Amsterdam Center for International Law
University of Amsterdam

RESEARCH PAPER SERIES

SHARES Research Paper 35 (2014)

Countermeasures against Multiple Responsible Actors

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Cite as: SHARES Research Paper 35 (2014)
available at www.sharesproject.nl

Forthcoming in: André Nollkaemper & Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014)

The Research Project on Shared Responsibility in International Law (SHARES) is hosted by the Amsterdam Center for International Law (ACIL) of the University of Amsterdam.

The research leading to this paper has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n° 249499.

Chapter 10: Countermeasures against Multiple Responsible Actors

Christian J. Tams[*]

1. Introduction

1.1 The concept of countermeasures

Countermeasures are coercive measures taken by a responding state (or other actor) against a target state (or other actor) in response to a wrongful act for which the targeted actor bears responsibility. They have become fairly rare today, but remain a conceptually important feature of the arsenal of 'law enforcement concepts'.

As a broad rule, general international law permits countermeasures as a flexible means of responding against previous wrongful conduct,[1] but submits their exercise to a range of procedural and substantive conditions. If these conditions are met, the countermeasure functions as a 'justification' or – in the terminology of the International Law Commission (ILC) – a circumstance precluding the wrongfulness of the conduct. In the words of Article 22 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[2]:

> The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

The essence of that provision is taken up in Article 22(1) of the 2011 Articles on the Responsibility of International Organizations (ARIO),[3] addressing countermeasures taken by international organisations. However, Article 22(2) ARIO adds that

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[*] Professor of International Law, University of Glasgow. The research leading to this Chapter has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n° 249499, as part of the research project on Shared Responsibility in International Law (SHARES), carried out at the Amsterdam Center for International Law (ACIL) of the University of Amsterdam.

[1] For a useful overview see the Chapters in Part V, Section III of J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010); for details see O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford: Clarendon Press, 1988).

[2] Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

[3] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).

> an international organization may not take countermeasures against a responsible member State or international organization [under the conditions referred to in paragraph 1] unless:
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> (b) the countermeasures are not inconsistent with the rules of the organization; and
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> (c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

This suggests that the general law of countermeasures – binding as customary international law and in many respects reflected in the ILC's two sets of Articles – interacts with special treaty regimes; it is subsidiary to treaty-specific 'means (…) for otherwise inducing compliance with the obligations of the responsible State or international organization'. Beyond that, as a feature of the general law of responsibility, countermeasures can be modified or contracted out by special treaties. Because '[c]ountermeasures are a feature of a decentralized system',[4] they are affected by processes of institutionalisation and/or centralisation. '[R]ules of the organization' (in the words of Article 22(2) of the ARIO) can no doubt impose restrictions. More generally, specific treaty regimes may add further conditions or may exclude countermeasures altogether.[5]

1.2 Delimitation

The concept of countermeasures justifies a particular type of response against wrongful conduct (or, in the terminology that is used in this edited volume, against 'harmful outcomes').[6] While the lines may at times be difficult to draw in practice, countermeasures need to be distinguished from three cognate concepts.

First, as a 'responsibility concept', countermeasures are to be distinguished from responses against qualified wrongful conduct amounting to (material) breaches of a treaty in the sense of

[4] Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Introduction to Part Four Chapter II, para. 1.

[5] Both of the ILC's texts recognise the primacy of specialised regimes that seek to disapply the general rules. In the words of Article 57 ARSIWA, n. 2: 'These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.' To give just two examples, 'sophisticated' regimes of dispute settlement, such as World Trade Organization (WTO) law and European Union law, are typically taken to have excluded the right to rely on countermeasures: see e.g. *United States – Sections 301/310 of the Trade Act of 1974*, Panel Report of 22 December 1999, WT/DS/152/R, paras. 7.35–7.46 (arguing that WTO law 'prevent[s] member States from unilaterally resolving their disputes in respect of WTO rights and obligations'); and further Article 344 of the Treaty on the Functioning of the European Union, and, *Commission of the European Economic Community v. Luxembourg and Belgium*, European Court of Justice, joined cases 90/63 and 91/63, (1964) ECR 626.

[6] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MIJIL 359–438, at 367.

