprisals/countermeasures.

Historical Perspective

As found in Mas Latrie 1875, La Brière 1928, and Colbert 1948 reprisals were originally connected to private persons and vessels. When kings and princes were concentrating their power, they recognized that issuing a commission (a letter of marquee and reprisals) was their prerogative. The collection and use of letters of reprisal were, in the Middle Ages, regulated by certain and generally accepted practices and formalities (Mas Latrie 1875). From a theoretical point of view, legal scholars, including German scholars, distinguished between reprisals as means of law enforcement and measures to obtain the reparation of damages (Le Fur 1919), positing a new legal basis of reprisals: from the bench, the arbitral awards rendered in the *Naulilla* and *Cysne* cases helped form the contemporary international law on reprisals. In the interwar period, international law confirmed the distinction between reprisals in times of war (belligerent reprisals) and reprisals in a time of peace, foreshadowing the prohibition of reprisals involving the use of force in times of peace, which was in the spirit of the Hague Conventions of 1899 and 1907, the League of Nations, and other developments in that period (La Brière 1928, Institut de Droit International 1934, Politis 1934). The progress among the collective security and sanction systems enshrined in the covenant of the League of Nations and in the charter of the United Nations did not suffice to set some forms of traditional self-protection aside, though few authors assume that the traditional unilateral resort to force, let alone self-defense, has survived the prohibition of Article 2.4 of the UN Charter (Colbert 1948). Taking into account the history of reprisals up to 1945, we have seen the paradoxical position that violence occupies as a source of authority and justice in international law, assuming that violence is both necessary and impossible in the international legal system (Barsalou 2010).

Barsalou, Olivier. "The History of Reprisals up to 1945: Some Lessons Learned and Unlearned for Contemporary International Law." *Military Law and the Law of War Review* 49 (2010): 335–367.

Provides a critical overview of the history, theoretical foundations, and rules and principles governing the use of reprisals in international law. Barsalou highlights the paradoxical position that violence occupies as a source of authority and justice in international law, assuming that violence is both necessary and impossible in the international legal system.

Colbert, Evelyn. *Retaliation in International Law*. New York: King's Crown, 1948.

Colbert wrote a history of the use of retaliation (private reprisals and public reprisals adopted by nations) during war and peace from the 17th century through World War I, represents the supporters of the minority trend who maintain that some forms of traditional unilateral resort to force, let alone self-defense, have survived the prohibition of Article 2.4 of the UN Charter.

Institut de Droit International. "Le régime des représailles en temps de paix." *Annuaire de l'Institut de Droit International* 38 (1934): 708–711.

Resolution adopted by the institute in the 1934 Paris session. The Institute codifies the law on reprisals, namely definition and distinction from related measures (retortion, self-defense, etc.), prohibition of armed reprisals, priority of means of peaceful settlement, and conditions of exercise. Also in *Résolutions de l'Institut de Droit International 1873–1956* (Basel, Switzerland: Editions juridiques et sociologiques, 1957), p. 167.

La Brière, Yves-Marie Leroy de. "Évolution de la doctrine et de la pratique en matière de représailles." *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 22 (1928): 241–294.

The author's opinions about the disappearance of reprisals are strong, and he deals with the law of reprisals during the Middle Ages and reprisals in times of war and peace in modern law. As he thinks reprisals constitute one of the modes of war, he takes note of the evolution from 1907 and posits the "expiration" of reprisals in time of peace.

Le Fur, Louis. *Des représailles en temps de guerre: Représailles et réparations*. Paris: Recueil Sirey, 1919.

Distinguishes between reprisals as means of law enforcement and measures to obtain the reparation of damages. Studies the legal basis of reprisals, particularly the classic theory of German scholars, and the limits and conditions of exercise (treatment of war prisoners and wounded, third states, etc.)

Mas Latrie, René Marie Louis de, comte de. *Du droit de marque ou de représailles au Moyen Âge, suivi de pièces justificatives*. Paris: Baur, 1875.

The author established that the collection and use of letters of reprisal were, in the Middle Ages, regulated by certain and generally accepted practices and formalities. He gives a selection of original pieces collected by him in the archives of Genoa, Florence, and Venice, and in the valuable collection Doat of the Imperial Library in Paris that have helped him to write his study. Text available online.

Politis, Nicolas. "Le régime des représailles en temps de paix—Rapport et projet de résolution et de règlement." *Annuaire de l'Institut de Droit International* 38 (1934): 1–166.

Having been rapporteur of the works of the Institute of International Law, Politis gathered the *travaux préparatoires* leading to the resolution adopted in the 1934 Paris session on reprisals in times of peace.

Contemporary International Law

Bearing in mind the historical perspective of reprisals (e.g., de Guttry 1985, Elagab 1988), authors that write on the contemporary international legal status of reprisals focus on their admissibility and legal regime. First of all, as a result of the general prohibition on use of force imposed by Article 2.4 of the UN Charter, armed reprisals in times of peace have generally been deemed no longer legal after 1945 (an exception is Dinstein 2012); but the possibility remains of other reprisals, including some belligerent reprisals, even if there are divergences concerning the concept of reprisals (Venezia 1960). More recently, the 1978 arbitral award in the *Aerial Services Agreement* case and the work of the International Law Commission (ILC) on the law of responsibility have renewed interest in countermeasures (Pueyo Losa 1988). Monographic studies have proliferated since then (e.g., Zoller 1984, de Guttry 1985, Elagab 1988, Elagab 1999, Alland

1994, or Focarelli 1994), some of them devoted to the study of countermeasures in a specific field and comprising measures of retorsion, sanctions, and the *exceptio non adimplenti* (Boisson de Chazournes 1992), others to the analysis of one state practice (Ruiloba Alvariño 2012). All of them deal with the terminology (reprisals, retorsion, sanction, countermeasures, etc.) and contribute to the definition of the legal framework of countermeasures; perhaps Focarelli 1994 is the work that most challenges the "common ideas" about the legal regime of countermeasures, notably on proportionality and the settlement of disputes.

Alland, Denis. *Justice privée et ordre juridique international: Étude théorique des contre-mesures en droit international public*. Paris: A. Pedone, 1994.

Addresses the recognition and legality of countermeasures in the international legal order. According to the author, international law admits countermeasures to regulate their exercise, focusing particularly in the motives that inspired them and their intended purpose (including the principle of proportionality) as well as the entitlement to take countermeasures and the procedural conditions of countermeasures.

Boisson de Chazournes, Laurence. *Les contre-mesures dans les relations internationales économiques*. Geneva, Switzerland: Institut Universitaire de Hautes Études Internationales, 1992.

Deals with measures relating to the management of international trade, the protection of intellectual property rights, and the protection of investments. The author analyzes the place and the role of countermeasures (their morphology, dynamic, and conditions), which the purpose of demonstrating how the legal regime minimizes the risks of countermeasures.

de Guttry, Andrea. *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale*. Milan: Giuffrè, 1985.

The author deals with reprisals and their autonomous configuration. From the precedents relevant for a reconstruction of the reprisals, de Guttry analyzes the legality of the use of reprisals, and the positions of the states therein, the compatibility of reprisals with the principles of the UN Charter, and the conditions of exercise.

Dinstein, Yoram. *War, Aggression and Self-Defence*. Cambridge, UK: Cambridge University Press, 2012.

First published in 1988, this book is a guide to the legal issues of war and peace, armed attack, self-defense, and enforcement measures taken under the aegis of the Security Council. Dinstein purports that "defensive armed reprisals" are allowed because they come within the scope of permissible self-defense, in conformity with Article 51 of the UN Charter.

Elagab, Omer Yousif. *The Legality of Non-forcible Counter-Measures in International Law*. Oxford: Clarendon, 1988.

Examines the history (from the 17th century up to 1945) and current status of the nonforcible countermeasures taken in the context of bilateral relations in customary international law since 1945. Through the analysis of practice, doctrine, and cases, Elagab elucidates the autonomy of countermeasures, the conditions under which states might be entitled to employ them, the collateral constraints and the policy considerations, as well as the legality of economic coercion.

Elagab, Omer Yousif. "The Place of Non-forcible Counter-Measures in Contemporary International Law." In *The Reality of International Law: Essays in Honour of Ian Brownlie*. Edited by Guy S. Goodwin-Gill and Stefan Talmon, 125–151. Oxford: Oxford University Press, 1999.

In this chapter, the author updates the developments contained in his 1988 monograph, analyzing the conditions for resorting to non-forcible countermeasures (prior demand, proportionality, and the existence of breach), identifying major areas in international law in which countermeasures have no place, and discussing the relationship dispute-settlement procedures and countermeasures.

Focarelli, Carlo. *Le contromisure nel diritto internazionale*. Milan: A. Giuffrè, 1994.

Undertakes a study of countermeasures (including self-defense) largely based on state practice after 1945. Focarelli draws the conclusion that consuetudinary law does not require the “sommation” or the offer to settle the dispute prior to the taking of (even nonarmed) countermeasures, as there is yet no requirement of proportionality.

Pueyo Losa, Jorge. “El derecho a las represalias en tiempo de paz, límites y condiciones de ejercicio.” *Revista Española de Derecho Internacional* 40 (1988): 9–40.

The author reflects in light of the ILC work on state responsibility. He deals with the admissibility of reprisals in general international law and the conditions of exercise: the prior demand and resort to peaceful settlement of disputes as well as the exceptions and proportionality.

Ruiloba Alvariño, Julia. *Las contramedidas: Análisis de la práctica española*. Madrid: Dilex, 2012.

The author analyzes the regime of countermeasures in international law and the Spanish practice in the light of the reports of the International Legal Office of the Spanish Ministry of Foreign Affairs, between 1938 and 1978, and since the adoption of the Spanish Constitution of 1978.

Venezia, Jean-Claude. “La notion de représailles en droit international public.” *Revue Générale de Droit International Public* 64 (1960): 465–498.

Poses the question of whether a concept of reprisals exists in international law. Suggests that reprisals are not defined from an objective perspective but from a subjective perspective, that is, based on the conditions of exercise and the effects.

Zoller, Elisabeth. *Peacetime Unilateral Remedies: An Analysis of Countermeasures*. Dobbs Ferry, NY: Transnational, 1984.

Zoller inquires about the usefulness of the term “countermeasures” instead of retaliation or reprisals, in particular to what extent it contributes to a distinction of certain common forms of international action (retorsion, reciprocity, suspension and termination of a treaty and reprisals). Once countermeasures are referred to a precise legal concept, the author tries to define the legal framework of countermeasures.

Textbooks

Modern textbooks usually deal with countermeasures as the International Law Commission (ILC) has done, in its work on the responsibility of states for internationally wrongful acts and on the responsibility of international organizations: as circumstances precluding wrongfulness and as means of law enforcement (responses to breaches of international obligations). Most of the authors identify countermeasures with the ILC’s concept of countermeasures (generally as measures taken by states), and differentiate countermeasures from related institutions such as retorsion or sanctions. (Notwithstanding Carrillo Salcedo 1991 or Pastor Ridruejo 2019, among others, qualify countermeasures as “sanctions” others consider the measures of retorsion as countermeasures, e.g., Schachter 1991). Textbooks have been updated as the ILC has been making progress in its work on the law of responsibility, and new practice and judicial decisions appeared. Although countermeasures are deemed to replace traditional reprisals, some of the authors distinguish even countermeasures from reprisals (which aim to punish the responsible state and not to induce it into compliance) and economic coercion not constrained by “the niceties of the requirements of countermeasures” (White and Abass 2018). Few of them qualify self-defense as a countermeasure (Conforti 2018). The authors also differentiate countermeasures and the suspension or termination of treaty obligations due to material breach within the meaning of Article 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties. No author denies that the concept of lawful nonforcible measures survived the new world order of the post-1945 period (namely for the UN Charter accords prioritizing the peaceful resolution of disputes rather than to the enforcement of law; see Schachter 1991), yet they consider the limitations that have been placed upon the application of countermeasures, i.e., the nonforcible character (Nguyen, et al. 2009). The principles of proportionality, temporarily, and reversibility, as well as the obligations that cannot be affected by countermeasures and other limitations that have been identified by the ILC and judicial decisions (*Naulilaa*, *Air Service Agreement*, *Gabčíkovo-Nagymaros Project*, etc.), all find a place in the textbooks. Countermeasures are considered somehow as “residual” measures, as states may deviate from the general (decentralized) regime (e.g.,

creating “self-contained regimes”). Furthermore, the authors dedicate themselves to questions of the interrelationship between decentralized reactions and the system of collective security and whether countermeasures can be taken by third states, that is, other than the (directly) injured state and the responsible state (Remiro Brotóns, et al. 2007; Remiro Brotóns, et al. 2010); some authors consider that the right of third states to take countermeasures is consolidated in contemporary international law (Carrillo Salcedo 1991, Schachter 1991, Dupuy and Kerbrat 2018). It is not so usual to deal also with the regulation and effects of countermeasures in domestic law (Conforti 2018 is an exception).

Carrillo Salcedo, Juan Antonio. *Curso de Derecho Internacional Público: Introducción a su estructura, dinámica y funciones*. Madrid: Tecnos, 1991.

Deals with retorsion and reprisals (countermeasures), commenting on the inadequacies of general international law concerning sanctions or countermeasures to enforce the law. Furthermore, he stresses the trends in contemporary international law: the prohibition of armed reprisals and the consolidation of the right of third states to take countermeasures.

Conforti, Benedetto. *Diritto internazionale*. 11th ed. Naples, Italy: Editoriale Scientifica, 2018.

Places the legal consequences of breaches of international obligations in a theoretical perspective: he analyzes the divergent thoughts of Anzilotti and Kelsen, to reach the conclusion that “self-help” is the “normal” reaction against the internationally wrongful act. Countermeasures (reprisals) are the most relevant measures of self-help.

Dupuy, Pierre-Marie, and Yann Kerbrat. *Droit international public*. 14th ed. Paris: Dalloz, 2018.

Originally published in 1992. Dealing with “sanctions” and law enforcement measures, Dupuy highlights the limited contribution of international organizations (control of decentralized measures and “sanctions”). He distinguishes between individual countermeasures by the injured state (including retorsion and reprisals, and studying the specificities of countermeasures in the economic field) and “solidarity measures” by (third) states.

Nguyen, Quoc Dinh, Patrick Daillier, Mathias Forteau, and Alain Pellet. *Droit international public*. Paris: Librairie Générale de Droit et Jurisprudence, 2009.

Deals with countermeasures within the framework of “sanctions” and limitations to coercion, that is, the prevention and regulation of the resort to coercive measures, beginning with the prohibitions of armed reprisals. The authors treat the legality and the practice of countermeasures.

Pastor Ridruejo, José Antonio. *Curso de derecho internacional público y organizaciones internacionales*. 23d ed. Madrid: Tecnos, 2019.

Considers a “sanction” to be every consequence of an internationally wrongful act, including the reparation. He deals with reprisals (countermeasures) and retorsion as the two main modes of self-protection or self-help.

Remiro Brotóns, Antonio, Rosa M. Riquelme Cortado, Javier Díez-Hochleitner, Esperanza Orihuela Calatayud, and Luis Pérez-Prat Durbán. *Derecho internacional*. Valencia, Spain: Tirant lo Blanch, 2007.

Originally published in 1997. Distinguishes retorsion from reprisals, sanctions, and countermeasures. Dealing with countermeasures, the authors analyze their common substantive limits and procedural conditions. They posit two questions, one about the interrelationship between decentralized reactions and the system of collective security and another concerning the position of third states against international crimes.

Remiro Brotóns, Antonio, Rosa M. Riquelme Cortado, Javier Díez-Hochleitner, Esperanza Orihuela Calatayud, and Luis Pérez-Prat Durbán. *Derecho internacional: Curso general*. Valencia, Spain: Tirant lo Blanch, 2010.

A second publication following Remiro Brotóns, et al. 2007.

Schachter, Oscar. *International Law in Theory and Practice*. Dordrecht, The Netherlands: Martinus Nijhoff, 1991.

Schachter acknowledges that the victims of violations have continued to resort to countermeasures (including retorsion) for the UN Charter accords priority to the peaceful resolution of disputes rather than to the enforcement of law. He examines the conditions and limitations that are not entirely free from controversy, including recourse to peaceful settlement.

White, Nigel D., and Ademola Abass. "Countermeasures and Sanctions." In *International Law*. 5th ed. Edited by Malcolm D. Evans, 521–547. Oxford: Oxford University Press, 2018.

Dealing with responses to breaches of international obligations, the authors consider that in between countermeasures (nonforcible measures taken by states, which in ILC terms the paradigm is the *US-French Air Services Arbitration* of 1978) and sanctions (nonforcible measures taken by international organizations), there are related doctrines of retorsion, reprisals, and economic coercion.

