Countermeasures by Non-Injured States in the Law on State Responsibility

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Abstract

The adoption of the Final Articles on the Responsibility of States for Internationally Wrongful Acts in 2001 by the International Law Commission (hereinafter the ILC), has far from concluded the debate over the entitlement of non-injured States to resort to countermeasures. Whilst Article 54, due to lack of sufficient State practice, limits the right of any State entitled to invoke responsibility under Article 48 only to *lawful measures* rather than countermeasures, the Commentary leaves the settlement of the issue to the further development of international law.[1] The increasing significance of the notions of peremptory norms and obligations owed to the international community as a whole in contemporary international law, and the lack of effective and compulsory enforcement mechanisms in the international legal arena, make the question of third-State countermeasures even more compelling than ever before. The purpose of this paper is to give an account on how the notion of third-State countermeasures first made its appearance and developed in international law and within the work of the ILC, and address the main concerns that made the ILC abandon the idea at least for the time being. It will then focus on how these concerns might be met today, especially in the light of lack of consensus among States on what safeguards could be provided against abusing the right to countermeasures, in particular the principle of proportionality.

1. Introduction

In the absence of a structure equivalent to that existing in domestic legal systems, with compulsory legislative, judicial and enforcement procedures, international law has often come under attack as not being real "law", but rather a system of moral values and principles which vanish whenever the geo-political or other interests of the stronger components of the international community are at stake. Whilst law-making takes place in the international legal order in the form of customary and conventional rules and general principles, and adjudication finds expression in the jurisdiction, even if consensual, of the International Court of Justice and other international tribunals, the lack of an automatic enforcement mechanism is the most striking feature of general international law. Yet, the legal loophole is not filled with the existence of the Security Council whose role is merely restricted to the safeguarding of international peace and security and not, although it may at times coincide, the enforcement of international law. As a consequence, compliance with international law and with the fundamental principles of the international community as a whole still, and to a great extent, relies on the good will of each State.

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My deep gratitude goes to my supervisor Professor Colin Warbrick for all the knowledge he has given me. Any mistakes in this paper are the responsibility of the author alone.
[1] In this text and as a matter of convenience the term "third-State countermeasures" will be used instead.

2. The Notion of Third-State Countermeasures in International Law

A. Justification

In such a decentralized legal system in which as a matter of general rule resort to the use of armed force is prohibited, the notion of countermeasures comes to fill the legal lacuna and to an extent contributes towards compliance with and even the enforcement of international law. In particular, this notion corresponds to measures, unilateral in character, taken in response to an internationally wrongful act which was previously committed by the State against whom they are turned and which, under normal circumstances, they would themselves be unlawful as infringing the rules of international law. The concept of countermeasures finds justification in the need to restore the equality between sovereign States and to restore the balance that has been disturbed with the commission of the internationally wrongful act. Despite the fact that they are otherwise internationally wrongful acts themselves, countermeasures are justified, and thus responsibility is precluded, by reasons of self-protection, reciprocity, and the need to induce the defaulting State to cease the wrongful act, to offer full reparation for the injury, material or moral, suffered by the aggrieved party, and to secure guarantees for non-repetition in the future. It is now clearly established that for countermeasures to be legitimate they must not be aimed at revenge and they must have temporary effect.[2] Nevertheless, whilst the right to resort to countermeasures by an injured State is undisputed, the same does not apply with the right of third States to respond with countermeasures or, as otherwise known, solidarity measures,[3] whenever the fundamental interests of the international community as a whole are endangered.

Bearing in mind that in some cases of gross violations of international law there is no injured State but injured people, nationals of the same State committing the violation such as in the case of genocide, apartheid and torture, to preclude the possibility of peaceful but nonetheless coercive action by independent components of the international community means to deny those most in need the hope of justice. Furthermore, and although aggression has for long been considered as the most serious offence of international law threatening peace and security, now other violations such as the ones mentioned above are worth of equal attention. The paradox however lies on the fact that whilst third States are entitled to resort to the use of force on the basis of collective self-defence in response to armed attack, the current international legal order seems to prohibit third States from resorting to milder means, such as countermeasures, in reaction to serious infringements of specific international rules, including aggression.