Article 60 of the Vienna Convention on the Law of Treaties (VCLT).[7] While the specific measures taken may be quite similar (e.g. the suspension of an agreement in response to a breach), international law establishes distinct legal regimes for 'treaty-based' and 'responsibility-based' responses. The former notably require a material breach and a focus on responses within one and the same treaty regime; what is more, they suspend the treaty obligation rather than providing a justification for its non-compliance.[8]

Second, intrinsically wrongful countermeasures (that thus require some justification) are to be distinguished from unfriendly acts below the level of (*prima facie*) illegality.[9] Examples include protests, diplomatic demarches, support for resolutions condemning breaches, the decision to refrain from cooperation in other fields, the rupture of diplomatic relations, and all other forms of retorsions. Such unfriendly, but legal, conduct is typically the most obvious way of responding to 'harmful outcomes'; in practice it may well be decisive and constitute a highly efficient way of putting pressure on the wrongdoing actor. However, international law does not regulate responses below the threshold of '*prima facie* illegality' in any detail. All states and all organisations can always protest, send letters, decide not to agree on treaties benefiting another state, etc. – they do not require a 'title' to respond.

Third, while permitting the use of coercion, countermeasures are today understood to refer to responses of a *non-forcible* nature. Whether forcible countermeasures can be justified at all is a matter for debate. In any event, forcible responses would be subject to the special regime

[7] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

[8] ARSIWA Commentary, n. 4, Introductory Commentary, Part Three, Chapter II, para. 4: 'Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach. Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.' In practice, things may be much more complex than this suggests; but from a responding actor's perspective, the stringent conditions imposed by Article 60 of the VCLT mean that countermeasures are the far more attractive option. For details see B. Simma and C.J. Tams, 'Reacting against Treaty Breaches', in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: OUP, 2012), pp. 576–604.

[9] Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, n. 1, p. 4 and pp. 29–30. In its work on state responsibility, the ILC made a similar point when distinguishing formal ways of invoking responsibility (requiring some form of 'title') from informal representations (which were always acceptable). In its ARSIWA Commentary to Article 42, para. 2, n. 4, it observed: 'There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal, or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed.'

regulating/limiting recourse to force in international relations, as set out in the United Nations (UN) Charter.[10]

More controversially, it is necessary to determine the relationship between the general concept of countermeasures and reactions based on specific treaties. This is not a case of clear-cut inclusion or exclusion. On the face of it, countermeasures constitute a 'private' response governed by general international law, and operate outside institutionalised contexts. However, in some instances institutionalised sanctions may provide evidence of a particular approach reflected (also) in general international law. Whether this is so depends on the level of specificity of the institutional regime, and in particular on whether it intends to derogate from the general framework.

1.3 Essential features of the regime

Drawing on international practice and case law, both the ARSIWA and the ARIO recognise a general right to resort to countermeasures,[11] subject to a number of conditions. For reasons of convenience, these can be presented in three 'clusters'.[12]

First, countermeasures can only be taken in response to a wrongful act. Subjective perceptions of wrongfulness are not sufficient. As, typically, international conduct triggering responses is not submitted to an objective, prior scrutiny, this means that the responding actor responds at its own risk.[13] The initial wrongful act must have also affected the responding actor to justify a response. This requirement is typically phrased as one of 'legal interest' or 'injury', both of which describe the relation between the initial breach and the responding actor. In the regular scenario, described in Article 42 of the ARSIWA and Article 43 of the ARIO, the responding actor acts as an 'injured State or international organization'; this is true for example where it

[10] See Article 50(1)(d) ARSIWA, n. 2 and ARSIWA Commentary to Article 50(1)(d), n. 4.
[11] As noted above, this may be disapplied or modified by special rules.
[12] For details see notably the ARSIWA Commentary to Articles 49–54, n. 4.
[13] Pronouncements by the Arbitral Tribunal in the case concerning the *Air Service Agreement of 27 March 1946, (United States of America/France)*, (1978) 54 ILR 338 (*Air Service*) at para. 81 at some time gave rise to doubt, but the matter now seems settled. In its ARSIWA Commentary to Article 49, para. 3, n. 4, the ILC set out what seems the (now generally) accepted position: '*Paragraph 1* of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment. In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness' (footnotes omitted).

has been individually affected by a breach. More controversial are responses in defence of general or 'public' interests. These are generally discouraged, as otherwise any state or international organisation – claiming to defend a greater good – could take countermeasures.[14] However, Article 54 of the ARSIWA and Article 57 of the ARIO leave some room for 'lawful measures', by 'an entity other than an injured State or international organization', against breaches of obligations protecting collective interests of the international community as a whole or of communities of treaty parties. Such 'lawful measures' can be taken to 'ensure cessation of the breach and reparation in the interest of the injured party or of the beneficiaries of the obligation breached'.