Judicial Decisions

Few conclusions by arbitrators or judges have explicitly and specifically affirm the right or faculty to take countermeasures. This is hardly the principle on which the differing views of states, parties to disputes, or the judicial or doctrinal views clash. The issues that are the subject of discussion or of rulings are generally the substantive and procedural conditions that the taking of countermeasures is subjected to: namely, whether or not the adoption of countermeasures should in any case have been contingent on failure of a prior attempt to secure reparations; whether the adoption of countermeasures was admissible despite the content of the rights infringed and the obligations not performed as a reaction; whether or not proportionality should be or had in fact been respected; or whether or not the state resorting to countermeasures has complied with dispute settlement procedures, etc. The "classical" judicial formulation of the right to adopt countermeasures (then reprisals) was due to the Portugal-Germany Arbitration Tribunal, established under paragraph 4 of the annex to Articles 297 and 298 of the Treaty of Versailles (1919), namely, in the awards related to the *Naulilaa* incident (*Portugal v. Germany* [1928]) and the *Cysne* case (*Portugal v. Germany* [1930]), both cited under Arbitral Tribunals. It is noteworthy that, despite the existence of the Permanent Court of International of Justice (since 1920) and after the International Court of Justice (since 1945), it has been another arbitral tribunal (the tribunal in the Air Service Agreement case, cited under Arbitral Tribunals) that has first contributed to the "modern" legal regime of countermeasures. These three decisions recognized the legitimacy of countermeasures in certain cases, provided certain conditions are met. Later, somehow intermingling arbitral and judicial determinations and the International Law Commission's (ILC's) work on state responsibility, sometimes explicitly, at other times implicitly, alongside some interesting developments in previous judgments (International Court of Justice 1949, International Court of Justice 1970, International Court of Justice 1972, International Court of Justice 1980, and International Court of Justice 1986, all cited under International Court of Justice) and advisory opinions (International Court of Justice 1971 cited under International Court of Justice), it has undoubtedly been the judgment in International Court of Justice 1997, cited under International Court of Justice, where the ICJ has confirmed the recognizance of the existence of countermeasures as part of international law and relevant aspects of the legal regime of countermeasures, including the distinction between the law of treaties (exception of nonperformance) and the law of state responsibility (countermeasures). International Court of Justice 1986 and International Court of Justice 2003, cited under International Court of Justice, deal with countermeasures and the use of force. Later, other international tribunals have drawn conclusions of the judicial and arbitral precedents and the work of the ILC on international responsibility—for example the more recent (2007) *Guyana v. Suriname* award or the application of the rules on countermeasures in investment claims (cited under Arbitral Tribunals and Paparinskis 2008 and Parlett 2015 [cited under Arbitral Tribunals]).

Arbitral Tribunals

The “classical” judicial formulation of the right to adopt reprisals was due to the Portugal/Germany Arbitration Tribunal, which rendered the awards relating to the *Naulilaa* incident (*Portugal v. Germany* [1928]) and the *Cysne* case (*Portugal v. Germany* [1930]). Years later, it was another arbitral tribunal (the tribunal in the Air Service Agreement case) that first contributed to the “modern” legal regime of countermeasures. The three decisions recognized the legitimacy of countermeasures in certain cases, provided certain conditions are met, but it has been the Arbitral Tribunal Constituted Pursuant to Article 287, and in accordance with Annex 7, of the United Nations Convention on the Law of the Sea, *Guyana v. Suriname* (2007), which relied upon the “well-established” principle of international law that countermeasures may not involve the use of force; this tribunal also recognized the priority of using all available peaceful means of addressing the breach, notably compulsory dispute settlement procedures, including a court or tribunal with authority to prescribe provisional measures. Simultaneously and subsequently, other arbitral tribunals constituted, for example, in accordance with Chapter XI of the North American Free Trade Agreement have ruled on arguments regarding countermeasures, such as *Cargill, Inc. v. United Mexican States* 2009 and related arbitrations in *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* 2007 and *Corn Products International v. United Mexican States* 2008.

Air Service Agreement of 27 March 1946 between the United States of America and France: 9 December 1978. *Reports of International Arbitral Awards* 18 (1978): 417–493.

The tribunal formulates what is to be considered the state of the art of international law concerning countermeasures, its legitimacy, and the limits and conditions in the light of the existence either of a machinery of negotiations or of a mechanism of arbitration or judicial settlement. It was revealed that it was difficult for arbitrators to agree about judging of proportionality.

***Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*. Arbitral Tribunal constituted under Chapter XI of the North American Free Trade Agreement (ICSID Case No. ARB (AF)/04/5), 21 November 2007.**

The tribunal analyzes the *lex specialis* clause in ILC articles and customary international law on countermeasures (previous breach, object and purpose and proportionality), coming to this conclusion after analysis of three theories of investor (procedural or substantive) rights (of access) in NAFTA.

***Cargill, Inc. v. United Mexican States*. Arbitral Tribunal constituted under Chapter XI of the North American Free Trade Agreement (ICSID Case No. ARB(AF)/05/2), 13 August 2009, dispatched 18 September 2009.**

The tribunal approaches the issue of countermeasures as circumstances precluding the wrongfulness recognizing both the central position of the work of the ILC and the importance of ascertaining the applicable custom in the light of the ILC’s articles and the particular facts of the case.

***Corn Products International v. United Mexican States*. Arbitral Tribunal constituted under Chapter XI of the North American Free Trade Agreement (ICSID Case No. ARB (AF)/04/1), 15 January 2008).**

The tribunal analyzes international law regarding countermeasures and whether Mexico is precluded from advancing a countermeasures defense because of the WTO decisions, whether international law on countermeasures is applicable to claims under Chapter XI and whether the requirements for a lawful countermeasure are satisfied.

***Guyana v. Suriname*. Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea. Permanent Court of Arbitration, The Hague, 17 September 2007.**

The tribunal relied upon the well-established principle of international law that countermeasures may not involve the use of force, as reflected in the ILC Draft Articles on state responsibility at Article 50.1(a), and the availability of peaceful means of addressing the breach, notably resorting to compulsory dispute settlement procedures, including a court or tribunal with authority to prescribe provisional measures.

Paparinskis, Martins. "Investment Arbitration and the Law of Countermeasures." *British Yearbook of International Law* 79.1 (2008): 264–454.

The author seeks to examine the contemporary relationship between the two concepts that typify the contrast between classic and modern approaches to investment protection law in perhaps the starkest terms: the law of countermeasures and investment arbitration. Available online by subscription.

Parlett, Kate. "The Application of the Rules on Countermeasures in Investment Claims. Visions and Realities of International Law as an Open System." In *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*. Edited by Christine Chinkin and Freya Baetens, 389–405. Cambridge, UK: Cambridge University Press, 2015.

Building upon the 2002 published Crawford's reflection on international law as an open system (states, intergovernmental organizations, individuals, companies and so on), the author analyzes the extent to which the rules on countermeasures also apply to claims brought by nonstate actors, and, in particular, to investment treaty claims.

***Portugal v. Germany*. Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne): 31 juillet 1928. *Recueil des Sentences Arbitrales* 2 (2006): 1011–1033.**

From contemporary literature, mainly German, the tribunal established when and in what circumstances reprisals (involving force, in the case) were to be deemed legitimate measures, dealing with several requirements (prior wrongful act and unfulfilled demand and proportionality). But the tribunal did not deal with several aspects of reprisals purported by many scholars, such as the temporary character of reprisals, the limitations of reprisals based on humanity and good faith, and the limited object of reprisals.

***Portugal v. Germany*. Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal contre Allemagne) 30 juin 1930. *Recueil des Sentences Arbitrales* 2 (2006): 1035–1077.**

Building upon the 1928 *Naulilaa* award and the doctrine, the tribunal demonstrates its opinion that reprisals must be directed against the responsible state and are not justified against third states.

International Court of Justice

The International Court of Justice (ICJ) has overseen some interesting developments in the legal regime of countermeasures. Though International Court of Justice 1949 has been generally interpreted as condemning armed reprisals and contributing to the consolidation of the prohibition of use of force into a general rule, and later the court affirmed the prohibition of the use of force and the criteria of self-defense as an exception in International Court of Justice 1986 or International Court of Justice 2003, the court drew a distinction between serious and nonserious breaches of the rule, referring enigmatically to "proportionate countermeasures" against acts of force less serious than an armed attack (see International Court of Justice 1986, also the separate opinion of Judge Simma in International Court of Justice 2003). In other judgments, the court has stressed the relevance of the obligations of dispute settlement contained in a treaty the continued validity or effect of which is challenged by a merely unilateral suspension (see International Court of Justice 1972), even vis-à-vis countermeasures (see International Court of Justice 1980); or it has recognized the particular nature of diplomatic law as a "self-contained" regime (see International Court of Justice 1980). In International Court of Justice 1971 the ICJ posited limitations to (counter)measures based on humanitarian concern. On the other hand, an *obiter dictum* in International Court of Justice 1970 is interpreted as the recognition of the right of "third" states to react against the infringement of an obligation owed to the international community as a whole. Explicitly taking into account the International Law Commission's (ILC's) work on state responsibility, and contributing to define the legal regime of countermeasures, the ICJ's judgment in International Court of Justice 1997 has confirmed the recognizance of the existence of countermeasures as part of international law and relevant aspects of that legal regime, including the distinction between the exception of nonperformance and countermeasures.

International Court of Justice. "Corfu Channel Case (Merits): Judgment of April 9th, 1949." *ICJ Reports* (1949): 4–169.

The court did not support explicitly the condemnation of armed reprisals but rejected the restrictive interpretation of Article 2(4) advanced by the United Kingdom, thus consolidating the prohibition of use of force (the "policy of force") into a general rule with respect to the recovering of the mines from the Corfu Channel by the British navy ("Operation Retail").

International Court of Justice. "Case Concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain) (Second Phase): Judgment of 5 February 1970." *ICJ Reports* (1970): 3–53.

In the case of an obligation owed to the international community as a whole, ICJ has affirmed that all states have a legal interest in compliance.

International Court of Justice. "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970): Advisory Opinion of 21 June 1971." *ICJ Reports* (1971): 16–54.

The ICJ affirmed the duty not to recognize as lawful a situation emerging from a wrongful act, but excluded (counter)measures such as nonperformance of treaties or deprivation of advantages derived from international cooperation as consequences of the wrongful act, as these (counter)measures would damage the "injured entity," that is, the population of Namibia itself.

International Court of Justice. "Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan): Judgment of 18 August 1972." *ICJ Reports* (1972): 46–75.

The court reaffirmed the principle that dispute-settlement provisions must be upheld notwithstanding that they are contained in a treaty at the heart of the dispute and the continued validity or effect of which is challenged by a merely unilateral suspension.

International Court of Justice. "Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran): Judgment of 24 May 1980." *ICJ Reports* (1980): 3–46.

The court asserts here that existing third-party dispute settlement mechanisms remain in force notwithstanding a dispute that has given rise to countermeasures and has recognized the particular nature of diplomatic law as a "self-contained" regime. It also comments on the incursion into Iranian territory made by US military units pending the case before the court.

International Court of Justice. "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits: Judgment of 27 June 1986." *ICJ Reports* (1986): 14–150.

The court indirectly condemned countermeasures involving the use of force in asserting the customary nature of the 1970 declaration. Notwithstanding, the court drew a distinction between serious and nonserious breaches of the Article 2(4)e, and referred enigmatically to the exclusion of "collective countermeasures involving the use of force" but not of "proportionate counter-measures" against acts of force less serious than an armed attack.

International Court of Justice. "Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997." *ICJ Reports* (1997): 7–84.

ICJ drew a clear line between the law of treaties and the law of responsibility, disentangling the mixture of arguments advanced by Hungary. The court clearly accepted the principle of countermeasures, provided certain conditions are met (proportionality, purpose, reversibility, prior call upon the responsible, and these two branches of international law.

International Court of Justice. "Oil Platforms (Islamic Republic of Iran v. United States of America): Judgment of 6 November 2003." *ICJ Reports* (2003): 161–219.

The court focused on the international law of self-defense, examining thus whether there was an armed attack (i.e., a "most grave" form of the use of force) and fulfillment of the criteria of necessity and proportionality. Yet Judge Simma brought up the *Nicaragua* case and defined "proportionate counter-measures" as "defensive military action 'short of' full-scale self-defence" (see Separate Opinion of Judge Simma).

Work of the International Law Commission on State Responsibility

After the International Law Commission (ILC) selected state responsibility among the topics it considered suitable for codification (1949), the first special rapporteur, F. V. García Amador, dealt with the question of responsibility for injuries to persons or property of aliens. But the commission decided to change the scope and approach to the topic, including even relations that give the state injured by an internationally wrongful act the possibility of responding by way of countermeasures. Three special rapporteurs, Roberto Ago (rapporteur from 1969 to 1980), W. Riphagen (rapporteur from 1980 to 1987) and G. Arangio-Ruiz (rapporteur from 1987 to 1996) contribute to the adopting of draft articles on first reading in 1996. To deal with the second reading, the commission appointed a new special rapporteur, James Crawford (from 1997 to 2001), and the commission finalized the second reading in 2001, in view of further comments submitted by governments with regard to the draft articles. Perhaps articles on countermeasures deal with the most difficult and controversial aspects of the subject of state responsibility. There were different views concerning whether to retain the detailed provisions on countermeasures other than the one recognizing them as circumstances precluding wrongfulness, that is, provisions concerning countermeasures as a modality of implementation of international responsibility. Although the regime of countermeasures was only partly developed under customary law, the commission eventually accepted that judicial decisions, state practice, and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. The work of the ILC has drawn the attention of most scholars (Alland 1987, Malanczuk 1987, Bederman 2002, Sicilianos 2005, Lesaffre 2010, all cited under Scholarly Writings on the 1996 and 2001 Draft Articles Adopted by the International Law Commission), some of them members of the ILC itself (Crawford, et al. 2010, cited under Scholarly Writings on the 1996 and 2001 Draft Articles Adopted by the International Law Commission), and it is relevant to identify the aspects that fall under the codification in the strict sense of the term and those appearing to be a "progressive development," or in any case those that are not in force in international law (Sicilianos 2005, Scholarly Writings on the 1996 and 2001 Draft Articles Adopted by the International Law Commission). Eventually, the UN General Assembly took note of the articles adopted on second reading and has brought them to the attention of governments several times, taking another action without prejudice to the question of their future adoption or other appropriate action. For additional information, see the International Law Commission website.

International Law Commission.

Offers an analytical guide and a summary to the work with links to, inter alia, the special rapporteurs' and ILC reports, the ILC's 1996 and 2001 draft articles and commentaries, as well as studies undertaken by the secretariat, reports of the secretary-general and the drafting committee, comments by governments, and General Assembly actions.

First Reading (1956–1996)

After receiving six successive reports from 1956 to 1961 of the special rapporteur, F. V. García Amador (who had dealt with the question of responsibility for injuries to persons or property of aliens), the ILC decided to categorize under "international responsibility" all the relations that arise under international law from the internationally wrongful act of a state, even when such relations give the injured state the possibility of responding by way of countermeasures. Then, the commission appointed Roberto Ago as special rapporteur and, in 1980, provisionally adopted on first reading Part 1 of the draft articles ("The Origin of International Responsibility"), including countermeasures as one of the circumstances precluding wrongfulness. Between 1980 and 1996, two other special rapporteurs, W. Riphagen and G. Arangio-Ruiz, presented seven and eight reports, respectively, completing the whole question of state responsibility on first reading with Part 2 ("Content, Forms and Degrees of International Responsibility") and Part 3 ("Settlement of Disputes," together with two annexes relating to dispute settlement procedures), both including several articles coping with the legal regime of countermeasures (necessity and proportionality, purpose, substantive limits and procedural conditions, including proportionality and "progressive" dispute settlement

provisions). The new articles were adopted by the ILC provisionally from 1983 to 1996, and the draft articles on state responsibility were adopted with some revisions on first reading in 1996.

Special Rapporteurs' Reports

In 1963 the ILC decided to change the scope and approach to the topic that the first special rapporteur, F.V. García-Amador, had undertaken. The commission appointed R. Ago (rapporteur from 1969–1980) as new special rapporteur and he dealt in 1979 with countermeasures as one of the circumstances precluding wrongfulness (Ago 1981). Two other special rapporteurs, W. Riphagen (1980–1987) and G. Arangio-Ruiz (1987–1996) presented several reports to complete the question of state responsibility, including articles coping with the legal regime of countermeasures (Riphagen 1986, Riphagen 1987, Riphagen 1988, and Arangio-Ruiz 1994, Arangio-Ruiz 1995, Arangio-Ruiz 2000, Arangio-Ruiz 2001). The debates of the ILC on countermeasures were mainly focused on Arangio-Ruiz's proposals.

Ago, Roberto. *Eighth Report on State Responsibility*. UN Doc. A/CN.4/318 and Add. 1–4. *Yearbook of the International Law Commission 1979, Vol. II, Part 1* (1981): 3–66.

After studying the practice, legal precedents, and literature, Ago proposed Draft Article 30 ("Legitimate application of a sanction") among the circumstances precluding wrongfulness. He conceived the "sanctions," individual (somehow as a punitive action to some wrongful acts) or collective, as a consequence of responsibility, altogether with the duty to make reparation.