B. The Evolution of the Concept of Third-State Countermeasures

The concept of third-State countermeasures is closely associated with the early realization in international legal doctrine that not all internationally wrongful acts were of the same legal weight, significance and effect. In 1915 for instance Professor Elihu Root, making a comparison between municipal and international law, pinpointed to the necessity for a distinction in the international legal order between wrongs that affected only the parties directly involved in the

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[2] O. Elagab, *The Legality of Non-forcible Counter-measures in International Law* (1988) 46. Also see J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2003) 283.

[3] Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 71 *BYIL* (2001) 337, at 339.

dispute and wrongs which inflicted a legal injury to every nation.[4] However, it was not until the end of the Second World War that "a real current opinion emerged" according to which general international law provided for two different regimes of responsibility: one that would apply as a result of the breach of obligations of great significance to the international community as a whole, and another that would apply to breaches concerning obligations of lesser importance.[5] The debate over the existence of two categories of international obligations became more intense with the adoption of the 1969 Vienna Convention on the Law of Treaties and in particular of Article 53 on peremptory norms, identified as norms accepted and recognized by the international community as a whole and from which no derogation is permitted; and, the 1970 obiter dictum of the International Court of Justice in the *Barcelona Traction* case according to which a distinction must be made between obligations in the observance and the protection of which all States have an interest, and obligations "arising vis-à-vis another State in the field of diplomatic protection".[6]

Consequently, contemporary international law has been enriched with new principles, new rules and new concepts. In a highly interdependent world, community values have surfaced formulating a distinction between wrongful acts and legal consequences, whilst widening the spectrum of actors which have a legal interest to invoke the responsibility of the wrongdoing State. In this regard, current international law consists of more than just reciprocal obligations between two States: the recognition of interests and values placed to serve collective interests and the international community is now undisputed. Most significantly, international law is now moving towards adopting new mechanisms for its enforcement in an attempt to escape from the legal stagnation imposed by its own lack of compulsory jurisdiction over the most flagrant violations of international law. Similarly, the role of individual in contemporary international law has been enhanced: thus, international law is not merely drafted to protect sovereign States, but also individuals and peoples.

C. The Law on State Responsibility

The question regarding the differentiation between two types of internationally wrongful acts and accordingly of two types of responsibility is further related to the determination of the subjects entitled to invoke the responsibility of the State that has committed the wrongful act. The right of third States to resort to countermeasures was extensively dealt with by the ILC in the context of State responsibility. In 1979 the Special Rapporteur Roberto Ago considered in particular whether the right to countermeasures belonged to the monopoly of directly affected States or whether it extended beyond those, especially in relation to violations of obligations that were established to protect collective interests. Nevertheless, aware of the risks behind recognizing that third States had the right to resort to countermeasures in response to a breach that did not directly affect them, the Special Rapporteur expressed the view that the task of determining the existence of a breach of an obligation of fundamental significance for the international community as a

[4] Root, 'The Outlook for International Law', *Proceedings of the American Society of International Law* (1915) 8, 9.
[5] Fifth Report on State Responsibility by Mr Roberto Ago, Yearbook of the ILC (1976) vol. II, Part One, 26, para 80.
[6] *Barcelona Traction, Light and Power Company Limited*, Second Phase, ICJ Reports 1 (1970) 3, at 32, para 33.

whole, and of deciding the measures that should be taken in response, should be vested not to individual States but to international organizations such as the United Nations.[7]

Twenty-five years later and the concerns that prevailed then against recognition of third-State countermeasures have not been diluted nor has the United Nations taken up the role of the enforcer of international law. With the finalization of the Articles on State responsibility in 2001 no mention to such right is made. On the contrary, Article 49 which defines the object and limits of countermeasures speaks only of the right of the "injured State", and Article 54 concerning measures taken by States other than the injured States (as those are defined in Article 48) refers only to *lawful measures* against the defaulting State. The ILC intentionally chose not to include this notion in the Final Articles as third-State countermeasures were still very much disputed whilst State practice was "embryonic".[8] The action of States other than the injured was limited to securing the cessation of the breach and reparation on behalf of the injured State or the beneficiaries by other means permissible under international law because of the fear that by codifying and establishing such right would open Pandora's box where powerful States could behave in an arbitrary way as the law's executers and enforcers.