Second, before resorting to countermeasures, the responding actor must call upon the targeted actor to cease its wrongful conduct and notify it of its intention to resort to countermeasures. An exception to this general condition is recognised for so-called 'urgent countermeasures as are necessary to preserve [the responding actor's] rights'.[15] In its Commentary to Article 55 of the ARIO, the ILC formulated the underlying rationale in the following terms:

> The responsible international organization is thus given an opportunity to appraise the claim made by the injured State or international organization and become aware of the risk of being the target of countermeasures. By allowing urgent countermeasures, paragraph 2 makes it however possible for the injured State or international organization to apply immediately those measures that are necessary to preserve its rights, in particular those that would lose their potential impact if delayed.[16]

While the line between urgent and regular countermeasures may at times be difficult to draw in practice, it is not questioned as a matter of principle.

Third, as regards their scope, countermeasures must be proportionate, or – in the words of Article 51 of the ARSIWA and Article 54 of the ARIO – 'commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.[17] This is the essential substantive limitation on countermeasures, which ensures that responses are not treated as a licence to punish the wrongdoing actor. Because countermeasures can affect a broad range of legal relations, 'judging the "proportionality" of countermeasures is

[14] See ARSIWA Commentary to Article 54, n. 4 and Article 56 ARIO, n. 3; and further C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP, 2010), pp. 198 et seq.
[15] Article 55(2) ARIO, n. 3.
[16] Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), Article 55(2).
[17] See e.g. Article 51 ARSIWA, n. 2. The notion of a 'commensurate' response goes back to the ICJ's judgment in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, at p. 56, paras. 85–87 (*Gabčíkovo-Nagymaros*).

not an easy task and can at best be accomplished by approximation'.[18] What is required is a comparison between the initial breach and the countermeasures; the latter must remain equivalent. In assessing proportionality, the impact of the measures needs to be taken into account, as must the relevance of the underlying legal provision that has been violated.[19] Lastly, in order to be proportionate, countermeasures must in principle be temporary and reversible.[20]

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It is clear from the preceding paragraphs that, as a general form of law enforcement applicable in a range of settings, countermeasures are regulated in a rather flexible way. From the perspective of shared responsibility as defined in this volume, this is an opportunity as much as a problem. It can be presented as a problem because applying the legal regime of countermeasures will often not yield 'obvious' or 'natural' results. Conversely, the flexibility inherent in such notions as 'legal interest', 'proportionality', and so on can be used to fine-tune the general legal regime of countermeasures to the specific problems of shared responsibility. This will be done in the subsequent sections, initially by mapping shared responsibility issues arising in relation to countermeasures (section 2), and then by suggesting how the general regime could be applied to the different settings that are identified (sections 3 to 5).

2. Questions and scenarios

2.1 Questions

The legal regime of bilateral, inter-state countermeasures has been discussed for decades. To date, it remains shaped by venerable awards such as *Naulilaa*,[21] or decisions in disputes about

[18] *Air Service*, n. 13, at para. 83.

[19] Hence in *Air Service*, the Tribunal suggested that it was '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'; see ibid.

[20] See notably Article 49(3) ARSIWA, n. 2 and Article 51(3) ARIO, n. 3. The ILC emphasises the temporary and reversible character of countermeasures on frequent occasions, but in the end recognises that 'the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles'. ARSIWA Commentary to Article 49, para. 9, n. 4.

[21] *Responsabilité de l'Allemagne à raison de dommages causés dans les colonies portugaises du Sud de l'Afrique (Portugal v. Germany)*, Award, (1928) 2 RIAA 1011 (*Naulilaa*).

bilateral treaties (*Air Service*,[22] *Gabčíkovo-Nagymaros*).[23] Notwithstanding disagreement on some smaller issues, the traditional regime seems generally to be reflected in Part Three, Chapter II of the ILC's ARSIWA. As is clear from the introductory summary, it has been developed to fit bilateral inter-state relations and it is in this context that requirements such as prior notification or proportionality can be applied, and that a concept as general as proportionality could perhaps be concretised meaningfully.