Arangio-Ruiz, Gaetano. *Third Report on State Responsibility*. UN Doc. A/CN.4/440 and Add.1. *Yearbook of the International Law Commission 1991, Vol. II, Part 1* (1994): 1–36.

Arangio-Ruiz discusses the measures to be considered (self-defense, sanctions, retorsion, reprisals, countermeasures, reciprocal measures, *inadimplenti non est adimplendum*) and limits and conditions (prior internationally wrongful act, claim for reparation, dispute settlement, proportionality, suspension and termination of treaties as countermeasures, self-contained regimes, the problem of differently injured states).

Arangio-Ruiz, Gaetano. *Fourth Report on State Responsibility*. UN Doc. A/CN.4/444 and Add.1–3. *Yearbook of the International Law Commission 1992, Vol. II, Part 1* (1995): 1–50.

The special rapporteur discusses the practice concerning countermeasures and submits solutions and draft articles on the various aspects of their legal regime as identified in the previous report (proportionality; prohibited countermeasures; self-contained regimes; or the problem of a plurality of equally or unequally injured states).

Arangio-Ruiz, Gaetano. *Fifth Report on State Responsibility*. UN Doc. A/CN.4/453 and Add.1–3. *Yearbook of the International Law Commission 1993, Vol. II, Part 1* (2000): 1–58.

Contains six proposed draft articles concerning dispute settlement procedure (Part 3 of the draft articles: conciliation, arbitration, and judicial settlement), accompanied by an annex.

Arangio-Ruiz, Gaetano. *Sixth Report on State Responsibility*. UN Doc. A/CN.4/461 and Add.1–3. *Yearbook of the International Law Commission 1994, Vol. II, Part 1* (2001): 3–20.

A reappraisal of pre-countermeasures dispute settlement provisions so far envisaged for the draft on state responsibility, including the formulation adopted by the 1993 Drafting Committee for Article 12 of Part 2 of the draft articles, the issue of the requirement of prior recourse to dispute settlement procedures, and other important matters.

Riphagen, Willem. ***Fifth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*****. UN Doc. A/CN.4/380.** ***Yearbook of the International Law Commission 1984, Vol. II, Part 1*** **(1986): 1–4.**

Copes with reciprocity and reprisals (including the questions of peremptory norms [*jus cogens*] and proportionality) "procedural" limitations of reprisals (peaceful settlement of the dispute and interim measures of protection), "objective regimes" (including provisions concerning diplomatic law and peremptory norms). The proposed articles were accompanied by references to the relevant paragraphs of earlier reports, in particular the fourth report.

Riphagen, Willem. ***Sixth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles) and "Implementation" (mise en oeuvre) of International Responsibility and the Settlement of Disputes (Part 3 of the Draft Articles)*****. UN Doc. A/CN.4/389.** ***Yearbook of the International Law Commission 1985, Vol. II, Part 1*** **(1987): 3–20.**

Submits commentaries to previous draft articles and advocates a distinction between "reciprocal countermeasures" and other countermeasures. He also submits proposals on possible content of Part 3 on the "implementation" of international responsibility and the settlement of dispute, being fully aware of operating at the borderline between codification and progressive development of international law.

Riphagen, Willem. ***Seventh Report on State Responsibility*****. UN Doc. A/CN.4/397 and Add.1.** ***Yearbook of the International Law Commission 1986, Vol. II, Part 1*** **(1988): 1–20.**

Consists of draft articles and commentaries on Part 3 of the draft (prior notification, obligation to peaceful settlement of disputes, and special procedures concerning the adoption or the intent of adoption of reciprocal measures or reprisals).

Reports of the International Law Commission

In 1980 the commission provisionally adopted, on first reading, Part 1 of the draft articles ("The Origin of International Responsibility"); this Part 1 included Article 30 on countermeasures as circumstances precluding wrongfulness, previously adopted by the ILC (International Law Commission 1980). The other articles on countermeasures contained in Part 2 ("Content, Forms and Degrees of International Responsibility") and Part 3 ("Settlement of Disputes," together with two annexes relating to dispute settlement procedures) were adopted by the ILC provisionally from 1983 to 1996, on the proposals of W. Riphagen and G. Arangio-Ruiz. Yet the proposals of Riphagen on countermeasures were discussed by the ILC in its thirty-seventh and thirty-eighth sessions (International Law Commission 1986 and International Law Commission 1987), the commission did not then adopt any draft article. In its forty-fourth (International Law Commission 1994) and forty-fifth (International Law Commission 1995) sessions, the commission considered draft articles on countermeasures proposed by Arangio-Ruiz for Part 2 but again deferred action on those articles. In the forty-sixth session (International Law Commission 1997) the commission provisionally adopted Article 47 (then Article 11, on countermeasures by an injured state), Article 49 (then Article 13, on proportionality) and Article 50 (then Article 14 on prohibited countermeasures) and deferred action on Article 48 (then Article 12 on conditions relating to the resort to countermeasures) and decided that it may have to review Article 47 in the light of the text it would eventually adopt for Article 48. In its forty-seventh session (International Law Commission 1998a) the commission adopted articles and an annex constituting Part 3 of the draft on the settlement of disputes and articles 49 and 50, with commentaries. The draft articles on state responsibility, including Article 30 and articles 47 to 50 on countermeasures with commentaries, were adopted with some revisions on first reading in its forty-eighth session (International Law Commission 1998b).

International Law Commission. ***Report of the International Law Commission on the Work of Its Thirty-First Session, 14 May to 3 August 1979*****. UN Doc. A/34/10.** ***Yearbook of the International Law Commission 1979, Vol. II, Part 2*** **(1980).**

The commission considered the eighth report of R. Ago, and, among others, adopted on first reading the text of Article 30, with commentary. The commission appointed Willem Riphagen as new special rapporteur.

International Law Commission. ***Report of the International Law Commission on the Work of Its Thirty-Seventh Session, 6 May to 26 July 1985*****. UN Doc. A/40/10.** ***Yearbook of the International Law Commission 1985, Vol. II, Part 2*** **(1986).**

Following discussion on the basis of the sixth report of W. Riphagen, the commission referred Draft Articles 7 to 16 to the Drafting Committee. The commission provisionally adopted Article 5, with a commentary.

International Law Commission. ***Report of International Law Commission on the Work of Its Thirty-Eighth Session 5 May to 11 July 1986*****. UN Doc. A/41/10.** ***Yearbook of the International Law Commission 1986, Vol. II, Part 2*** **(1987).**

Following discussion on the basis of the seventh report of W. Riphagen, the commission referred Draft Articles 1 to 5 and the annex of Part 3 to the Drafting Committee.

International Law Commission. ***Report of International Law Commission on the Work of Its Forty-Fourth Session, 4 May to 24 July 1992*****. UN Doc. A/47/10.** ***Yearbook of the International Law Commission 1992, Vol. II, Part 2*** **(1994).**

After hearing the presentation of Special Rapporteur G. Arangio-Ruiz, the commission considered Draft Articles 11 to 14 on countermeasures contained in the fourth report and decided to refer them to the Drafting Committee.

International Law Commission. ***Report of the Commission to the General Assembly on the Work of Its Forty-Fifth Session, 3 May to 23 July 1993*****. UN Doc. A/48/10.** ***Yearbook of the International Law Commission 1993, Vol. II, Part 2*** **(1995).**

The commission referred the articles and the annex of Part 3 to the Drafting Committee and agreed to defer action on the proposed Draft Articles 11 to 14 on countermeasures, adopted by the Drafting Committee on first reading.

International Law Commission. ***Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May to 22 July 1994*****. UN Doc. A/49/10.** ***Yearbook of the International Law Commission 1994, Vol. II, Part 2*** **(1997).**

The ILC considered chapter 2 of the special rapporteur's sixth report. On the basis of the recommendations of the Drafting Committee, the commission provisionally adopted articles 11, 13, and 14. It deferred action on Article 12 and decided that it may have to review article 11 in the light of the text it would eventually adopt for Article 12.

International Law Commission. ***Report of the International Law Commission on the Work of Its Forty-Seventh Session, 2 May to 21 July 1995*****. UN Doc. A/50/10.** ***Yearbook of the International Law Commission 1995, Vol. II, Part 2*** **(1998a).**

The commission received from the Drafting Committee, and adopted in an amended form, a set of seven articles and an annex constituting Part 3 of the draft on the settlement of disputes, with commentaries. Regarding provisions on countermeasures, the commission also adopted Articles 13 and 14, with commentaries.

International Law Commission. ***Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May to 26 July 1996*****. UN Doc. A/51/10.** ***Yearbook of the International Law Commission 1996, Vol. II, Part 2*** **(1998b).**

The commission, after considering the special rapporteur's eighth report, and the report of the Drafting Committee (which completed its first reading of the draft articles in Parts 2 and 3), decided to transmit a set of sixty draft articles (with annexes), provisionally adopted on first reading to governments for comments and observations.

1996 Draft Articles on Countermeasures and Commentaries

In 1996 the ILC adopted provisionally, on first reading, a set of sixty draft articles that were divided into three parts and accompanied by two annexes on state responsibility. The commentaries to the draft articles and annexes, as provisionally adopted from 1973 to 1996, are contained in the annual reports of the ILC and reproduced in the commission's yearbooks. The UN secretariat prepared a consolidated text of the draft articles and of the commentaries thereto, available online. Draft articles included several provisions on countermeasures. Concerning the "Origin of International Responsibility" (Part 1), countermeasures were included as circumstances precluding wrongfulness (Article 30): the text and commentary is reproduced in International Law Commission 1980. In Part 2 ("Content, Forms and Degrees of International Responsibility"), there was a chapter 3 ("Countermeasures," Articles 47 to 50) dealing with countermeasures by an injured state, conditions relating to resort to countermeasures, proportionality, and prohibited countermeasures. The text, general commentary, and other commentaries related to those articles are reproduced in International Law Commission 1998a. Finally, in Part 3 ("Settlement of Disputes") the taking of countermeasures deserved specific provisions of settlement of disputes, notably arbitration (Article 58 and Annex 2), which text and commentaries are reproduced in International Law Commission 1998b.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Thirty-First Session, 14 May to 3 August 1979*. UN Doc. A/34/10. *Yearbook of the International Law Commission 1979, Vol. II, Part 2* (1980).

Includes countermeasures as a circumstance precluding wrongfulness: Draft Article 30 (Countermeasures in respect of an internationally wrongful act) and commentary. Also see consolidated text: Vol. I, pp. 218–225.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Forty-Seventh Session, 2 May to 21 July 1995*. UN Doc. A/50/10. *Yearbook of the International Law Commission 1995, Vol. II, Part 2* (1998a).

Part 3 ("Settlement of Disputes," Articles 54 to 60, former articles 1 to 7) and annexes 1 and 2, and commentaries (commentaries to Articles 54 to 58 [former Articles 1 to 5] and to annexes 1 and 2 (former articles 1 and 2 of the annex), are contained in *Yearbook . . . 1995*, Vol. II, Part 2, pp. 75–79 and 81 et seq., respectively. Also see consolidated text: Vol. I, pp. 361–365.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Forty-Eighth Session, 6 May to 26 July 1996*. UN Doc. A/51/10. *Yearbook of the International Law Commission 1996, Vol. II, Part 2* (1998b).

Includes countermeasures as part of the content, forms, and degrees of international responsibility of states: general commentary and Articles 47 to 50 (former Articles 11 to 14) and commentaries (commentaries to Articles 49 and 50 are contained in *Yearbook . . . 1995*, Vol. II, Part 2, pp. 64–74). Also see consolidated text: Vol. I, pp. 304–344.

Second Reading (1997–2001)

To deal with the second reading, the commission appointed a new special rapporteur, James Crawford (who held the position from 1997 to 2001). Crawford presented three reports from 1998 to 2000. The commission finalized the second reading in 2001, in view of further comments submitted by governments with regard to the draft articles and further practice and judicial decisions, notably the ICJ's judgment in International Court of Justice 1997 (see under International Court of Justice). There were a number of modifications on the articles on countermeasures, particularly on the definition of the injured state, the formulation of the principle of proportionality, the relationship between countermeasures and dispute settlement procedures, and the reaction of "third" states. Yet the regime of countermeasures was only partly developed under customary law, as the commission eventually accepted that judicial decisions, state practice, and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. The General Assembly took note of the articles and has brought them to the attention of governments, and they have taken other action without prejudice to the question of their future adoption or other appropriate action.

Special Rapporteur's Reports

The special rapporteur, James Crawford, presented four reports from 1998 to 2001 written in light of comments and observations received from governments and developments in state practice, judicial decisions, and literature. He dealt with the question of the inclusion of detailed provisions on countermeasures and dispute settlement (Crawford 2008a), reviewed countermeasures both as circumstances

precluding wrongfulness and means of implementation the responsibility (Crawford 2008b), identified the issues, and advanced recommendations and proposals on countermeasures (Crawford 2009); eventually he reviewed provisions on settlement of disputes and countermeasures (Crawford 2010).

Crawford, James. *First Report on State Responsibility*. UN Doc. A/CN.4/490 and Add.1–7. *Yearbook of the International Law Commission 1998, Vol. II, Part 1* (2008a): 1–80.

The special rapporteur deals with general issues relating to the draft articles, including the question of the inclusion of detailed provisions on countermeasures and dispute settlement, in light of comments from governments and developments in state practice.

Crawford, James. *Second Report on State Responsibility*. UN Doc. A/CN.4/498 and Add.1–4. *Yearbook of the International Law Commission 1999, Vol. II, Part 1* (2008b): 3–100.

Reviews countermeasures both as a circumstance precluding wrongfulness (alongside the study of the *exceptio inadimplenti non est adimplendum* as (another) possible justification or excuse) and as measures taken in order to induce the responsible state to cease the conduct in question and to provide reparation.

Crawford, James. *Third Report on State Responsibility*. UN Doc. A/CN.4/507 and Add.1–4. *Yearbook of the International Law Commission 2000, Vol. II, Part 1* (2009): 3–112.

The special rapporteur recommends a program for completion of the second reading of the draft articles, identifying the outstanding issues and advancing recommendations and proposals on countermeasures.

Crawford, James. *Fourth Report on State Responsibility*. UN Doc. A/CN.4/517 and Add.1. *Yearbook of the International Law Commission 2001, Vol. II, Part 1* (2010): 1–32.

Reviews provisions on settlement of disputes concerning states' responsibility and countermeasures in the light of discussion in the Sixth Committee and of further written comments by a number of governments, as well as by an ILA study group on the Drafting Committee's text. He essays to reelaborate the commentaries to the articles previously adopted provisionally by the ILC. The new commentaries are somehow more substantive and detailed while less argumentative and doctrinal.

Reports of the International Law Commission

Among members of the ILC, different views were expressed concerning whether or not to retain the detailed provisions on countermeasures other than those recognizing them as circumstances precluding wrongfulness, that is, provisions concerning countermeasures as a modality of implementation of international responsibility. The commission finalized the second reading in 2001, in view of further comments submitted by governments with regard the draft articles. Yet the regime of countermeasures was only partly developed under customary law, the commission eventually accepted (International Law Commission 2003, International Law Commission 2006, International Law Commission 2007) that judicial decisions, state practice, and doctrine confirm the proposition that countermeasures meeting certain substantive limits and procedural conditions may be legitimate.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Fifty-First Session, 3 May to 23 July 1999*. UN Doc. A/54/10. *Yearbook of the International Law Commission 1999, Vol. II, Part 2* (2003).

The commission deals with the question of countermeasures as circumstances precluding wrongfulness, on the basis of comments and observations received from governments on the draft articles provisionally adopted on first reading and the second report of the special rapporteur. The commission decided to refer Draft Article 30 to the Drafting Committee.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Fifty-Second Session, 31 July to 18 August 2000*. UN Doc. A/55/10. *Yearbook of the International Law Commission 2000, Vol. II, Part 2* (2006).

The commission decided to refer several articles on countermeasures and the texts (Article 30, Article 47, Article 47 *bis*, Article 48, Article 49, Article 50, Article 50 *bis*, Article 50A, and Article 50 B) to the Drafting Committee. The commission took note of the report of the Drafting Committee on all the draft articles that were provisionally adopted by the Drafting Committee.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session, 3 April to 1 June and 2 July to10 August 2001*. UN Doc. A/56/10. *Yearbook of the International Law Commission 2001, Vol. II, Part2* (2007).

After addressing the main issues relating to the draft articles in the light of the comments and observations received from governments, the commission decided to refer all the draft articles to the Drafting Committee. The commission also decided to establish two working groups on the topic and, subsequently, adopted the draft articles on responsibility of states for internationally wrongful acts, with commentaries.