More analytically, according to the conclusions of the ILC, State practice did not provide evidence for the existence of a rule allowing countermeasures by States other than the injured, even in the case of gross and systematic violations of obligations established either for the collective interest of a group of States, or owed to the international community as a whole. Nevertheless, from an examination of the State practice one can see that it does not exclude third-State countermeasures either. When for instance the European Economic Community decided in the 1980s to take action against Poland, the Soviet Union or Argentina it never specifically addressed the issue of legitimacy or illegitimacy of its action in international law.[9] When in 1978 the Congress of the United States decided to take measures against Uganda after having determined that the latter had committed genocide against its own people, it justified its decision as an "exceptional response" to Uganda's serious misconduct.[10] In the Teheran Hostage crisis the United Kingdom justified its own sanctions imposed against Iran on the ground that the latter had to cease disregarding international law.[11] Despite the fact that in these and certain other examples explicit reference is made to the serious violations of international law that preceded the coercive action, there exists a veil of uncertainty with respect to the legal ground on which these measures actually relied. There are two possible interpretations in this regard: that either the States

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[7] Eighth Report on State Responsibility by Mr Roberto Ago, Yearbook of the ILC (1979) vol. II, Part One, at 43-44, paras 91-92.

[8] Crawford, *supra* note 2, at 305.

[9] For the EEC sanctions against Argentina see Council Regulation 877/82, OJ 1982 L102/1. For the EEC reaction against Poland and the Soviet Union see the Final Communique of 4 January 1982, para. 10 in Bulletin of the European Communities (1981: 12) 1.4.2. More on the matter in Bulletin of the European Communities (1982:1) 2.2.38 and (1982:2) 2.2.44. For the sanctions imposed by the European Union against Yugoslavia (which came before a Security Council authorization) see Bulletin of the European Communities, No 7/8, Vol. 24 (1991) 1.4.3 and Common positions of 7 May and 29 June 1998, OJ 1998 L 143/1 and L 190/3.

[10] Pub. L. 95-435, 1978 HR 9214, section 5, Oct. 10, 1978, 92 Stat. 1052; to be found in Section 2151, United States Code Annotated, Title 22, Foreign Relations and Intercourse Sections 1251 to 2500 (1979 edition by West Publishing CO).

[11] House of Commons Debates, vol. 985, Written Answers, col. 347: 22 May 1980 also in 29 *BYIL* (1980) 413-14.

resorting to such measures were knowingly acting in violation of international law, or that they were relying on something which justified their course of action. Although this by itself would not preclude wrongfulness, it does reveal a certain *opinio juris* that is moving in the direction of gradually formulating a customary rule of international law. Therefore, although no concrete conclusion can be made that *de lege lata* third-State countermeasures are permissible, these examples at least reveal a tendency towards *de lege ferenda*. Furthermore, what at least the current State practice reveals is that States would not hesitate to repeat such non-forcible action in the future should new gross infringements of international law be repeated, retaining what it *looks* to be claimed as their "right" to do so, even if this was never before determinatively out spelled.

3. The Principle of Proportionality

A. The Need for Restraint

Professor Koskenniemi argues that in view of the unwillingness of States to commit themselves to clear-cut definitions of notions such as *erga omnes* obligations, serious breaches, or the fundamental interests of the international community, which may in the future trigger "automaticity" of action, and their preference of flexible terminology allowing them discretion for the protection of their national interests should such a need arise in the future, makes the danger of abuse of solidarity measures apparent. It is therefore imperative, in the name of community interests, that resort to such measures is restricted.[12]

Nonetheless, as long as the issue of third-State countermeasures remains unresolved the dangers arising from the use of such measures, even in violation of international law, are not eliminated. It therefore seems that only two alternatives exist: either that third-State countermeasures are prohibited, in which case however there exist no guarantees that the stronger components of the international community will respect their international obligations arising from such prohibition, especially in view of the absence of any enforcement mechanism against them or, in the need to make the international legal order more effective particularly with respect to the protection of collective values, to legitimize third-State countermeasures on the basis of stringent conditions. For this purpose, and in order to mitigate the fears of many States regarding authorization of countermeasures by States other than the injured one, it is necessary to reduce the risks of abuse by those States that are favoured in terms of military and economic strength. This is exactly where the principle of proportionality gains significance. Proportionality serves to restrict the intensity and nature of unilateral power that legitimizes what in other circumstances would be illegitimate and therefore safeguarding the own rights of the defaulting State.[13] At the same time, it aims to bring legal certainty and predictability in international relations by setting the conditions with which excessiveness of a certain action can be measured.