The involvement of further actors tests the viability of the regime; it raises the question of whether the (traditionally bilateral) concept of countermeasures can be meaningfully adapted to fit multilateral settings. So far, this question has largely been addressed from the perspective of multiple *responding actors*. As hinted at in the preceding section, there is some debate about whether states that are not individually affected by a prior breach should be entitled to defend general or public interests by means of countermeasures – a matter left open by Article 54 of the ARSIWA and Article 57 of the ARIO – and if so, whether and how such responses ought to be coordinated.[24] The converse perspective – that of multiple actors responsible for the harmful outcome – seems not to have been analysed systematically thus far. Rather than looking at a broadening of the circle of responding actors, this would result in a multiplication of the potential targets. When addressing the matter in the following sections, from the perspective of shared responsibility, the crucial question is whether countermeasures can be *taken against each of the multiple actors* responsible for one 'harmful outcome'.

Allowing such responses against each of the responsible actors could enhance the effectiveness of the law of responsibility, as countermeasures might force each of them towards compliance. On the other hand, countermeasures might perhaps be too broad a concept to respect differentiated contributions to shared responsibility. It therefore also needs to be asked whether countermeasures *taken in response* to shared responsibility are subject to specific conditions. It is these two questions that the present inquiry seeks to address. It does so on the basis of responses given in the ILC texts of 2001 and 2011. At the outset, it should be noted that in many respects, answers remain tentative. There is fairly little solid practice that could help to ground responses. Very often, the international regime is developed by 'extrapolation' from

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[22] *Air Service*, n. 13.

[23] *Gabčíkovo-Nagymaros*, n. 17.

[24] See M. Akehurst, 'Reprisals by Third States' (1970) 44 BYIL 1; J. Charney, 'Third State Remedies in International Law' (1989) 10 MIJIL 57; Tams, *Enforcing Obligations Erga Omnes*, n. 14, pp. 198 et seq. See H.P. Aust's contribution in Chapter 6 of this volume, H.P. Aust, 'Circumstances Precluding Wrongfulness', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

bilateral rules, and the ILC's responses given in the Articles of 2001 and 2011 often reflect uncertainty about fundamental concepts of shared responsibility.

2.2 Scenarios

In seeking to apply the regime of countermeasures to instances of shared responsibility, different forms of shared responsibility need to be distinguished. The conceptual framework on which this edited volume is based suggests a general distinction between cases in which the responsibility arises out of concerted action, and cases in which there is no concerted action.[25] Drawing on, and adapting, that distinction in the context of countermeasures, it seems possible to identify three scenarios of shared responsibility that focus on the degree of responsibility borne by the different actors that are responsible for harmful outcomes.[26]

2.2.1 Equally shared responsibility

Multiple actors can share responsibility for a harmful outcome as equals. If the 'harmful outcome' in question is one and the same wrongful conduct, it will often be based on some form of cooperation or joint omission. Joint, possibly collusive, active conduct in violation of international law would be the prime example in point: an armed attack by armies of more than one state would be a 'classic' example. This is by no means the only setting though. Conduct through an organ established by a plurality of actors would be another example. What is more, where responsibility for omission within multilateral contexts (e.g. non-compliance with a duty to prevent a certain event from occurring) is concerned, shared responsibility would seem to be the normal case, and outside special settings (protecting powers, or guarantees) it will typically be equally shared Finally, responsibility can be 'equally shared' even in the absence of coordinated action. A plurality of actors, acting independently of each other, could violate commitments under 'parallel' but not identical obligations, including where the obligation is of

[25] See Chapter 1 of this volume, P.A. Nollkaemper, 'Introduction', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___. Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 6, at 360–370, especially 368–369.

[26] Admittedly, the line between the first two scenarios ('equally shared' and 'differentiated responsibility') is not always easy to draw. As principles of shared responsibility are only gradually established, it is still being negotiated.

a different nature (e.g. an obligation of conduct and an obligation of result).[27] To take up an example referred to by the ILC, 'several States might contribute to polluting a river by the *separate* discharge of pollutants.'[28] In this case, their contribution to the harmful outcome, while not coordinated and joint, could make each of the actors equally responsible as well.