2001 Draft Articles on Countermeasures and Commentaries

The text of draft articles adopted by the commission on second reading at its fifty-third session, in 2001 was submitted to the General Assembly as a part of the commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in International Law Commission 2007. The consolidated text of the draft articles and of the commentaries thereto prepared by the UN Secretariat is available online. Draft articles included several provisions on countermeasures: concerning "The International Wrongful Act of a State" (Part 1), countermeasures are included as circumstances precluding wrongfulness (International Law Commission 2006); within Part 3 ("The Implementation of the International Responsibility of a State"), there is a chapter 2 (International Law Commission 2007) dealing with object and limits of countermeasures, obligations not affected by countermeasures, proportionality, conditions relating to resort to countermeasures, termination of countermeasures, and measures taken by states other than an injured state. The text of the articles is reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4; the General Assembly took note of the articles and brought them to the attention of governments without prejudice to the question of their future adoption or other appropriate action. The report, which also contains commentaries on the draft articles, appears in International Law Commission 2007. The General Assembly resolutions 59/35 of 2 December 2004, 62/61 of 6 December 2007, and 65/19 of 6 December 2010 once again brought the articles to the attention of governments, without regard to the question of their future adoption or other appropriate action. See also Crawford 2002.

Crawford, James. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge, UK: Cambridge University Press, 2002.

Crawford offers the text of the ILC articles and commentaries on state responsibility, together with an introduction, a guide to the legislative history, a detailed index, and a table of cases.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Fifty-Second Session, 31 July to 18 August 2000*. UN Doc. A/55/10. *Yearbook of the International Law Commission 2000, Vol. II, Part 2* (2006).

Covers countermeasures as circumstances precluding wrongfulness, that is, Draft Article 22 (Countermeasures in respect of an internationally wrongful act) and commentary.

International Law Commission. *Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session, 3 April to1 June and 2 July to 10 August 2001*. UN Doc. A/56/10. *Yearbook of the International Law Commission 2001, Vol. II, Part2* (2007).

Covers countermeasures and the implementation of the international responsibility of a state: general commentary and articles 49 to 54 (object and limits of countermeasures, obligations not affected by countermeasures, proportionality, conditions relating to resort to countermeasures, termination of countermeasures, and measures taken by states other than an injured state), and commentaries.

Scholarly Writings on the 1996 and 2001 Draft Articles Adopted by the International Law Commission

The inclusion of countermeasures in the work of the ILC on state responsibility (first, as circumstances precluding wrongfulness, on Ago's proposal, and second, as part of the contents, forms, and degrees of state responsibility or as means of implementation of that responsibility) favored a renewal of academic interest in reprisals/countermeasures, as the proliferation of monographic studies highlights (e.g., Leben 1982 and Sicilianos 1990, both cited under Introductory Works, and see Zoller 1984, de Guttry 1985, Elagab 1988, Boisson de Chazournes 1992, Alland 1994, and Focarelli 1994, all cited under Contemporary International Law). The developments on countermeasures by the ILC itself have also drawn the attention of most scholars (see Alland 1987, Malanczuk 1987, Bederman 2002, Sicilianos 2005, Lesaffre 2010), some of them members of the ILC itself (see Hafner 2002; Crawford, et al. 2010), and it has been considered the utmost relevance to identify the aspects that fall under the codification in the strict sense of the term and those that appear to be a "progressive development" or, in any case, which are not in force in international law (Sicilianos 2005), including the questions that the far from well-established regime applicable to countermeasures raises (Lesaffre 2010). Particularly relevant is the need to relate the doctrinal meaning of countermeasures in the work of the ILC on state responsibility to traditional concepts of self-help, reprisal, and retorsion (Malanczuk 1987) and to UN law on the use of force (Barboza 2003). From a theoretical point of view, it is interesting to match the work of the ILC and political and legal theory (Alland 1987) or to examine the key intellectual underpinnings of articles on countermeasures (Bederman 2002).

Alland, Denis. "International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility." In *United Nations Codification of State Responsibility*. Edited by Marina Spinedi and Bruno Simma, 143–195. New York: Oceana, 1987.

Develops the linkages of the initial codification work of the ILC under Ago's reports to political and legal theory, perhaps with too little critical appraisal of the Kantian (Kelsen) and Hegelian (Jhering) assumptions identified.

Barboza, Julio. "Contramedidas en la reciente codificación de la responsabilidad de los Estados. Fronteras con la legítima defensa y el estado de necesidad." *Anuario Argentino de Derecho Internacional* 12 (2003): 15–47.

The author distinguishes countermeasures from other institutions that revolve around "necessity" in international law (armed reprisals, self-defense, and state of necessity) and analyzes the legal regime of countermeasures in the ILC's articles on state responsibility. Available online.

Bederman, David J. "Counterintuiting Countermeasures." *American Journal of International Law* 96.4 (2002): 817–832.

Seeks to explore the wider dimensions of the codification of rules for countermeasures and self-help in the face of internationally wrongful acts, examining a few key intellectual underpinnings of countermeasures articles (relevant sources of countermeasures practice, the effect of articles on the international legal process, the roles played by formalism and pragmatism) and highlighting the search for a "polite international society" as the central conceptual mission of the countermeasures provisions.

Crawford, James, Alain Pellet, and Simon Olleson, eds. *The Law of International Responsibility*. Oxford: Oxford University Press, 2010.

Seeks to cover the entirety of the field of international responsibility, with a particular focus on the work of the ILC, including diplomatic protection, liability for harmful activities not prohibited under international law, and responsibility of international organizations. It provides detailed discussion, analysis, and commentary on this topic, authored by an international team of specialists in the field.

Hafner, Gerhard. "El derecho a las contramedidas en el Proyecto de artículos de la CDI sobre responsabilidad del Estado." *Revista Electrónica de Estudios Internacionales* 5 (2002).

The author, once a member of the ILC, summarizes the debate within the ILC and the Sixth Commission, and the legal regime of countermeasures. He emphasizes that the debate has been about the exercise of power, and that the most powerful states were not

interested in the regulation of countermeasures.

Lesaffre, Hubert. "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures." In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 469–473. Oxford: Oxford University Press, 2010.

Lesaffre writes that the recognition of countermeasures, as a circumstance precluding wrongfulness, resolves fewer questions than it raises about the far from well-established regime applicable to countermeasures. Yet these difficulties did not prevent codification of an internationally recognized practice (by arbitral tribunals, ICJ, IDI, legal scholars, WTO, etc.) in respect of countermeasures.

Malanczuk, Peter. "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility." In *United Nations Codification of State Responsibility*. Edited by Marina Spinedi and Bruno Simma, 197–286. New York: Oceana, 1987.

The author relates the doctrinal meaning of countermeasures and self-defense in the codification work of the ILC on state responsibility to traditional concepts of sanctions (such as self-help, reprisal, and retorsion) and to UN law on the use of force.

Sicilianos, Linos-Alexandre. "La codification des contre-mesures par la Commission du droit international." *Revue Belge de Droit International* 38 (2005): 447–500.

Undertakes a critical analysis of the work of the ILC on countermeasures in the framework of the law of responsibility of states for internationally wrongful acts; his purpose is to identify the aspects that fall under the codification in the strict sense of the term and those that appear to be a "progressive development" or, in any case, those that are not in force in international law.

Proportionality

The 1928 *Naulilaa* award (see *Portugal v. Germany* [1928], cited under Arbitral Tribunals) noted that up until then, unanimous recent opinions of scholars had abandoned the requirement of proportionality. Notwithstanding, it deemed that should the alleged reprisals not abide by this proportionality requirement, they would be wrongful. The obligation to respect the principle of proportionality had been present in the doctrine since the 17th century and is nowadays generally accepted in international law, also in specific regimes, such as the World Trade Organization (Mitchell 2006), even if there is no single proportionality principle here (Desmedt 2001): the measures that go beyond the limits prescribed by international law (type of countermeasure and degree of intensity) are no longer countermeasures. Proportionality prevents the abuse to which the factual inequality of states may lead, and has a function partly independent of the question whether the countermeasure is necessary to its aim. However, views differ significantly in regard to its meaning and content; hence, its assessment: perhaps due to its flexibility and fluidity, fluctuating between a "positive" and a "negative" normative proposition. There should be proportionality between the wrongful act and the whole response thereto; proportionality of countermeasures is obviously not the least important, since such measures involve an infringement of rights of the responsible state. Yet international tribunals and scholars do not always break proportionality down. Some refer only to the degree of gravity of the wrongful act (e.g., the 1928 *Naulilaa* award); others refer to the injuries suffered (that is, the effects of the wrongful act [see Ago 1981, cited under Special Rapporteurs' Reports, and de Guttry 1985 and Elagab 1988, both cited under Contemporary International Law]), and still others refer to both the gravity of the wrongful act and damages suffered by the states (Institut de Droit International 1934, cited under Historical Perspective; the 1978 Air Service Agreement, cited under Arbitral Tribunals; Riphagen 1987, Arangio-Ruiz 1995, ILC's drafts of 1996 and 2001, all cited under Special Rapporteurs' Reports, and International Court of Justice 1997, cited under International Court of Justice). As there are "quantitative" and "qualitative" aspects of proportionality, it is difficult for the wrongful act and the countermeasure use to belong to different fields. Hence, the test sometimes required of "not clearly disproportionate" (both the 1928 *Naulilaa* and the 1978 Air Service Agreement awards, and Article 49 of the 1996 ILC's draft articles); notwithstanding, Articles 51 of the 2001 ILC's draft (and Article 53 and Article 54 of the 2009 and 2011 ILC drafts on the responsibility of international organizations) adopted a positive formulation of the proportionality requirement, probably crystallizing the customary rule (O'Keefe 2010, Katselli Proukaki 2010). The application of the principle has shed much of its indeterminacy (Franck 2008), including the determination whether countermeasures need to be limited to temporary or definitive (but reversible) measures. There are also authors who relate proportionality to the function of the response (see Cannizzaro 2001 and Wicker 2006).

Cannizzaro, Enzo. "The Role of Proportionality in the Law of International Countermeasures." ***European Journal of International Law*** **12.5 (2001): 889–916.**

Suggests proportionality should be assessed on the basis of different standards that correspond to the different functions pursued by countermeasures (normative, retributive, coercive, and executive), given due consideration to the structure of the breached rule and to the consequences of the breach.

Desmedt, Axel. "Proportionality in WTO Law." ***Journal of International Economic Law*** **4.3 (2001): 441–480.**

Suggests that the experience in some areas of WTO law (including countermeasures) shows that the proportionality principle has not yet been recognized as an unwritten principle of WTO law but depends on the language found in the text of the relevant provisions. He even affirms that more specific provisions concerning countermeasures limit the proportionality principle's relevance.

Franck, Thomas M. "On Proportionality of Countermeasures in International Law." ***American Journal of International Law*** **102.4 (2008): 715–767.**

Focuses on the principle of proportionality and its application to a range of subjects (armed conflicts between states, interstate trade disputes, and restrictions on internationally protected human rights). The author finds that proportionality succeeds in modulating conflict between states, because through frequent application it has shed much of its indeterminacy.

Katselli Proukaki, Elena. ***The Problem of Enforcement in International Law: Countermeasures, the Non-injured State and the Idea of International Community*****. London: Routledge, 2010**

In the last part of the book (chapter 5), the author explores proportionality as a legal constraint on the exercise of countermeasures.

Mitchell, Andrew D. "Proportionality and Remedies in WTO Disputes." ***European Journal of International Law*** **17.5 (2006): 985–1008.**

Considers the role of proportionality in determining the level and type of remedies available to WTO members for violations of legal obligations or for certain other undesirable or unfair conduct, taking into account the purpose of the remedies. He stresses that, contrary to several past decisions, proportionality is not relevant to the imposition of safeguards in the WTO.

O'Keefe, Roger. "Proportionality." In ***The Law of International Responsibility*****. Edited by James Crawford, Alain Pellet, and Simon Olleson, 1157–1168. Oxford: Oxford University Press, 2010.**

Affirms that Article 51 of the 2001 ILC's draft articles can be considered to have crystallized the customary statement of the rule. He analyzes the underlying rationale of proportionality through the history (equity, equivalence, safeguard, etc.) and aspects of proportionality and its assessment as enshrined in Article 51. Emphasizes the different wording of English and French version of that Article 51 and commentary thereto.

Wicker, Christian. ***The Concepts of Proportionality and State Crimes in International Law: An Analysis of the Scope of Proportionality in the Right of Self-Defence and in the Regime of International Countermeasures and an Evaluation of the Concept of State Crimes*****. Frankfurt: Peter Lang, 2006.**

Wicker deals with the complex and controversial task of determining the exact content of the proportionality principle, posing questions such as "proportionate to what?" or "what role does the objective or function of the response play?"

Dispute Settlement

It is true that there should be a prior demand ("sommation") and attempt to obtain reparation. Yet there is a dilemma: no state can accept countermeasures of another state based on self-judging and subsequent demands; and no state can accept that its countermeasures should be based only on the agreement of the other state as to the existence of a wrongful act and the due reparation. It should be emphasized the relevance of negotiations and the intervention of an impartial third party, namely the independent and authoritative establishment of the facts and the applicable law by an arbitrator or judge. Notwithstanding, though the compulsory recourse to means of peaceful settlement of disputes is desirable and opportune, and this recourse was even advocated by the Institut de Droit International in 1934, is it compulsory to have recourse to these means of peaceful settlement of disputes before taking countermeasures? Obviously, those means are always available to the state parties. On the other hand, does this mean that the alleged author state, by offering to submit the dispute to a settlement procedure, can avoid countermeasures? Or that the other state may take countermeasures only if it offers to submit the dispute to a settlement procedure? After Riphagen's proposals (1983, 1985, and 1986), the International Law Commission (ILC) debated Special Rapporteur Arangio-Ruiz's proposal (1992–1993), a revolutionary step as they would have eliminated the self-judging. The ILC was sharply divided. This debate was extended to more academic forums (e.g., Schachter 1994; or Arangio-Ruiz 1994, Tomuschat 1994, Simma 1994, and ILA Study Group 2000, among others). It seems a tension exists between two approaches ("individualistic" and "communitarian"), which are the expression of two conceptions of the dynamic of international law (Alcaide Fernández 2004). Some authors comment on the rights of the injured state and consider that international law does not require prior resort to means of dispute settlement. Others stress the problems that countermeasures pose (self-judging, subjectivism), hence the priority of dispute settlement (e.g., Politis, Riphagen, Arangio-Ruiz, Schachter, Condorelli, Pellet, Bennouna, Dominicé). Eventually, the ILC dropped the specific provisions on settlement of disputes previously adopted in 1995–1996; instead, it built a system upon the observations of the tribunal in the *Air Service* arbitration (Article 52), where the situation is (re)balanced through the obligation to offer to negotiate, the recognition of the right to (exceptionally) resort immediately to "urgent" countermeasures, and the taking into account of the power of a court or tribunal to order interim measures of protection, as well as the cessation or not of the wrongful act and the subsequent conduct of the wrongdoing state. The notice principle and offer to negotiate, altogether with treaty lawmaking, will at least widen "indirect control" on countermeasures (O'Connell 2005).

Alcaide Fernández, Joaquín. "Contre-mesures et règlement des différends." ***Revue Générale de Droit International Public*** **108 (2004): 347–380.**

From the ILC and academic debate about two conceptions of the application and effectiveness of international law, the author concludes that the recognition of the prior offer to negotiate constitutes a valuable limit to relativism and the risks of arbitrariness: namely, bearing in mind the paradigm shift from bilateralism to common interests.

Arangio-Ruiz, Gaetano. "Counter-Measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility: A Crucial Issue before the International Law Commission." ***European Journal of International Law*** **5.1 (1994): 20–53.**

Arangio-Ruiz defends his proposals on (pre- and post-countermeasures) amicable dispute settlement obligations in order to correct the use of unilateral countermeasures vis-à-vis the 1993 Drafting Committee's text of (then) Article 12, the ILC debate, and the prospects for 1994.

Crawford, James. "Counter-Measures as Interim Measures." ***European Journal of International Law*** **5.1 (1994): 65–76.**

Crawford, who succeeded Arangio-Ruiz as ILC special rapporteur on state responsibility, identifies six general principles that should apply to the settlement of disputes in relation to countermeasures. He examines the proposals and discussions at the ILC and remarks that the "shades of grey" between the white (i.e., rights of the alleged injured state) and the black (i.e., rights of the alleged responsible state) call for resolutions of disputes in the interim phase.

ILA Study Group. ***First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility*****. London: International Law Association, 2000.**

Presents initial comments on the basis of the work done thus far by Working Group II on countermeasures and dispute settlement, yet not followed by ulterior comments. The group study and comment on the draft texts was prepared by J. Crawford as the ILC special rapporteur on the discussion in the ILC and on the draft articles adopted by the ILC on second reading.

O'Connell, Mary Ellen. "Controlling Countermeasures." In *International Responsibility Today: Essays in Memory of Oscar Schachter*. Edited by Maurizio Ragazzi, 49–62. Leiden, The Netherlands: Martinus Nijhoff, 2005.

Though customary international law does not require (and the ILC did not accept) the Arangio-Ruiz proposals, the author holds that indirect control on countermeasures will widen through treaties that require prior dispute resolution (such as WTO law) and the evolution of the notice principle and offer to negotiate.

Schachter, Oscar. "Dispute Settlement and Countermeasures in the International Law Commission." *American Journal of International Law* 88.3 (1994): 471–477.