B. The Content of the Principle

Countermeasures must be viewed as exceptional measures against a State that has committed an internationally wrongful act and the scope of which is restricted to the cessation of the internationally wrongful act, safeguards for non-repetition, and reparation. It is also widely

[12] Koskenniemi, *supra* note 3, at 349-350, 355.

[13] Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' 12 *EJIL* (2001) 890.

accepted in international law that countermeasures, whenever allowed, must be proportionate. The crucial question with respect to proportionality is to what countermeasures must be proportionate. Although the principle of proportionality in the law of countermeasures has a fundamental role in the safeguarding of international legitimacy and restraint, it remains a principle the exact context of which even today has not been entirely unveiled. Some authors view proportionality in the light of the injury suffered; others on the basis of significance and nature of the infringed rule whilst there are also those who support that proportionality must be addressed in the context of the seriousness of the breach.[14]

Zoller takes the view that proportionality becomes relevant whenever the response to the wrongful act goes beyond the suspension or termination of a right or obligation equivalent to the right or obligation which has initially been infringed. In this context, the notion of proportionality implies a harmonious relationship between different things and therefore calls not for mathematical approximation but rather for relative equality.[15]

Proportionality in relation to countermeasures was the subject of examination of the Arbitral Tribunal established with the agreement of the US and France in the *Case Concerning the Air Services Agreement of 27 March 1946*.[16] The dispute broke out between the parties when France refused to allow a Pan American aircraft travelling from the US to Paris with change of gauge in London to disembark its passengers and freight, whilst suspending future Pan Am flights to Paris. France argued in particular that the decision of the Pan American Airlines to use smaller aircraft for the route from London to Paris was in violation of the 1946 Agreement. In response the US, and for as long as the French authorities enforced the restrictions against Pan Am, ordered two French airlines to file the schedule of their flights whilst few days later they prohibited Air France from operating certain flights to the US. Both orders were passed under Part 213 of the US Civil Aeronautics Board's Economic Regulations. In the meantime the two countries by common agreement submitted their dispute to an Arbitral Tribunal requesting it among others to determine whether the US orders were lawful and proportionate.

In assessing the lawfulness of the US action the Tribunal noted that it would have to rely its conclusions on the aim actually pursued and whether that was confined to reciprocity, quicker settlement of the dispute, or prevention of future violations by other States.[17] The Tribunal re-affirmed in this regard the rule that countermeasures should be equivalent to the breach although it acknowledged that proportionality could be assessed only by approximation. To also add that,

> In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach.[18]

The Tribunal stressed that a mere comparison of the losses the parties in the dispute suffered or would have suffered, did not suffice for the determination of whether the US action was proportionate. Rather, it gave emphasis on the interests and principles at stake by the initial

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[14] Among the issues one needs to address regarding the proportionality of countermeasures is whether or not this is identical to the proportionality that applies for the limitation of forcible action.

[15] E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984) 131.

[16] International Law Reports, 54 (1979) 304.

[17] Ibid, at 337, para 78.

[18] Ibid, at 338, para 83.

action of France and its impact on the general air transport policy of the US and on a large number of international agreements with States other than France concerning changes of gauge in third countries. What mattered in this regard was the proportionality between the effects sought by the countermeasures. Zoller further illustrated this point by associating the case before the Tribunal with the restriction of civil rights by police for the maintenance of public order. The determinative factor for proportionality in this latter case would be to balance the effects of the exercise of the civil rights and the effects of the implementation of the police measure. As Zoller very characteristically points out, this principle is reflected in the 'aphorism' that, 'The police may not use machine guns to kill birds'.[19] Subsequently, what proportionality measures is not the breach and the response but the purpose aimed at and the means used in order to achieve it.[20]

Viewed in this context the Tribunal did not find that the US response was disproportionate in comparison with the French measures.