2.2.2 Differentiated responsibility

Multiple actors may bear different degrees or forms of responsibility for one and the same harmful outcome. Most lawyers schooled in domestic law would think of the cooperation between the 'principal' and the 'accomplice' in the violation of the law, and the same scenario can of course be envisaged under international law.[29] In fact, the recognition, in Article 16 of the ARSIWA and international case law,[30] of a *general* concept of complicity in state responsibility makes this scenario increasingly relevant.[31] Complicity is not the only instance of differentiated – and 'derivative'[32] – responsibility, though. In a specific setting, states or other actors may be required not to instigate, or incite, wrongful conduct,[33] and special rules may preclude them from recognising the effects of certain grave breaches of other actors.[34] Beyond forms of active conduct, wherever international law has recognised a duty to prevent or suppress certain harmful outcomes,[35] it may be necessary to distinguish between (a) the responsibility for commission of a wrong and (b) responsibility for failure to prevent it (a form of responsibility thrown into stark relief by the 2007 merits judgment of the International Court

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[27] However, see below for a comment on the relationship between wrongful acts based on active conduct, and those based on omission.

[28] ARSIWA Commentary to Article 47, para. 8, n. 4 (emphasis added).

[29] For many details see H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: CUP, 2011); for an earlier, cautious, assessment see B. Graefrath, 'Complicity in the law of international responsibility' (1996) 29 RBDI 370.

[30] See the ICJ's judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, para. 420 (*Bosnian Genocide* case) (where Article 16 ARSIWA is said to 'reflec[t] a customary rule').

[31] Curiously, the point is regularly ignored. Aust's study on *Complicity and the Law of State Responsibility*, n. 29, provides the clearest exposition of the applicable regime and highlights its practical relevance. See also Chapter 5 of this volume, V. Lanovoy, 'Complicity in an Internationally Wrongful Act', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

[32] Cf. Introductory ARSIWA Commentary to Part One, Chapter IV, para. 7, n. 4.

[33] See e.g. Article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277 (Genocide Convention), and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195.

[34] See e.g. Article 41(2) ARSIWA, n. 2 and Article 42(2) ARIO, n. 3.

[35] See e.g. Article I of the Genocide Convention, n. 33, and Article IV(a) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973, in force 18 July 1976, 1015 UNTS 243.

of Justice (ICJ or Court) in the *Bosnian Genocide*[36] case). Where negative duties (to abstain) coexist alongside duties of prevention, the relationship between responsibility for conduct and responsibility for omission is more difficult to characterise. However, at least where the multiple responsible actors belong to the same category – e.g. where one state has committed a wrong that another state has failed to prevent – it is probably best viewed as a form of differentiated responsibility.[37]

2.2.3 Responsibility for conduct carried out in the framework of an international organisation

Even where responsibility is based on one single act, and no issue of differentiated responsibility arises, the uncertain rules governing the allocation of responsibility between states and international organisations may give rise to specific problems in relation to countermeasures. This is true irrespective of whether responsibility is equally shared or differentiated. In both instances, the link between the international organisation and its member states adds a further dimension to the 'shared responsibility puzzle'.

These three scenarios are not mutually exclusive, and can be combined. What is more, it may not always be obvious whether different forms of responsibility are equally shared or differentiated. Still, at the risk of a schematic assessment, the distinction will be applied in the following sections, as it allows for a relatively clear presentation of the material in this otherwise fairly 'hazy' area of international responsibility.

3. Countermeasures and equally shared responsibility

Of the three scenarios, the first – equally shared responsibility – is probably the least problematic in theory, even though applying the conditions limiting resort to countermeasures may pose practical challenges. In line with the questions identified in section 2.1, it needs to be asked whether each of the various actors that are equally responsible for a 'harmful outcome'

[36] See *Bosnian Genocide* case, n. 30, paras. 428–438. While the Court did not 'purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts' (para. 429), aspects of its discussion of the requirements of responsibility for omission would seem to be capable of general application.

[37] The matter is certainly not obvious and requires much further discussion. One might also consider responsibility for an act and responsibility for an omission to be 'equal'. However, it is worth noting that in the *Bosnian Genocide* case, n. 30, the ICJ seems to have restricted the range of remedies available in case of breaches by omission.

can be targeted by countermeasures. The relevant legal texts would seem to answer this question in the affirmative.