Poses three questions concerning the reasons to condition the lawfulness of countermeasures on dispute settlement measures, the merit of Arangio-Ruiz's proposals, and the expectations of governments). Concludes that the proposals offered the ILC the opportunity to contribute and to try to prevent the illicit and arbitrary use of countermeasures.

Simma, Bruno. "Counter-Measures and Dispute Settlement: A Plea for a Different Balance." *European Journal of International Law* 5.1 (1994): 102–105.

Like Tomuschat, Simma embraces the Bowett's proposal at the ILC (leading the text of Article 12 adopted by the ILC Draft Committee in 1993), but explores further the "Bowett-Tomuschat formula" by adding the maintenance of precedence of *lex specialis*. His proposals differs from Arangio-Ruiz's proposals and the text adopted by the Drafting Committee.

Tomuschat, Christian. "Are Counter-Measures Subject to Prior Recourse to Dispute Settlement Procedures?" *European Journal of International Law* 5.1 (1994): 77–88.

Tomuschat makes it clear that, in defining a balance using the rules on permissible use of countermeasures, it would be a serious mistake to favor a wrongdoing state. In his opinion, Arangio-Ruiz's proposed regime is imbalanced and rigid to the detriment of the injured state.

Other Substantive Limits and Procedural Conditions

The "objective" existence of a prior internationally wrongful act, the requirement of proportionality, the fulfillment of dispute settlement arrangements or the limitation to the responsible state are not the only necessary substantive and procedural conditions for qualifying a measure as a countermeasure. Like other forms of self-help, countermeasures are liable to be abused and this potential is exacerbated by the factual inequalities between states. Furthermore, the impartial settlement of disputes through due process of law is not yet guaranteed in the international system. Therefore, to keep countermeasures within generally acceptable bounds, that qualification also calls for the status of certain fundamental obligations that may not be subject to countermeasures, for the temporary or reversible character of the measures, and (along with the prior demand) for the prior notification. These (other) substantive limits and procedural conditions of countermeasures might be imposed for several reasons: the existence of peremptory norms (no circumstance precluding wrongfulness [even countermeasures] authorize or excuse any derogation from a peremptory norm of general international law); or the existence of special rules that exclude or modify the general legal regime on countermeasures (*lex specialis* or "self-contained" regimes); or the maintenance or restoration of international peace and security; or even the necessity and proportionality of countermeasures in order to ensure the performance of the obligations of the responsible state (cessation and/or reparation). Particularly, "strong" forms ("self-contained" regimes) and "weaker" forms of *lex specialis* derogate *legi generali* somehow predetermine "primary" special provisions concerning determination of breach and/or legal consequences (such as EU or WTO law, or diplomatic law) that may deviate from the "secondary" general or normal regime. Concerning "self-contained" regimes, the question often remains open whether those provisions are exclusive or coexist with the general regime, that is, it is still possible for a "fallback" on the general regime.

Obligations Not Affected by Countermeasures

One of the main limits of countermeasures is imposed by the status of certain fundamental obligations that may not be subject to countermeasures. These obligations cannot be affected by countermeasures because of their character, including the fact that they protect channels of communication between states or provide a means to settle their disputes. These obligations are: the obligation to refrain from the threat or use of force (meaning, essentially, “armed” force [Leben 2010], not economic and political coercion) because most authors do not recognize the relevance of the condemnation of the use of force in determining the lawfulness of economic or political coercion; the obligation to resort to any peaceful means for settlement of disputes (particularly means other than negotiation); the obligations to protect fundamental human rights and of humanitarian character prohibiting (belligerent) reprisals; and the obligations with respect to diplomatic and consular inviolability. Many of these obligations derive from the existence of peremptory norms; yet more generally, contemporary doctrine widely recognized that no obligation under peremptory norms of general international law (Leben 2010) or other nonderogable obligations (Boisson de Chazournes 2010) shall be affected by countermeasures.

Boisson de Chazournes, Laurence. “Other Non-derogable Obligations.” In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 1205–1214. Oxford: Oxford University Press, 2010.

The author complements the analysis of prohibited countermeasures considering three different groups of “primary rules” (or “self-contained” regimes): diplomatic law, norms governing the field of economic and political coercion, and norms in the area of the international protection of the environment.

Leben, Charles. “Obligations Relating to the Use of Force and Deriving from Peremptory Norms of International Law.” In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 1197–1204. Oxford: Oxford University Press, 2010.

First, the author deals with obligations with reinforced normative authority (*jus cogens* and *erga omnes* obligations). Second, the author deals with the use of force. In this last part, the author makes two distinctions: between simple peremptory norms and reinforced peremptory norms and between armed force and economic sanctions.

The Use of Force

The UN Charter does not expressly forbid forcible measures of reprisals. However, after 1945, few propositions have enjoyed more support than the proposition that under the charter the use of force by way of reprisals is illegal (GA Res. 2625 [25], 1975 Helsinki Final Act or some SC resolutions, such as resolution 188 [1964] of 9 April 1964). This was the culmination of an evolution: analogous to the one fulfilled in the national societies (Alibert 1983) where the Hague Convention (II) of 1907 was a turning point. Notwithstanding, “realities” of international politics and law (the Cold War, conflicts in Middle East, Kosovo 1998–1999, terrorism before and but mostly after 9/11, etc.) have lead a few writers to insistently pose the return to Westphalia, that is, to question the validity of any strict charter prohibition on force, even asserting the death of Article 2(4) because of the gradual erosion of the charter system or the absence of “effective collective measures” foreseen in the charter itself. Two complementary arguments have been advanced. First, building on the “Caroline doctrine” as commonplace for the customary right to self-defense (rather than a formulation of a state of necessity) some writers broadened the scope of the right of self-defense to cover the “functional equivalent to forcible measures of reprisals” (Tucker 1972), so blurring the distinction between “self-help” and “self-defense.” After 9/11 a broad understanding of the right of self-defense against imminent and latent threats seems to have prevailed in UN doctrine and among legal scholars (Franck 2002). Second, some authors have renewed occasionally the discussion relating to the legality of armed reprisals due to divergences between the norm and the practice (Falk 1969, Blum 1970, Bowett 1972, Tucker 1972); however, except for Antonio Cassese (Cassese 1999), Yoram Dinstein (Dinstein 2012, cited under Contemporary International Law), and a few others, those authors are nonetheless inclined to base such justification on notions other than that of reprisals/countermeasures, as do states resorting to force (Pueyo Losa 1990). Yet Ago 1981 (cited under Special Rapporteurs’ Reports) was not conclusive, and the ILC did not echo this debate after Riphagen and Arangio-Ruiz’s reports; although they recognized that questions concerning the use of force in international relations are governed by the relevant primary rules, the ILC reaffirmed the difference between self-defense and countermeasures and the (absolute) prohibition of “armed countermeasures” in times of peace. The prohibition is consistent with several ICJ judgments (International Court of Justice 1949 and International Court of Justice 1986, both cited under

International Court of Justice), and the *Guyana v. Suriname* case (2007; see Arbitral Tribunals) confirmed that prohibition as "a well-established principle of international law." Yet some authors believe the ILC left open recourse to use of force in self-help (Franck 2002).

Alibert, Christine. *Du droit de se faire justice dans la société internationale depuis 1945*. Paris: Librairie Générale de Droit et Jurisprudence, 1983

From a political and sociological perspective, the author poses a question: why does private justice (meaning unilateral recourse to force) subsist in international practice? For this author, the answer is simple: because of the UN's failure. But there is hope that international society will evolve in the same way as national societies.

Blum, Yehuda Z. "The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk." *American Journal of International Law* 64.1 (1970): 73–105.

Blum asserts that the peacetime reprisal doctrine would not apply to the Arab-Israel conflict; if it was applicable, unless it is an accepted double-standard practice, Lebanon's responsibility for guerrilla activities emanating from its territory and Israeli efforts to obtain redress from Lebanon confirmed the lawfulness of the Beirut raid.

Bowett, Derek W. "Reprisals Involving Recourse to Armed Force." *American Journal of International Law* 66.1 (1972): 1–36.

Focuses on the "credibility gap" acquired by prohibition by reason of the divergence between the norm and the actual practice of states (and of the Security Council), principally (though not exclusively) in the Middle East. This was his attempt at clarifying the nature of reprisals to arrest the process of degeneration of the normative character of the law on reprisals.

Cassese, Antonio. "A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*." *European Journal of International Law* 10.4 (1999): 791–799.

A previous article by Cassese suggested that in light of the NATO intervention in Kosovo, a new customary rule might be in the process of formation. From the views of states expressed during and since the Kosovo crisis, the author concludes in this article that no consistent *usus* had emerged and *opinio necessitatis* has not gone unopposed.

Falk, Richard A. "The Beirut Raid and International Law of Retaliation." *American Journal of International Law* 63.3 (1969): 415–443.

Criticizing the Israelis' use of force in retaliation against terrorism (1968 Beirut raid), Falk attempts a first step in the working out of a necessary systematic framework for the assessment of claims to use retaliatory force and the contribution of international lawyers therein. He conceded the impossibility or unreality of any blanket, unqualified proscription of reprisals involving force.

Franck, Thomas M. *Recourse to Force: State Action against Threats and Armed Attacks*. Cambridge, UK: Cambridge University Press, 2002.

Looks at the invocation of Article 51 to take armed countermeasures against terrorism and, in general, that in exceptional cases the use of force in self-help may be justified and not actually prohibited by the UN Charter. States that the ILC may have recognized this implicitly.

Pueyo Losa, Jorge. "Represalias, uso de la fuerza y crímenes internacionales en el actual orden jurídico internacional." In *Cursos de Derecho internacional de Vitoria-Gasteiz 1988*. Edited by Departamento de Derecho Internacional Público de la Universidad del País Vasco, 45–147. Bilbao, Spain: Servicio Editorial de la Universidad del País Vasco, 1990.

Discusses the relationship between the prohibition of the use of force and armed reprisals in light of the new uses of force and exceptions to the prohibitions: particularly the legitimization of armed reprisals through the expansion of self-defense (through the "indirect armed

aggression") and the protection of national interest and ideological intervention.

Tucker, Robert W. "Reprisals and Self-Defense: The Customary Law." ***American Journal of International Law*** **66.3 (1972): 586–596.**

Considers the prohibition of forcible measures of reprisals is of marginal significance. Such reprisals may be forbidden, but the functional equivalent may nevertheless be permitted in the customary law in the form of self-defense ("forcible measures of self-help"). Reprisals and self-defense are two quite distinct and limited forms of self-help.

Human Rights and Humanitarian Law

Countermeasures may not affect obligations for the protection of human rights, particularly basic human rights that may not be derogated in any circumstance, including essential economic rights (as countermeasures should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights and, inter alia, the prohibition of starvation of civilians as a method of warfare). Certainly, reciprocity is limited in international human rights law and international humanitarian law (Provost 1994, Olleson and Borelli 2010). At least since the beginning of the 20th century, scholars assessed the limitations on reprisals based on considerations of humanity (as the 1928 *Naulilaa* award recognized, even though the tribunal did not deal with those limitations): the 1934 Institut de Droit International resolution was a confirmation of those limitations. The normative and institutional developments of international human rights since 1945 have taken the limitations further; similarly, as before, reprisals against protected persons or property have been prohibited in international humanitarian law. Those prohibitions are enshrined today in the Geneva Conventions of 1949, as well as in the Additional Protocol I of 1977, but not in Additional Protocol II (Hampson 1988). In the 1974–1977 diplomatic conferences, reprisals proved to be the most controversial and intractable problems. It is no surprise then that there are further gaps in the Protocol I (Nahlik 1984) and that the compromise between the admissibility of reprisals and their limitation based on considerations of humanity enshrined in Protocol I did not meet the approval of most states. Can or should they enter a reservation to those articles (Hampson 1988)? On the other hand, Article 60.5 of the Vienna Convention on the Law of Treaties confirms the absolute character of the limitations based on humanity, and the ILC took note of it in the 1996 and 2001 draft articles on state responsibility. Yet the ILC recognized that questions concerning belligerent reprisals are governed by those relevant primary rules, bearing in mind that obligations for the protection of fundamental human rights and of a humanitarian character prohibiting reprisals shall not be affected by countermeasures. While in the words of the International Committee of the Red Cross (ICRC) the prohibition is "absolute," declarations of key states indicate residual ambiguity over the scope of permissible reprisals, particularly in the context of armed conflicts that are not international. Legal literature is fully aware of the problematic "sanction" of infringements of international humanitarian law (Nahlik 1984, Sachariew 1989) and hardly denies the historical role of belligerent reprisals (Kalshoven 2005); legal restrictions, practice, and "new" armed conflicts suggest there is need for clarification (Darcy 2003) and better reassessment of "reasonable" reprisals (Newton 2010). Some authors question whether the trend toward the outlawing of reprisals has now gone too far (Greenwood 1989).

Darcy, Shane. "The Evolution of the Law of Belligerent Reprisals." ***Military Law Review*** **175 (2003): 184–251.**

Asserts that the extension of reprisals prohibitions pertaining to international conflicts and to conflicts that are not international promoted by the ICRC and the International Criminal Tribunal for the Former Yugoslavia (ICTY) is unsustainable and should be clarified. From this study it does not seem that customary law has completely prohibited the use of belligerent reprisals.

Greenwood, Christopher J. "The Twilight of the Law of Belligerent Reprisals." ***Netherlands Yearbook of International Law*** **20 (1989): 35–69.**

Examines the current state of the law regarding belligerent reprisals, separating the study of reprisals into international armed conflicts and internal armed conflicts. Greenwood discusses whether the trend toward outlawing reprisals has gone too far. He also considers the prospects for the future development of this legal area.

Hampson, Françoise J. "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949." ***International and Comparative Law Quarterly*** **37.4 (1988): 818–843.**

Examines the law regarding belligerent reprisals (not involving the use of force) prior to 1977 and analyzes and evaluates whether a state ratifying the protocols can or should enter a reservation to those articles that further limits the scope of lawful reprisals.

Kalshoven, Frits. *Belligerent Reprisals*. 2d ed. Leiden, The Netherlands: Martinus Nijhoff, 2005.

Examines the general aspects, the historical developments, and the results and perspectives in the law and practice relating to recourse to belligerent reprisals. He notes that the prohibition has been hard fought (1929, 1949, and 1977) and that it remains contested to this day. First published in 1971 (Leiden, The Netherlands: A. W. Sijthoff), the work has become a classic.

Nahlik, Stanislaw E. "Le problème des sanctions en droit international humanitaire." In *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*. Edited by Christophe Swinarski, 469–481. The Hague: Martinus Nijhoff, 1984.

Reflecting on the analogies and differences between international law and domestic law, Nahlik remarks that international law has long had quasi-civil (reparation) and quasi-criminal (reprisals) sanctions (and more recently true criminal sanctions, or criminal responsibility of individuals). He analyzes the relationship between reprisals and humanitarian law.

Newton, Michael A. "Reconsidering Reprisals." *Duke Journal of Comparative and International Law* 20.3 (2010): 361–388.

The author holds that reasonable reprisals grounded on an empirical assessment of their deterrent value or framed as appropriate punishment for prior acts of terror may be the most humane strategy for serving the strategic imperatives of civilized society confronted with a persistent and adaptive terrorist enemy. He adds that thoughtful and multilateral reassessment of the lawful scope and rationale for reasonable reprisals is overdue.

Olleson, Simon, and Silvia Borelli. "Obligations Relating to Human Rights and Humanitarian Law." In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 1177–1196. Oxford: Oxford University Press, 2010.

Discusses how, due to the nonreciprocal and *erga omnes* nature of these obligations and to the hierarchically superior character of the underlying norms, the suspension of human rights obligations by way of countermeasure and the taking of countermeasures "affecting" fundamental human rights obligations is prohibited. Similarly, there are conventional limits to recourse to belligerent reprisals, and the customary law prohibits belligerent reprisals against civilians.

Provost, René. "Reciprocity in Human Rights and Humanitarian Law." *British Yearbook of International Law* 65.1 (1994): 383–454.

Examines various elements of human rights and humanitarian law to determine whether they indicate a relevance for reciprocity that is markedly less than in other areas of general international law. Also looks at whether similar patterns appear in this respect in both areas of law. Available online by subscription.

Sachariew, Kamen. "Les droits des États en matière de mesures de mise en œuvre du droit international humanitaire." *Revue Internationale de la Croix-Rouge* 71 (1989): 187–207.

Analyzes the mechanisms, the position, and the practice of states concerning the implementation of the Geneva Conventions and of Additional Protocol I, in terms of the theory of state responsibility, the principles of the UN Charter, and the ILC work on state responsibility.