The principle of proportionality was also examined in the *Case Concerning the Gabcikovo-Nagymaros Project* between Hungary and Slovakia. Under an agreement signed between them in 1977, Hungary and Czechoslovakia decided the construction and operation of a system of barrage and locks on that part of the Danube shared by them as an international river and boundary.[21] When in 1989 Hungary, due to environmental concerns, decided to suspend and finally abandon the works of the project, Czechoslovakia responded with diversion of the waters of the river Danube within its boundaries which it justified as a measure of 'approximate application' of the agreement. Assessing the lawfulness of Czechoslovakia's response, as later succeeded by Slovakia, the International Court of Justice confirmed the principle that countermeasures should be commensurate to the injury caused with due consideration of the rights in question. Highlighting the significance of international watercourses the enjoyment of which belonged to all riparian States without discrimination or anyone of them enjoying preferential treatment, the ICJ found Czechoslovakia's decision as interference on a shared legal right, thus depriving Hungary of its right to 'an equitable and reasonable share of the natural resources of the Danube'.[22] This action was according to the Court disproportionate without however further analysing the principle.

The criterion adopted in both those two cases was of qualitative rather than quantitative character placing the emphasis on the nature of the rights involved. In this same framework Article 51 of the 2001 ILC Articles is drafted. Accordingly, what matters for purposes of proportionality is not only the injury suffered and the losses, usually material, caused as a result, but also the significance of the interests protected by the infringed rule and the seriousness of the breach.

Cannizzaro also distanced himself from the view which wants proportionality to lie in a quantitative relationship between the breach and the response. He believes that 'in a plurality of instruments and tools of self-redress'[23] in the international legal order, emphasis must be given on the function each response fulfils instead. This function can be normative, retributive, coercive or executive. In other words, different countermeasures, different functions, different measurement of proportionality. This conclusion relies on the fact that in resorting to

[19] Zoller, *supra* note 15, at 135.
[20] Ibid, at 135.
[21] *Case Concerning the Gabcikovo-Nagymaros Project,* ICJ Reports (1997). On line at http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm
[22] Ibid, at para 85.
[23] Cannizzaro, *supra* note 13, at 889.

countermeasures States do not pursue one and the same purpose. As a consequence of this mosaic of countermeasures one should also think in terms of a mosaic of proportionality. Therefore, proportionality should not be conceived as a fixed notion, unchangeable and inflexible, applicable to all situations no matter how different between them. Proportionality must on the contrary be "built" on a case-by-case basis. As noted, the proportionality of a response to the infringement of a bilateral trade obligation cannot be compared with the proportionality required for the response to a violation of an obligation *erga omnes*. Whilst in the first case the reciprocal suspension of rights may suffice, in the latter case the reaction may aim at imposing the compliance of the defaulting State with the infringed rule. Furthermore, and despite the fact that the coercive element may be apparent in both cases, it may have different significance where a measure is taken in response to a violation of an erga omnes obligation.[24] The emphasis is hereby placed on the appropriateness of the aim of the response and the appropriateness of the adopted measures in the light of the result they want to achieve. The author further suggests to divide the response to several bundles of measures and determine the objective pursued by each one of them. In this regard, if a State in response to a wrongful act proceeds to suspend its reciprocal obligations under the infringed treaty and at the same time freezes the assets and goods of the wrongdoing party, it is suggested that proportionality should not be evaluated on the basis of the totality of the measures. Rather, it should be measured on the basis of the objectives pursued by each measure. For this purpose, the suspension of the treaty will be judged on the basis of the objective regarding the re-establishment of the legal balance disturbed by the initial wrongful act, whilst the freezing of assets will be judged on the basis of the need for compliance or the obtaining of reparation.

For the determination of the appropriateness of the aim Cannizzaro suggests an external element whereby the appropriateness of the aim of the response is examined in the light of the infringed rule and the legal consequences of the breach, and an internal according to which the appropriateness of the aims of the measures adopted is judged on the basis of the result they want to achieve.

4. Concluding remarks

I tend to conclude that in an international community where everything develops around the State and its interests, the need to have specific enforcement mechanisms is essential if international law is not to become uncertain in its effectiveness. For this reason I believe that it is better to have some forms of remedies, even of a unilateral but non-forcible nature, rather than not, especially for the protection of supreme values and principles of humanity. To do so however by genuinely securing a just and peaceful international community we must ensure that the most stringent conditions for third-State countermeasures apply, and explore the exact content of the principle of proportionality as a means of legal restraint.

[24] Ibid, at 896.