3.1 Responsibility triggered by independent wrongful acts

Where different actors separately (i.e. without coordination) contribute to a harmful outcome, this in fact would seem to follow from the general principle of independent responsibility. The ILC Commentary notes – and the point of principle would not seem to be disputed – that '[i]n such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.'[38] Examples mentioned by the ILC include 'the separate discharge of pollutants' eventually resulting in an oil spill; or the separate, and independent, violations of international law by Yugoslavia (laying of mines) and Albania (failure to warn) that formed the backdrop to the *Corfu Channel* case.[39] Notwithstanding the involvement of multiple actors, responsibility in these settings arises in the bilateral relations between the individual actors concerned. Each contributor is responsible only to the extent that it has violated international law: Albania for the failure to warn; Yugoslavia for the laying of mines. As long as the focus remains on these separate responsibility relationships – i.e. as long as an injured actor seeks to hold Albania responsible for its independent failure to warn, or Yugoslavia for its laying of the mines – the regular framework of responsibility can be applied. It is perfectly possible to treat the two breaches as self-standing, each triggering its own consequences, and each triggering a right of the injured actor to implement responsibility, including by means of countermeasures.

Thus 'bilateralised', responsibility can be addressed by the regular rules governing implementation as laid down in the respective Parts IV of the ARSIWA and the ARIO. An injured actor would need to establish some form of entitlement to act (legal interest) and comply with the conditions governing the admissibility of claims, and it could eventually enforce responsibility by means of countermeasures. In all this, responsibility remains limited to the bilateral relations. Notably, as regards the consequences of a state's wrongful conduct, each of the independently responsible states has to make 'reparation [only] for the injury

[38] ARSIWA Commentary to Article 47, para. 8, n. 4.
[39] Ibid. Cf. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ Reports 1949, 4.

caused by [its] internationally wrongful act'.[40] This may be difficult to apply in practice – what, precisely, is the consequence of a failure to warn; how much of the harmful outcome has been caused by each individual contributor? – but in principle, it is not disputed.

The independent character of responsibility is reflected in the rules on countermeasures, which, after all, are designed to implement claims to cessation and reparation, and only go so far as such claims exist.[41] In applying the rules on proportionality, a responding actor will therefore have to establish that its response is commensurate with the injury caused by the independent breach of the targeted actor. And in line with the general rules, countermeasures taken against one of multiple responsible actors engaged in independent conduct will have to cease when the particular independent breach stops.

All this suggests that where responsibility is triggered by independent wrongful acts, the general regime can be applied without major modification. There is no doubt a risk of artificial compartmentalisation when wrongful acts are treated as independent, even though they contribute to the same (harmful) outcome. Yet this compartmentalisation is the result of treating independent wrongful acts as separate (which is a basic assumption of Part One of the ARSIWA) and of requiring a causal link between wrongful conduct and injury for the purposes of reparation (a key decision informing Part Two of the ARSIWA). The regime of countermeasures merely follows suit. Designed to enhance the prospect of enforcing responsibility, it is instrumental.

3.2 Responsibility triggered by interrelated wrongful acts

Matters are more complex where equally shared responsibility is incurred in relation to the *same* wrongful act, and where the conduct of various actors is interrelated rather than separate. Still, in principle, the basic presumption is that each of the actors involved may face claims for responsibility, and none of them can hide behind the 'collective'. Article 47(1) of the ARSIWA and Article 48(1) of the ARIO are quite clear in fact: they both provide in near-identical terms that

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[40] Article 31(a) ARSIWA, n. 2. See also Chapter 7 of this volume, P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

[41] For example, under Article 52(1)(a) ARSIWA, n. 2, the responding state must 'call upon the responsible State (…) to fulfil its obligations under part two'; this presupposes the existence of an obligation.

> [w]here several States [or: an international organization and one or more States or other international organizations] are responsible for the same internationally wrongful act, the responsibility of each State [or organization] may be invoked in relation to that act.

Article 48(2) of the ARIO moves beyond this by laying down a special rule for instances of 'subsidiary responsibility'.[42] Addressing 'subsidiarity', it would not seem to cover instances in which responsibility is equally shared.

The Commentaries on the respective Articles 47 are not particularly detailed, but the Commentary to Article 47 of the ARSIWA identifies the key reasons supporting the position adopted. In the words of the ILC, the provision gives expression to

> the general principle that in such cases [of joint responsibility for the same internationally wrongful act, CJT] each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.[43]

This view, while formulated in relation to the general concept of 'invocation of responsibility' underlying Part Three ARSIWA and Part Four ARIO, affects the position as to countermeasures. As Article 49 of the ARSIWA and Article 50 of the ARIO clarify, countermeasures are one particular way of invoking responsibility, and they are a generally available response against the responsible state or international organisation.[44]

International practice is by no means widespread, but it would seem to support the position taken by the ILC. Three examples can serve to illustrate the point.