Diplomatic Law

On functional grounds (although Cahier 1964 does not state the legal basis or source from which the relevant prohibition comes), the status of the obligations designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents and

consular officials, as well as the premises, archives, and documents devoted to diplomatic and consular relations, is another substantive limitation of the admissibility of countermeasures. Despite measures that may be affecting diplomatic rights or privileges, these obligations concerning the diplomatic or consular inviolability shall be respected in all circumstances, including in the case of armed conflict. In the judgment on the *US Diplomatic and Consular Staff in Tehran* case (1980), the ICJ states that the rules of diplomatic law are a "self-contained" regime: they provide the necessary means of defense against, and sanction for, illicit activities by members of diplomatic or consular missions, excluding countermeasures against the sending state targeting those members. The action taken by the United States during the Iranian hostage crisis in 1979 and 1980 offered a new opportunity to examine the legality of economic countermeasures and (threat of) military reprisals, as well as the relevance of the decisions of the UN Security Council on the legality of the countermeasures (Schachter 1984). The ILC has echoed that minimum guarantee of protection, essential to the communication and interaction between states and to protect highly vulnerable persons and premises. Support is widespread in the doctrine for the prohibition of reprisals (countermeasures) against persons enjoying protection as a matter of diplomatic law. Some authors believe that this prohibition is derived from the primary rules concerning the protection of diplomatic envoys they characterized as having a "special status" in customary law (Rölling 1980), what appears to be "peremptory norms" or analogously (Dominicé 1981), while others find its basis in the particular nature of diplomatic law as a "self-contained" regime (see Elagab 1988, cited under Contemporary International Law, and Vilariño Pintos 2011). A few authors question the existence of a rule of general international law condemning otherwise not unlawful acts of coercion directed against diplomatic envoys (Conforti 2018, cited under Textbooks), and some authors point out that diplomatic immunity works in favor of the powerful (Falk 1980) or recognize it is possible to dispute the wisdom of the legal situation (Rölling 1980).

Cahier, Philippe. *Le droit diplomatique contemporain*. 2d ed. Paris: Librairie Minard, 1964.

Cahier's classic book follows the trend to affirm the illegality of reprisals against diplomatic personnel, but it does not state the legal basis or source of the relevant prohibition.

Dominicé, Christian. "Représailles et droit diplomatique." In *Recht als Prozess und Gefüge: Festschrift für Hans Huber zum 80. Geburtstag*. Edited by Hans Huber, 541–552. Bern, Switzerland: Stämpfli, 1981.

Analyzes the reason advanced by the ICJ in its 1979 and 1980 decisions (in the American hostages in Iran case) to affirm that the rules of diplomatic law cannot be suspended as a countermeasure. Dominicé distinguishes whether the obligation initially breached emanates from a rule of diplomatic law or from other rules of international law.

Falk, Richard. "The Iran Hostage Crisis: Easy Answers and Hard Questions." *American Journal of International Law* 74.2 (1980): 411–417.

Points out that diplomatic immunity works in favor of the powerful as no means exist in current international law (or this law does not deal with an adequate counterweight) to expose and counter diplomatic misconduct (e.g., unlawful interference and support of a regime that violates human rights).

Rölling, B. V. A. "Aspects of the Case Concerning U.S. Diplomats and Consular Staff in Teheran." *Netherlands Yearbook of International Law* 11 (1980): 125–153.

The author states that the ICJ was not confronted with the question of whether the right of reprisal can be applied vis-à-vis diplomatic and consular personnel; Rölling regrets the court did not take the opportunity to state that those reprisals are forbidden in all circumstances, yet he recognizes it is possible to dispute the wisdom of the legal situation.

Schachter, Oscar. "Self-Help in International Law: U.S. Action in the Iranian Hostages Crisis." *Journal of International Affairs* 37.2 (1984): 231–246.

Examines the action taken by the United States in the Iranian hostages crisis (freeze, ban on oil imports and general prohibition of exports, and the rescue attempt and threats of military reprisal), and the relevance of the decisions of the UN Security Council on the legality of the countermeasures.

Vilariño Pintos, Eduardo. *Curso de derecho diplomático y consular*. 4th ed. Madrid: Tecnos, 2011.

In his comprehensive textbook, Vilariño Pintos deals with diplomatic and consular inviolability obligations as obligations not affected by countermeasures, mentioning the “self-contained” argument from the 1980 ICJ judgment and the 2001 ILC draft articles. Originally published in 1987.

Prior Demand and Notification

It is almost unanimously recognized that before taking countermeasures, a state is required to call on the responsible state to comply with international law. After the 1928 *Naulilaa* award, the 1934 IDI resolution recognized this condition, and many authors agree with it (e.g., Elagab 1988, cited under Contemporary International Law; Gianelli 1997, Dominicé 1999). Within the ILC, Riphagen 1988, Arangio-Ruiz 1995, and Arangio-Ruiz 2001 (all cited under Special Rapporteurs’ Reports) supported the existence of this condition. If appropriate, the state shall submit an application to a court or tribunal. On the other hand, it is debatable whether or not the state is required to notify the responsible state that it intends to take countermeasures before adopting these countermeasures: there are authors who affirm the existence of that requirement (e.g., Schachter, Condorelli, Simma), while others do not share this opinion (e.g., Zoller, Sicilianos). Within the ILC there have been also contrary opinions (e.g., Riphagen 1988, Arangio-Ruiz 1995, Arangio-Ruiz 2001, all cited under Special Rapporteurs’ Reports) in favor of this requirement. It should be noted that, in respect of termination or suspension of the operation of a treaty, prior notification is required under Article 65, paragraphs 1 and 5 of the 1969 Vienna Convention. As with the obligation to offer to negotiate and, eventually, to resort to any other means for settling the dispute (other than to a competent court or tribunal ready to authoritatively make decisions binding on the parties, including interim measures of protection, and provided the wrongful act has ceased and the responsible state does not fail to implement the dispute settlement procedure in good faith), if appropriate it is recognized that the requirement of notification would not prevent the state from taking such urgent countermeasures as are necessary to preserve its rights. The ILC has accepted the requirement of the “sommation”: first in the 1996 draft articles; second, after the confirmation by the 1997 ICJ judgment in the *Gabčikovo-Nagymaros* case, in the 2001 draft articles; last, in the 2009 and 2011 draft articles on the responsibility of international organizations. Furthermore, the ILC has equally accepted the prior notification (Iwasawa and Itwatsuki 2010), without detriment to urgent countermeasures (Kamto 2010).

Dominicé, Christian. “La vaine sommation, condition d’exercice des contre-mesures.” In *Mélanges en hommage à Michel Waelbroeck*. Edited by Marianne Dony and Aline De Walsche, 57–75. Brussels: Bruylant, 1999.

Studies the condition of the unsuccessful prior “summation,” in the context of all the conditions of exercise of countermeasures. Stresses that the purpose of countermeasures is to assess the various procedural conditions laid down in the legal regime of countermeasures.

Gianelli, Alessandra. *Adempimenti preventivi all’adozione di contromisure internazionali*. Milan: Giuffrè, 1997.

Gianelli deals exhaustively with the procedural conditions for the taking of countermeasures, including dispute settlement procedures and prior demand and notification, particularly in the light of the ILC and Sixth Commission of the UN General Assembly debates.

Iwasawa, Yuji, and Naoki Itwatsuki. “Procedural Conditions.” In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 1149–1155. Oxford: Oxford University Press, 2010.

Explaining the raison d’être of the procedural conditions included in the legal regime of countermeasures, the authors deal with the ILC’s consideration of the issues and study specifically the call for reparation (sommation) and notification and the relationship between countermeasures and procedures for the peaceful settlement, including the application of the principle of necessity and the urgent countermeasures.

Kamto, Maurice. "The Time Factor in the Application of Countermeasures." In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 1169–1176. Oxford: Oxford University Press, 2010.

Focuses on the time factor, both in the implementation procedure of countermeasures and from the perspective of the limitation of countermeasures in time. Analyzes the temporal requirement for the starting point of countermeasures, the urgent countermeasures, and the suspension of countermeasures. Also deals with the duration, reversibility, and termination of countermeasures.

"Third" States

Countermeasures should be directed against the state that committed the wrongful act and not against third states. But there is a much more controversial question in relation to the reaction to the violation of *erga omnes* obligations and peremptory norms (to what were called "international crimes of states"): the entitlement of noninjured or indirectly/legally injured ("third") states to take individual countermeasures. There is a long line of doctrinal opinion (Akehurst 1970), but legal scholars do not always share the same perception about the consensus on values and policies as the international community, and they do not draw the same conclusions from the practice of states. They compare the potentials of practice and the International Law Commission (ILC) work (Dupuy 1983) and use this not to defend the existence of a duty (Gaja 2005) but to defend a right, connected to a new "constitutional" structure of international law (Frowein 1994) or not (Hillgruber 2006). Ago introduced this debate within the ILC in 1979, but he thought of the "institutionalized reaction," namely, through the UN. The ILC seemingly accepted this view between 1979 and 1996, but, notwithstanding, adopted a broad definition of "injured state," at some instances comprising the entitlement of all (third) states. Yet, as Riphagen suggested in 1983, in the 1996 draft the ILC recognized that "legally" injured states would be more limited than materially injured states in their choice of the type and the intensity of measures that would be proportional to the injury suffered. Eventually, not taking into account institutional reactions in the 2001 draft articles, the ILC drew a much more restrictive distinction between injured states and other states entitled to invoke state responsibility and dealt with only countermeasures adopted by the injured state. The ILC concluded that despite proclamations such as the one from the ICJ in the 1970 *Barcelona Traction* judgment (see International Court of Justice 1970, cited under International Court of Justice), state practice on this subject was still "limited and rather embryonic" or "sparse and involv[(ing] a limited number of States," leaving open the question whether those noninjured states may or not take (counter)measures in the general or collective interest (i.e., "solidarity countermeasures") to further development and certainty in international law. Certainly, conscious of the risks (justifications of politically motivated acts or unilateral interventions by a state and spurious legal claims leading to alleged "countermeasures"), Article 54 simply limits the right of noninjured states entitled to invoke the responsibility of another state to take "lawful measures." The compromise solution of the ILC is the subject of some criticism; some authors do not consider codifying the law in force (Katselli Proukaki 2010), to others the justification of that solution given by the ILC is not convincing enough (Alland 2002, Sicilianos 2010) and third-party countermeasures are borne out in practice since the adoption of Article 54 by the ILC (Dawidowicz 2006, Dawidowicz 2015, and Dawidowicz 2017). Anyway, the risks call for limiting spontaneous solidarity measures (Koskenniemi 2001).

Akehurst, Michael. "Reprisals by Third States." *British Yearbook of International Law* 44 (1970): 1–18.

Akehurst recalls Grotius and Vattel, and more recent writers, suggesting that third states are entitled to take reprisals; but he also remarks on the (then) almost complete absence of authority in the other sources of international law. He turns to collective self-defense and qualified neutrality and termination or suspension of treaties as a result of their breach and enforcement of judicial decisions. Available online by subscription.

Alland, Denis. "Countermeasures of General Interest." *European Journal of International Law*, 13.5 (2002): 1221–1239.

Considers the questions raised by the omission in the 2001 ILC's draft articles on state responsibility of the use of countermeasures by indirectly injured states and the link between international responsibility and the guarantee of international legality. The author analyzes how the shift from "international crime" to violation of *jus cogens* fits in with the notion of countermeasures of general interest.

Dawidowicz, Martin. "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*** **77.1 (2006): 333–418.**

The author analyzes the state practice in which third-party countermeasures have been adopted concurrently with Security Council enforcement measures under Chapter VII of the UN Charter. Available online by subscription.

Dawidowicz, Martin. "Third-Party Countermeasures: Observations on a Controversial Concept." In ***Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*****. Edited by Christine Chinkin and Freya Baetens, 340–362. Cambridge, UK: Cambridge University Press, 2015.**

This chapter considers whether most of the common criticism of the concept of third-party countermeasures are borne out in practice since the adoption of the ILC's articles on state responsibility.

Dawidowicz, Martin. ***Third-Party Countermeasures in International Law*****. Cambridge, UK: Cambridge University Press, 2017.**

Through a comprehensive review of state practice, the author focuses on whether third-party countermeasures have a solid foundation in international law. He thinks it is now demonstrated that such measures are part of customary international law, surpassing thereby the choice of the ILC's in 2001 articles on state responsibility (Article 54).

Dupuy, Pierre-Marie. "Observations sur la pratique récente des "sanctions" de l'illicite." ***Revue Générale de Droit International Public*** **87 (1983): 505–548.**

From the analysis of the practice, and the paralysis of the UN due to the vetoes, Dupuy concludes that the "substitution" of the institutionalized sanctions by the "sanctions" adopted by (Western) states is precarious and the law enforcement too random. He compares the respective potentials of the practice and the ILC work on state responsibility (countermeasures and "international crimes").

Frowein, Jochen A. "Reactions by Not Directly Affected States to Breaches of Public International Law." ***Recueil des Cours: Collected Courses of The Hague Academy of International Law*** **248 (1994): 345–437.**

The author bases the "need" for third-party reactions in the constitutionalization of the international community. He analyzes the third state reactions under the UN Charter, under treaty systems, and to violations of obligations *erga omnes*; however, the author concludes that the system is necessary to control these reactions.

Gaja, Giorgio. "Do States Have a Duty to Ensure Compliance with Obligations ***Erga Omnes*** **by Other States?" In** ***International Responsibility Today: Essays in Memory of Oscar Schachter*****. Edited by Maurizio Ragazzi, 31–36. Leiden, The Netherlands: Martinus Nijhoff, 2005.**

Gaja analyzes the duty first as a consequence of the breach (views of the ICJ and the ILC); second, he considers that duty as a primary obligation and not necessarily to protect all the *erga omnes* obligations. No matter which approach one takes, the author admits that the existence of the duty under international law is debatable and that there are risks of unjustified or exaggerated responses alleviated only by institutionalized responses.

Hillgruber, Christian: "The Right of Third States to Take Countermeasures." In ***The Fundamental Rules of the International Legal Order*****: Jus cogens** ***and Obligations*** **Erga omnes. Edited by Christian Tomuschat and Jean-Marc Thouvenin, 265–293. Leiden, The Netherlands: Martinus Nijhoff, 2006.**

Maintains that current international law recognizes a right on the part of third states to take countermeasures in certain cases, whether as "legally injured" states or, better, as "noninjured" states. In the author's opinion, the questions of whether "third" states have that right and

how those “third” states should exercise that right depend upon each violated norm the reaction to which the countermeasure is taken, and it is much easier to accept concerning contractually established norms and the subsequent rights to take countermeasures.

Huesa Vinaixa, Rosario. “Auge y declive de las ‘contramedidas colectivas’ en la construcción de un sistema de responsabilidad internacional.” In *Derechos humanos, responsabilidad internacional y seguridad colectiva: Intersección de sistemas, Estudios en homenaje al profesor Eloy Ruiloba Santana*. Edited by Rosario Huesa Vinaixa, 261–295. Madrid: Universidad de las Islas Baleares-Marcial Pons, 2008.

The author deepens the evolution, the meaning, and the legal configuration of the measures of reaction against the internationally wrongful acts and, in particular, analyzes the trajectory followed by “collective countermeasures” in the works aimed at the codification of responsibility.

Katselli Proukaki, Elena. *The Problem of Enforcement in International Law: Countermeasures, the Non-injured State and the Idea of International Community*. London: Routledge, 2010.

Criticizes the ILC stance concerning “solidarity measures,” arguing that the ILC has created an enforcement deficit for community interests. The author maintains that there is good evidence that a customary norm permitting the exercise of countermeasures by noninjured states has emerged on the basis of international practice and that solidarity measures have a role to play in the self-contained régimes.

Koskenniemi, Martti. “Solidarity Measures: State Responsibility as a New International Order?” *British Yearbook of International Law* 72.1 (2001): 337–356.

The author considers that, in addition to the functioning of the Security Council, the end of the Cold War allowed the study of the developments in the responsibility of states to be completed, particularly by grappling with the issue of enforcement of international law through countermeasures. Those countermeasures include, absent Security Council action, the “solidarity measures,” but the author concludes that a strong community interest exists in limiting spontaneous solidarity measures. Available online by subscription.

Sicilianos, Linos-Alexandre. “Countermeasures in Response to Grave Violations of Obligations Owed to the International Community.” In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 1137–1148. Oxford: Oxford University Press, 2010.

Analyzes the sources of controversy (the large number of states with the power to react and the imprecise links between the institutional and the individual) and the ambiguity of the compromise solution retained by the ILC: including the changes in the ILC’s attitude to the text in the 2000 report, questioning the justification of the solution.

Treaty Law

Reprisals and denunciation, as opposed to termination or suspension of the application of an international treaty due to its breach, have usually been viewed as worlds apart. The former concerns the enforcement of international law or, more recently, the law of responsibility for internationally wrongful acts; the latter concerns the law of treaties (Article 60 of the 1969 and 1986 Vienna Conventions). This opposing view seems rather simplified (Simma 1970). In the *Air Service* case (1978), the tribunal avoided the stumbling block of the dual approach (theory of reprisals and law of treaties) by the use of the broader term “countermeasures,” rejecting the extreme positions of either total differentiation or identification of reprisals and denunciation or suspension of the operation of a treaty. Once the problem was raised without any solutions given, it was still necessary to study the dialectical relationship between reprisals and conventional reactions. The similarities and differences concern both the conditions of the reaction and its implementation (relationship between the wrongful act and the reaction, legal capacity to react, identification of states affected by the reaction, and procedural requirements) as their substance (infringed rules, legal effects of the reactions, and principle of proportionality). Termination, denunciation, or suspension of the operation of a breached treaty constitute a form of countermeasures (Pisillo Mazzeschi 1984, Martín López 1999); but neither of the two diametrically opposed views fully reflects reality (Sicilianos 1993). Certainly, as the *Rainbow Warrior* arbitration (Weil 1994) and the International Court of Justice

in the *Gabčikovo-Nagymaros* case previously recognized (Weckel 1998), the International Law Commission asserted in 2001 that a distinction must be drawn between circumstances precluding wrongfulness (countermeasures provide a justification or excuse for nonperformance while the circumstance subsists) and the termination of the obligation itself; in other words, the exception of non-performance of Article 60 of the Vienna Convention (for a "material breach" of the treaty) is not concerned with the question of responsibility for (any) breach of the treaty. Some authors maintain that Article 60 constitutes the only basis for the suspension or termination of a treaty when its obligations are breached by a state party; others purport that it is certainly the only basis to terminate a treaty and to suspend the treaty because of a material breach of an obligation imposed by that treaty, but other questions associated with Article 60 and countermeasures remain unclear (Verhoeven 2010). Highlighted here are the possible incoherencies of codification of customary law of treaties and responsibility (Dupuy 1997). Yet the two aspects of law converge in order to maintain the stability of international law relations (Weckel 1998).

Dupuy, Pierre-Marie. "Droit des traités, codification et responsabilité international." *Annuaire Français de Droit International* 43 (1997): 7–30.

The author asserts that the decisions on the *Rainbow Warrior* and *Gabčikovo-Nagymaros* cases suggest a question: is this really the customary law of treaties and the customary law of responsibility as such which pose opposites interpretations about their potential rivalry, or is it the way they have been codified?

Martín López, Miguel Ángel. "La terminación y la suspensión de los tratados internacionales a título de contramedidas." *Anuario de Derecho Internacional* 15 (1999): 529–545.

Stresses the autonomy of the law of treaties and the law of responsibility and posits the compatibility between the *numerus clausus* character of the causes of termination and suspension of treaties according with the 1969 and 1986 Vienna Conventions, on the one hand, and, on the other, the termination and suspension as a countermeasure.

Pisillo Mazzeschi, Riccardo. *Risoluzione e sospensione dei trattati per inadempimento*. Milan: Fiuffrè Editore, 1984

The author focuses on the compatibility of the breach/termination and suspension (law of treaties) and the wrongful act/countermeasure (law of responsibility). The concluding chapter is devoted to the question of whether measures of termination and suspension can be clearly distinguished from nonarmed reprisals.

Sicilianos, Linos-Alexander. "The Relationship between Reprisals and Denunciation or Suspension of a Treaty." *European Journal of International Law* 4.3 (1993): 341–359.

Studies the dialectical relationship between reprisals and denunciation or suspension of the operation of a treaty. There is neither a clear distinction between both reactions nor the conventional reaction that constitutes a form of reprisal. The similarities and differences concern both the conditions of the reaction and its implementation as their substance.

Simma, Bruno. "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law." *Österreichische Zeitschrift für öffentliches Recht* 20 (1970): 5–83.

Simma confronts and compares the established doctrine, precedent, and diplomatic practice with Article 60. He deals with nonperformance of treaty obligations as nonforcible reprisals, and makes a distinction: if the wrongful act is a breach of an obligation under an "objective régime," the reprisal is admissible; otherwise, the reprisal is not admissible.

Verhoeven, Joe. "The Law of Responsibility and the Law of Treaties." In *The Law of International Responsibility*. Edited by James Crawford, Alain Pellet, and Simon Olleson, 105–113. Oxford: Oxford University Press, 2010.

The author stresses that the relationship between the law of treaties and the law of responsibility must be examined bearing in mind that "responsibility" includes the taking of countermeasures against the state responsible. Even if punishing the responsible state is not the point and does not require any criminal responsibility, this action comes close to a sanction.

Weckel, Philippe. "Convergence du droit des traités et du droit de la responsabilité internationale." *Revue Générale de Droit International Public* 102 (1998): 647–684.

In the light of the ICJ's judgment in the *Gabčikovo-Nagymaros* case, the author analyzes the similitude between acts (treaties) and (wrongful) facts, the interference of the law of responsibility into the law of treaties, and the complementarity of the law of responsibility and the law of treaties, which convergence facilitates the stability of international relations.

Weil, Prosper. "Droit des traités et droit de la responsabilité." In *International Law in an Evolving World: In Tribute to Professor Eduardo Jiménez de Aréchaga*. Edited by Manuel Rama-Montaldo, 523–543. Montevideo, Uruguay: Fundación de Cultura Universitaria, 1994.

Weil analyzes the two principles formulated by the arbitral tribunal in the *Rainbow Warrior* case: the treaty law and the law of responsibility have a different scope, and the breach of treaty is not governed by the former but by the latter. Also finds that the breach of treaty is not subject to a specific regime of international responsibility. Weil does not focus on countermeasures.

The Responsibility of International Organizations

Contrary to the issue of "sanctions" adopted by the League of Nations or the UN, legal scholars have paid little attention to countermeasures taken by, or against, international organizations until relatively recently, with very few exceptions. Certainly, it has been the work of the ILC on the responsibility of international organizations that has prodded the commission to study these countermeasures. Both Ago 1981 (cited under Special Rapporteurs' Reports) and the ILC included the "measures" taken by states upon a recommendation, decision, or authorization (a "sanction") adopted by an international organization between the "countermeasures" (or "sanctions") adopted by states. The commission took note of the trend to "institutionalize" the reaction against the breach of the most relevant obligations, while it did not rule out the taking of countermeasures by an international organization itself. Then the ILC also suggested that the conditions governing the countermeasures (e.g., prior demand or proportionality) are not necessarily the same in the case of sanctions adopted collectively in a competent international organization. But between 2002 and 2011 the International Law Commission (ILC) dealt with the topic, with Giorgio Gaja as special rapporteur. Besides the studies on the occasion of the work of the ILC, the E(E)C/EU law and practice have almost monopolized authors' interests, though in the early 21st century the idea of countermeasures has been a problem for the UN. The decision of the ILC to include countermeasures has been hardly criticized and authors deal with the specificities of the responsibility of international organizations vis-à-vis state responsibility for internationally wrongful acts, mainly because of the function of international organizations in the international system and the rules of international organizations.

The Work of the International Law Commission

The work has taken an approach similar to the articles on the responsibility of states for internationally wrongful acts, including the draft articles on countermeasures. To follow this pattern means to replicate with minor adaptations; the adaptations were intended particularly to consider the substantive and procedural conditions enshrined in the rules of the international organization; first of all, a distinction is made between countermeasures and "sanctions" taken according to those rules. The ILC emphasizes the application by analogy of articles on the responsibility of states and some specificities concerning, inter alia: the effects of countermeasures over the functioning of the responsible international organization; or the countermeasures taken against member states or international organizations (and the reverse situation). The UN General Assembly took note of the articles adopted at second reading and commended them to the attention of governments and international organizations without prejudice to the question of their future adoption or other appropriate action. The General Assembly decided to include in the provisional agenda of its sixty-ninth session (2014) an item entitled "Responsibility of International Organizations," with a view to examining, inter alia, the question of the form that might be given to the articles. See the International Law Commission (cited under the Work of the International Law Commission on State Responsibility).

Special Rapporteur's Reports

Special Rapporteur G. Gaja proposed an approach similar to the articles on the responsibility of states for internationally wrongful acts, including the draft articles on countermeasures. In this sense, some of Gaja's reports (Gaja 2006, Gaja 2008, Gaja 2009, and Gaja 2010) replicated the content of articles on countermeasures included in the articles on state responsibility for internationally wrongful acts with minor adaptations, particularly in order to account for the substantive and procedural conditions enshrined in the rules of the international organization. Countermeasures are considered as circumstances precluding wrongfulness and as means of implementation of the responsibility of international organizations or states. Developments relating to the object and limits of countermeasures, the obligations not affected by countermeasures, the proportionality, the conditions relating to resort to countermeasures, and termination and measures taken by an entity other than an injured state or international organization are included in the special rapporteur's reports.

Gaja, Giorgio. Fourth Report on Responsibility of International Organizations. UN Doc. A/CN.4/564. New York: United Nations, 2006.

Deals with countermeasures by an international organization against another international organization (or a state) with regard to an internationally wrongful act as circumstances precluding wrongfulness; and, alongside the alternative of leaving the text of the article provisionally blank, the author proposes the provisional inclusion of a provision concerning countermeasures among the draft articles on those circumstances.

Gaja, Giorgio. Sixth Report on Responsibility of International Organizations. UN Doc. A/CN.4/597. New York: United Nations, 2008.

Discusses the implementation of the responsibility of international organizations (or states) through countermeasures by an international organization and comprising draft articles on object and limits, obligations not affected by countermeasures, proportionality, conditions relating to resort to countermeasures, termination and measures taken by an entity other than an injured state or international organization.

Gaja, Giorgio. Seventh Report on Responsibility of International Organizations. UN Doc. A/CN.4/610. New York: United Nations, 2009.

Gaja again deals with countermeasures as circumstances precluding wrongfulness and as means of implementation of the responsibility of international organizations (or states) and proposes a new draft article on countermeasures as circumstances precluding wrongfulness.

Gaja, Giorgio. Eighth Report on Responsibility of International Organizations. UN Doc. A/CN.4/640. New York: United Nations, 2010.

Provides a survey of the comments made by states and international organizations on the draft articles on countermeasures adopted at first reading by the ILC at its sixty-first session.

Reports of the International Law Commission

The ILC's reports (International Law Commission 2006, International Law Commission 2008, International Law Commission 2009, and International Law Commission 2011) emphasize the application by analogy of articles on the responsibility of states and some specificities concerning, inter alia: the effects of countermeasures over the functioning of the responsible international organization; the substantive and procedural conditions enshrined in the rules of the international organization; or the countermeasures taken against member states or international organizations and the reverse situation. The commission accepted the inclusion of countermeasures as circumstances precluding wrongfulness and as means of implementation of the responsibility of international organizations or states and devoted articles to the object and limits of countermeasures, the obligations not affected by countermeasures, the proportionality, the conditions relating to resort to countermeasures, and termination and measures taken by an entity other than an injured state or international organization.

International Law Commission. Report of the International Law Commission on the Work of Its Fifty-Eighth Session, 1 May to 9 June and 3 July to 11 August 2006. UN Doc. A/61/10. New York: United Nations, 2006.

The commission referred the proposed Draft Article 19 on countermeasures to the Drafting Committee and subsequently considered and adopted the report of the Drafting Committee on Draft Article 19, with commentaries thereto.

International Law Commission. Report of the International Law Commission on the Work of Its Sixtieth Session, 5 May to 6 June and 7 July to 8 August 2008. UN Doc. A/63/10. New York: United Nations, 2008.

After receiving the oral report of the working group established for, inter alia, the purpose of considering the issue of countermeasures, the commission referred Draft Articles 52 to 57.1 to the Drafting Committee, together with the recommendations of the working group. The commission received the report of the Drafting Committee and took note of Draft Articles 54 to 60 on countermeasures, as provisionally adopted by the Drafting Committee.

International Law Commission. Report of the International Law Commission on the Work of Its Sixty-First Session, 4 May to 5 June and 6 July to 7 August 2009. UN Doc. A/64/10. New York: United Nations, 2009.

The commission referred Draft Articles 19 and 55 to the Drafting Committee and considered and adopted the report of the Drafting Committee. It also adopted Draft Articles 54 and 56 to 60, and completed a set of sixty-six draft articles on the responsibility of international organizations and their commentaries on first reading.

International Law Commission. Report of the International Law Commission on the Work of Its Sixty-Third Session, 26 April to 3 June and 4 July to 12 August 2011. UN Doc. A/66/10. New York: United Nations, 2011.

The commission referred draft articles to the Drafting Committee to commence the second reading. The commission considered the report of the Drafting Committee and adopted the entire set of draft articles and commentaries on second reading.

The 2009 and 2011 Draft Articles on Countermeasures and Commentaries

In 2009 the ILC adopted a set of sixty-six draft articles on the responsibility of international organizations on first reading (paragraph 50), and the commentaries to those draft articles (paragraph 51). The ILC adopted on second reading the articles and commentaries at its sixty-third session, in 2011, and submitted them to the General Assembly as a part of the commission's report covering the work of that session (paragraph 87). The consolidated text of the draft articles and of the commentaries thereto prepared by the secretariat of the United Nations are available online. The draft articles in International Law Commission 2009 and International Law Commission 2011 included several provisions on countermeasures: concerning "The International Wrongful Act of an International Organization" (Part 1), countermeasures are included as circumstances precluding wrongfulness (Articles 21 and 22, respectively); within Part 4 ("The Implementation of the International Responsibility of an International Organization"), there is a chapter 2 ("Countermeasures," Articles 50 to 56 and 51 to 57, respectively) dealing with object and limits of countermeasures, conditions for taking countermeasures by members of an international organization, obligations not affected by countermeasures, proportionality, conditions relating to resort to countermeasures, termination of countermeasures, and measures taken by states or international organizations other than an injured state or organization. The UN General Assembly resolution 66/100 of 9 December 2011 took note of the articles adopted at second reading, the text of which was annexed to the resolution, and brought them to the attention of governments and international organizations without prejudice to the question of their future adoption or other appropriate action. The General Assembly decided to include in the provisional agenda of its sixty-ninth session (2014) an item entitled "Responsibility of International Organizations," with a view to examining, inter alia, the question of the form that might be given to the articles.

International Law Commission. Report of the International Law Commission on the Work of Its Sixty-First Session, 4 May to 5 June and 6 July to 7 August 2009. UN Doc. A/64/10. New York: United Nations, 2009.

Text provisionally adopted by the commission at its fifty-eighth session, in 2006, and its sixtieth session, in 2008; it was finally adopted at its sixty-first session, in 2009, at first reading. The text of the draft articles adopted at first reading and the commentaries thereto are reproduced in A/64/10, paragraphs 50 and 51.

International Law Commission. Report of the International Law Commission on the Work of Its Sixty-Third Session, 26 April to 3 June and 4 July to 12 August 2011. UN Doc. A/66/10. New York: United Nations, 2011.

Text adopted by the commission at its sixty-third session, in 2011, with commentaries, and submitted to the General Assembly. The text of the draft articles is reproduced in the annex to GA resolution 66/100 of 9 December 2011.

Scholarly Writings

Legal scholars have dealt with the topic of countermeasures (or "sanctions," as Verhoeven 1984–1985 considers the unilateral measures adopted by international organizations with the purpose of guaranteeing the defense of the law; which counters Ehlermann 1984–1985) by and against an international organization mainly on occasion of the E(E)C/EU law and practice (Verhoeven 1984–1985 and Ehlermann 1984–1985) and also of the work of the International Law Commission (ILC) (Klein 1998 is an exception). Some authors criticize the inclusion of the articles on countermeasures (Álvarez 2006) or rarely mention the specificities of the responsibility of international organizations vis-à-vis state responsibility for internationally wrongful acts (Rey Aneiros 2006). Most authors deal with countermeasures just as circumstances precluding wrongfulness, not so much as a means of implementation of responsibility. Klein 1998 and Dopagne 2010a analyze the quality of international organizations as subjects injured and the substantive limits and procedural conditions on countermeasures by international organizations. The authors emphasize the principle of specificity governing the powers of international organizations (Cortés Martín 2008), the idea of autonomy of international organizations (Dopagne 2011), or the role of the substantive and procedural conditions enshrined in the rules of the international organizations (Ahlborn 2011); some of them insist, anyway, that the practice of countermeasures by international organizations highlights the persistence of the decentralized international society (Dopagne 2010b).

Ahlborn, Christiane. "The Rules of International Organizations and the Law of International Responsibility." ***International Organizations Law Review*** **8.2 (2011): 397–482.**

Discusses the role of the rules of the organizations in the 2011 draft articles on the responsibility of international organizations adopted by the ILC. Argues that the indecision of the ILC on the legal nature of those rules (international or internal law) permits a fluctuating scope of application concerning, inter alia, countermeasures against an international organization.

Álvarez, J. E. International Organizations: Accountability or Responsibility? Luncheon address, Canadian Council of International Law, 35 Annual Conference on Responsibility of Individuals, States and Organizations, 27 October 2006.

Considers that the whole work of the ILC on responsibility of international organizations would result in "a train wreck" mainly due to the inclusion of countermeasures against international organizations. Yet there is no clarification on his perception about the international law in force or the "strategy" the ILC should follow.

Cortés Martín, José Manuel. ***Las organizaciones internacionales: Codificación y desarrollo progresivo de su responsabilidad internacional*****. Seville, Spain: Instituto Andaluz de Administración Pública, 2008.**

Suggests that the taking of countermeasures by international organizations is limited by the principle of specificity governing the powers of such organizations; but the author bases his opinion on substantive limits and procedural conditions on the 2001 draft articles on state responsibility. He does not deal with countermeasures against international organizations.