First, the response by Western states against the imposition of martial law in Poland in 1981 highlights that, in the absence of indications to the contrary, responsibility triggered by conduct of two states will be perceived as 'equally shared', and will expose each of them to countermeasures.[45] In response to the draconian measures adopted against dissidents and Solidarnosc activists, many Western states expressed concern, protested against violations of internationally protected human rights standards, and responded by way of retorsions.[46] In

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[42] See section 5.

[43] ARSIWA Commentary to Article 47, para. 1, n. 4.

[44] See ARSIWA Commentary, n. 4, Introductory Commentary to Part Three Chapter II, para. 3: countermeasures are 'instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.'

[45] The case involved an instance of 'third party countermeasures', taken by states not injured in the traditional sense. As such, it supports the view that such 'third party countermeasures' are actually permitted.

[46] For details see H.E. Moyer Jr. and L.A. Mabry, 'Export Controls as Instruments of Foreign Policy: The History, Legal Issues and Policy Lessons of Three Recent Cases' (1983) 15 L & Pol Int Bus 1, at 63 ff.; Tams, *Enforcing Obligations Erga Omnes*, n. 14, pp. 213–215.

some instances, countries such as the United States, Switzerland, and the United Kingdom decided to suspend bilateral aviation agreements with Poland (which needed to be justified as a countermeasure). For present purposes, what matters most is that in addition to Poland, responses also targeted the Soviet Union, which was perceived to have required and facilitated the imposition of martial law. Hence the United States suspended the landing rights of Aeroflot, safeguarded by international agreements, on American territory. This no doubt reflected power politics during the Cold War era, but was based on the reasoning underlying Article 47 of the ARSIWA. In the words of President Reagan, a response targeting the Soviet Union was justified as it bore 'a major share of the blame for the development in Poland'.[47] In short, below the level of rhetoric and clamour, the conduct was based on a principle of joint Soviet-Polish responsibility for the alleged violation of international human rights standards.

Second, when looking at other forms of invoking international responsibility, the position taken in Article 47 of the ARSIWA and Article 48 of the ARIO also finds affirmation in international case law. The ICJ's *Nauru* judgment[48] in fact would seem to be the clearest exposition of the principle of joint responsibility (and was drawn on in the ILC's work). The case concerned allegedly wrongful conduct by three states (through the vehicle of an international entity, the 'Administering Authority') of which one, Australia, was sued alone. Dismissing Australia's argument that it could not be 'singled out', the Court observed that there was no reason

> why a claim brought against only one of the three States should be declared inadmissible in *limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.[49]

While the modality of invoking responsibility is a different one from that encountered in the Polish-Soviet case referred to above, the two instances in fact complement each other rather well. The former concerns the broadening of the range of 'target states'; the latter clarifies that even where three states are cooperating in a structured way, each of them can be subjected to law enforcement measures. As countermeasures (per Article 49 of the ARSIWA and Article 51

[47] Statement of 28 December 1981, reproduced in M. Nash, 'Contemporary Practice of the United States Relating to International Law' (1982) 76 AJIL 374, at 380.
[48] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, 240 (*Nauru*).
[49] Ibid., at para. 40.

of the ARIO) can be taken against all responsible states, the *Nauru* reasoning would seem to be of relevance.

Third, a brief passage from the European Court of Justice's (ECJ) case law can be taken to apply a parallel line of reasoning to the relations between member states and international organisations. Like *Nauru*, the case is not concerned with countermeasures, but it too is relevant as it indicates who bears responsibility (which then can be invoked by the generally available methods, including countermeasures). In *Parliament v. Council*, the ECJ analysed legal relations within mixed agreements concluded by the European Union and its member states. While some of them may contain special provisions, the ECJ noted that as a general rule,

> in the absence of derogations expressly laid down in the Convention, the Community and its member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.[50]

3.3 The scope of responsibility

The preceding discussion suggests that where responsibility is equally shared, each of the actors contributing to the (same) harmful outcome can be targeted by countermeasures. It remains to be seen whether the fact that a plurality of actors is responsible should affect the reach, or scope, of countermeasures taken against each single one of them. On the basis of the general rules outlined above, the answer should be in the affirmative. Just as in cases of independent responsibility mentioned above, the regime of countermeasures (requiring responses to be 'commensurate with the injury suffered')[51] is affected by rules on the *scope* of responsibility borne by each one of the multiple responsible actors. As an enforcement concept, countermeasures are restricted by rules determining the consequences of responsibility. Hence where one particular state bears the bulk of responsibility for a wrongful act, countermeasures directed against it can be more harmful than those directed against a state whose responsibility is more limited.