Dopagne, Frédéric. ***Les contre-mesures des organisations internationales*****. Louvain-la-Neuve, Belgium: Anthémis, 2010a.**

The author holds the “inherent” capacity of the international organizations to take countermeasures in their condition as subjects of international law and the practice of UN, specialized agencies, IAEA, and E(E)C-EU. He exhaustively studies the quality of injured/noninjured in international organizations and the conditions of exercise of countermeasures by international organizations, reporting on the work of the ILC.

Dopagne, Frédéric. “Countermeasures by International Organisations: The Decentralised Society in the Heart of the Institutionalised Society.” In *Select Proceedings of the European Society of International Law*. Edited by Hélène Ruiz Fabri, Rüdiger Wolfrum, and Jana Gogolin, 204–236. Oxford: Hart, 2010b.

Focuses on the practice and the main legal issues it raises. The author discusses the concept of countermeasures taken by international organizations and concentrates on the question of the countermeasures to protect general interests.

Dopagne, Frédéric. “Sanctions and Countermeasures by International Organizations: Diverging Lessons for the Idea of Autonomy.” In *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*. Edited by Richard Collins and Nigel D. White, 178–195. Abingdon, UK: Routledge, 2011

Devoted to the issue of sanctions and countermeasures taken by international organizations against member states or third states (suspension of rights and privileges or financial assistance, economic measures, etc.). Dopagne sheds new light on both the relationship between the organization and its members and the legal system of the organization and general international law.

Ehlermann, Claus-Dieter. “Communautés européennes et sanctions internationales: Une réponse à J. Verhoeven.” *Revue Belge de Droit International* 18 (1984–1985): 96–112.

Agrees with Verhoeven about the measures taken against a member state but disagrees about the concept of sanction (measures taken against nonmember states). He distinguishes between reprisals and retorsion and discusses the conclusions of Verhoeven concerning the entitlement of international organizations to take reprisals.

Klein, Pierre. *La responsabilité des organisations internationales: Dans les ordres juridiques internes et en droit des gens*. Brussels: Bruylant, 1998.

Klein studies to what extent the countermeasures recognized by the ILC as circumstances precluding wrongfulness of acts of the state are likely to preclude the wrongfulness of acts of international organizations. From this point of view, Klein analyzes the quality of injured of international organizations and the substantive limits and procedural conditions on countermeasures.

Rey Aneiros, Adelaida. *Una aproximación a la responsabilidad internacional de las organizaciones internacionales*. Valencia, Spain: Tirant lo Blanch, 2006.

Though the author focuses on countermeasures such as circumstance precluding wrongfulness, she studies the taking of countermeasures by (less against) an international organization remarking on the application by analogy to all the articles on countermeasures of the 2001 ILC draft articles. She considers economic measures adopted by the (then) European Community.

Verhoeven, Joe. “Communautés européennes et sanctions internationales.” *Revue Belge de Droit International* 18 (1984–1985): 79–95.

Understands that the sanctions are to guarantee the defense of the law. Does not deal with the conditions of sanctions as lawful or unlawful but rather with the entitlement of international organizations, namely the (then) European communities.

The Idea of Countermeasures against the United Nations

Although the E(E)C/EU law and practice have almost monopolized the authors' interests on what may properly be called countermeasures (sometimes called "sanctions") by international organizations, and though much less attention has been paid to countermeasures against international organizations, the UN has been blamed for allegedly unlawful sanctions adopted by the Security Council (Tzanakopoulos 2011). The argument about employing disobedience as a countermeasure against Security Council resolutions adds a new perspective into the debate over the legitimacy and legality of the exercise of its powers by the Security Council and states' reactions to it. The reaction to excesses of power or unlawful acts of the Security Council is an increasingly serious problem that has had a judicial determination by the Court of Justice of the EU in the *Kadi* case purely on the basis of EU law. Its theoretical justification on the basis of international law poses a political problem and leaves too many legal ends open (Klabbers 2011). First, it might not even be all that desirable to provide states with the legal encouragement they would need to disobey the Security Council. Second, there are other dilemmas, such as the determination of unlawfulness of Security Council acts, the entitlement to take countermeasures against the UN, the prior (unsatisfied) demand, the proportionality of countermeasures, the equalization between civil disobedience and countermeasures, etc. Tzanakopoulos's argument has enriched the debate on the action of the Security Council and its control (Tzanakopoulos 2011).

EJIL: Talk!

Featured on this blog are the following discussions on Tzanakopoulos 2011: "An Overview of Disobeying the Security Council" (24 May 2011); discussion with E. de Wet: "Debating Disobeying the Security Council: Is It a Matter of 'A rose by any other name would smell as sweet?'" (24 May 2011); with M. Milanovic: "A Comment on Disobeying the Security Council" (26 May 2011); and with M. Happold: "Some Remarks on Disobeying the Security Council" (27 May 2011).

Klabbers, Jan. "Antonios Tzanakopoulos' *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*." *International Organizations Law Review* 8.2 (2011): 483–489.

Argues that Tzanakopoulos's argument is rather normative, and not so much grounded in state practice. It leaves too many ends open: mainly, requirements for countermeasures (determination of unlawfulness of Security Council acts, entitlement to take countermeasures against the UN; prior (unsatisfied) demand, and proportionality) and equalization between civil disobedience and countermeasures.

Tzanakopoulos, Antonios: *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*. New York: Oxford University Press, 2011.

Examines how the UN Security Council, in exercising its power to impose sanctions under Article 41 of the UN Charter, may violate the charter itself and the general international law. The author posits that conduct of the Security Council may be attributed to the UN and that the international responsibility of the UN may be implemented through countermeasures.

GATT/WTO

Both the World Trade Organization (WTO) and its predecessor, the General Agreement on Tariffs and Trade of 1947 (GATT 1947), provide enforcement mechanisms and remedies of GATT and WTO rules, including recourse to "institutionalized" countermeasures or "multilaterally sanctioned countermeasures," which opt out of general international law rules on countermeasures. Furthermore, with the establishment of the WTO, a new compliance procedure was introduced (Fernández Pons 2006). The compulsory, exclusive, and quasi-judicial enforcement mechanism is enshrined in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), consisting of ad hoc three-member (or possibly five-member) panels and a standing appellate body, which the reports, recommendations, and rulings are legally bound to once adopted by the WTO's dispute settlement body (DSB), a one-member-one-vote political organ. If compliance is not achieved within the time period specified and no satisfactory compensation can be agreed upon, the prevailing member can request authorization from the DSB to take countermeasures. Some authors question the WTO's status as a "self-contained regime" (Lindroos and Mehling 2005, Fernández Pons 2006) and that the suspension of "concessions or other obligations under the covered agreements" (in the WTO jargon) could be described as countermeasures, since it is not necessarily a consequence of the violation of rules and their implicit objective is to compensate rather than to induce compliance (Charnovitz 2001 and Carmody 2002). Unlike the GATT, moving from one step to the next in the process no longer requires the positive consensus of all WTO members. On the other hand, it is also remarkable that the recourse to countermeasures has been much more frequent in the years since the establishment of the WTO than in the much longer history of the

GATT. Mainstream international trade law scholars have commented positively on the work of WTO adjudicators, but there is a general knowledge that economic and political inequality between WTO members and non-compliance recalcitrance make the functioning of DSU countermeasures difficult (Mavroidis 2000). More needs to be done to strengthen the system (Pauwelyn 2000, Charnovitz 2001, Shadikhodjaev 2009, Carmody 2002), but there is no a general accepted recipe for success (Colares 2011).

Carmody, Chi. "Remedies and Conformity under the WTO Agreement." *Journal of International Economic Law* 5.2 (2002): 307–329.

The author poses the question of whether the methods of WTO dispute settlement are perceived by member states as preserving and enhancing the integrity of the world trading system. Those methods should be appreciated in context and for the considerable achievement they represent while providing security and predictability.

Charnovitz, Steve. "Rethinking WTO Trade Sanctions." *American Journal of International Law* 95.4 (2001): 792–832.

Undertakes an appraisal of trade "sanctions" as a WTO instrument and concludes that this practice undermines the trading system, draining away the benefits of free trade and provoking "sanction envy." In view of this dysfunction, Charnovitz explores alternatives to trade enforcement and points to some softer measures that might have promise.

Colares, Juscelino F. "The Limits of WTO Adjudication: Is Compliance the Problem?" *Journal of International Economic Law* 14.2 (2011): 403–436.

Discusses "substantive adjudication" and compliance disputes to find that the enforcement proceedings do protect the pro–free trade interests overwhelmingly supported in substantive adjudication. The author holds that noncompliance is far from a threat to the regime and that some level of noncompliance is not only acceptable but a necessary feature of the system.

Fernández Pons, Xavier. *La OMC y el Derecho Internacional: Un estudio sobre el sistema de solución de diferencias de la OMC y las normas secundarias del Derecho internacional general*. Madrid: Marcial Pons, 2006.

This is an in-depth study of the relationships between different "secondary" rules, both specific and general. The specific secondary rules were established under the dispute settlement system of the WTO, and the general rules are those secondary rules pertaining to general international law. The author states that the WTO regime is anchored in general international law.

Lindroos, Anja, and Michael Mehling. "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO." *European Journal of International Law* 16.5 (2005): 857–877.

Draws on the law and practice of the WTO to determine how that body has positioned itself in the debate about the fragmentation of international law. The authors highlight that while the WTO dispute settlement organs have usually recognized that the rules on world trade do not exist in isolation of general international law, a closer look at actual case law unveils a far more ambivalent picture.

Mavroidis, Petros C. "Remedies in the WTO Legal System: Between a Rock and a Hard Place." *European Journal of International Law* 11.4 (2000): 763–813.

Looks at the discrepancy in legal and economics scholarship as to the effectiveness of the WTO remedies and legal system. He uses representative case law from the WTO to make the point that this effectiveness depends on the relative persuasive power of the WTO member that is threatening with countermeasures.

Pauwelyn, Joost. "Enforcement and Countermeasures in the WTO: Rules are Rules: Toward a More Collective Approach." *American Journal of International Law* 94.2 (2000): 335–347.

Remarking on the advantages and disadvantages of the WTO versus the ICJ, the author stresses that relatively frequent recourse to countermeasures and compliance procedures suggests that the practical enforcement of WTO rules through the dispute settlement may be too arduous. Second, Pauwelyn suggests a more collective and effective enforcement mechanism.

Shadikhodjaev, Sherzod. *Retaliation in the WTO Dispute Settlement System*. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009.

Analyzes the procedural and substantive aspects of retaliation under the WTO with particular reference to relevant rules (GATT 1947, and the DSU and SCM agreements) and case law concerning the calculation of the level of retaliation in Article 22.6/4.11 arbitration. Assesses the efficacy of the system and explores possible improvements.

Countermeasures and Cyberspace

Few formal international agreements related to cyber domain exist and the application of general international law to the cyberspace is not fully developed. While there remains little disagreement over the general applicability of existing international law to state's activity in cyberspace, there is less consensus over the precise application and content of many of the specific rules. Two UN-based processes have been established in responsible behavior in cyber space: the GGE and the OEWG. Though the GGE can be credited with the major achievement of introducing the principle that international law applies to the digital space, the failure in 2017 of the GGE convened in 2016 illustrates that states are reticent to make formal pronouncements on their understanding of legal obligations. Nevertheless, several legal scholars have taken up the challenge: the so-called Tallinn Manual, adopted originally in 2013 and updated and expanded in 2017 (Schmitt 2017). In conjunction with the manual, the director of the project has offered an examination of how and when states may employ countermeasures (Schmitt 2014) and a roadmap for thinking through the responses of states to cyber operations from the perspective of international law (Schmitt 2017, p. 239). It seems that it is hard to deduce from case studies that state practice follows the provisions of Tallinn Manual 2.0, particularly in connection with the application of countermeasures (Efrony and Shany 2018), and it has been contended that "reciprocal countermeasures" are deeply problematic for an international legal regime that seeks to appropriately constrain state responses to cyber conflict (Hinkle 2011). International law is yet to develop governing the use of cyberspace and the consequences for state-sponsored unlawful cyber operations (Lotrionte 2018), and the uncertainties of the law governing countermeasures in general are accentuated regarding the cyberspace: the problem of determining the attribution of the previous unlawful cyber operations or the stringent conditions associated with the application of countermeasures are no less important, and neither is it the legal, ethical, and policy issues of the "offensive digital countermeasures" (Stevens and Biller 2018). Bearing this in mind, scholars have proposed different alternatives: a "proportionate counter CAN rule" (Halberstam 2013); or a new international convention (Anderson 2016). On the other hand, the focus on the international legal dimensions of cyber conflict among nonstate actors marks an attempt to break with state-centric analysis (Messerschmidt 2013).

Anderson, Troy. "Fitting a Virtual Peg into a Round Hole: Why Existing International Law Fails to Govern Cyber Reprisals." *Arizona Journal of International & Comparative Law* 34.1 (2016): 135–158.

This note focuses on current international law in analyzing whether there may be room for retaliatory cyberattacks, concluding that international legal rules are woefully inadequate and incapable of governing cyber retaliation.

Efrony, Dan, and Yuval Shany. "A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice." *American Journal of International Law* 112.4 (2018): 583–657.

Through literature survey –academics and practitioners working in the field, including reactions by state representatives– and case studies, the authors attempt to evaluate the degree to which state conduct is consistent with acceptance on their part of the Tallinn Rules as an international legal framework describing their rights and obligations in relation to cyberoperations. Available online by subscription.

Halberstam, Manny. "Hacking Back: Reevaluating the Legality of Retaliatory Cyberattacks." ***George Washington International Law Review*** **46.1 (2013): 199–237.**

The author proposes a "proportionate counter computer network attack (CNA) rule" that states should consult as a legal guide for when they can use counter cyber operations. The rule relieves the international community of the need to create a cyber-specific legal regime by interpreting the current international law.

Hinkle, Katharine C. "Countermeasures in the Cyber Context: One More Thing to Worry About." ***Yale Journal of International Law Online*** **37 (2011): 11–21.**

Building upon the 2007 cyberattacks on Estonian networks, this analysis seeks to fill that gap in literature on the potential central role of countermeasures in governing the responses of states faced with cyber incursions. It suggests that the law of countermeasures is far from ready to take on the challenges of the digital age, and that it too must be reconsidered in addressing the unique implications of the cyber era.

Lotrionte, Catherine. "Reconsidering the Consequences for State-Sponsored Hostile Cyber Operations under International Law." ***Cyber Defense Review*** **3.2 (2018): 73–114.**

The article focuses on the challenges of determining what actions by states in cyberspace short of war are prohibited in international law, particularly when, and in what manner, a state can take action through cyberspace or otherwise, in response to hostile cyber operations short of war that threaten the security of the state.

Messerschmidt, Jan E. "Hackback: Permitting Retaliatory Hacking by Non-state Actors as Proportionate Countermeasures to Transboundary Cyberharm." ***Columbia Journal of Transnational Law*** **52 (2013): 275–324.**

The author provides a novel account of how international law should govern cross-border hacks by private actors, and especially hackbacks, permitting states "to allow private actors to resort to self-defense as proportionate countermeasures" (p. 275).

Schmitt, Michael N. "'Below the Threshold' Cyber Operations: The Countermeasures Response Option and International Law." ***Virginia Journal of International Law*** **54 (2014): 697–732.**

In this article, shortly after the publication of the first edition of the Tallinn Manual, Schmitt examines how and when states may employ countermeasures in response to malicious cyber operations that fail to qualify as armed attacks and to use cyber countermeasures against non-cyber activities.

Schmitt, Michael N. "Peacetime Cyber Responses and Wartime Cyber Operations Under International Law: An Analytical Vade Mecum." ***Harvard National Security Journal*** **8 (2017): 239–280.**

The text explains each step in the analytical process of cyberattacks and state responses, both in peacetime and during armed conflicts. Together, it serves as a vade mecum designed to guide government legal advisers and others through the analytical process that applies in these two situations. The article should be used in conjunction with the Tallinn Manual 2.0 (Schmitt 2017).

Schmitt, Michael N., ed. ***Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*****. Cambridge, UK: Cambridge University Press, 2017.**

The two international groups of experts who drafted the manuals examine the application of existing international law to cyber activities occurring during both peacetime and armed conflict with the intention of facilitating the analysis of cyber operations and their regulation by international law. Manual 2.0 comprises 154 rules, together with commentaries, and briefly discusses the use of countermeasures (Rule 20).

Stevens, Rock, and Jeffrey Biller. "Offensive Digital Countermeasures: Exploring the Implications for Governments." *Cyber Defense Review* 3.2 (2018): 93–114.

The authors discuss the concept of Offensive Digital Countermeasures (or active defense strategies) that can be used to defend sensitive data and intellectual property. They explore the legal, ethical, and policy issues, with the implications for both foreign and domestic targets, of these countermeasures, from honeypots—at the most benign end of the spectrum of invasiveness—to countermeasures that could involve physical damage or destruction in the real world.

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