In theory, this seems rather clear. However, two concerns need to be addressed. First, where a particular harmful outcome is the consequence of interrelated conduct, there is much debate

[50] *Parliament v. Council*, European Court of Justice, case C-316/91, (1994) ECR I-653, at 660–661, para. 29.
[51] Article 49 ARSIWA, n. 2; Article 51 ARIO, n. 3.

about the allocation of responsibility between the different responsible actors. The matter is typically addressed in terms of the domestic law concept of 'joint and several' responsibility, and it boils down to a straightforward question: should each of the equally responsible actors be individually liable for the entire injury caused by the breach of international law? The problem is much discussed,[52] but remains controversial. For present purposes, it is important to note that if international law were to accept a standard of joint and several responsibility, each responsible actor could be targeted by countermeasures commensurate with the harmful outcome in its entirety – which in turn should result in a greater tolerance of 'intrusive' countermeasures. This indeed would seem to follow from special treaty provisions that expressly declare each actor responsible for the harmful outcome in its entirety. For example, Article IV(2) of the Convention on International Liability for Damage Caused by Space Objects (while dealing with liability, and within a very specific setting) expressly reserves the right of claimants 'to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable'.[53]

By contrast, the general texts on responsibility are more guarded. Article 47(2) of the ARSIWA and Article 48(3) of the ARIO seek to ensure that a claimant ought not to be able to 'recover, by way of compensation, more than the damage it has suffered'. And even in the *Nauru* case, the ICJ was cautious to clarify that permitting recourse against Australia as one of the responsible states 'does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered'; this would require an analysis of 'the characteristics of the Mandate and Trusteeship Systems (…) and, in particular, the special role played by Australia in the administration of the Territory'.[54] In light of these statements, the existence of a general principle of joint and several responsibility should not simply be assumed.

The second concern is of more general relevance; it is based on the flexible nature of the proportionality test. As noted above, proportionality is the key criterion limiting the reach of countermeasures. It 'translates' rules on the division of responsibility between multiple actors

[52] See e.g. Aust, *Complicity and the Law of State Responsibility*, n. 29, pp. 274 ff; A. Orakhelashvili, 'Division of Reparation', in J. Crawford, A. Pellet and S. Olleson, n. 1, p. 647; S. Besson, 'La pluralité d'Etats repsonable' (2007) RSDIE 13; J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle of Joint and Severable Liability' (1988) 13 YJIL 225 (all with further references). See also Chapter 7 of this volume, D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', n. 40.

[53] Convention on International Liability for Damage Caused by Space Objects, London, Moscow, and Washington D.C., 29 March 1972, in force 1 September 1972, 961 UNTS 187. Judge Simma's Separate Opinion in the *Oil Platforms* case might be interpreted similarly: see *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161, Separate Opinion by Judge Simma, para. 60 ff.

[54] *Nauru*, n. 48, p. 262, para. 56.

into limits on countermeasures. And yet, while it is a crucial limit in theory, perhaps one should not place too much reliance on proportionality. There is no doubt a responding actor is required to tailor its countermeasures to be commensurate. However, in practice, the flexibility inherent in the proportionality test renders precise assessments rather illusory. If judging proportionality 'can at best be accomplished by approximation',[55] how should one determine whether a particular response (say, a travel ban imposed on government officials) would still be a commensurate response against one of multiple responsible actors? Also, given the dearth of authoritative assessments, could we really expect this particular assessment to depend on whether the targeted actor is responsible for the injury in its entirety, or merely for its share? It seems that proportionality will need to be specified much more before it can be seen as a real limit on countermeasures. This, one hastens to add, is not a problem of shared responsibility proper, but a weakness of the general regime, in which proportionality remains underdeveloped. In the presence of multiple responsible actors, it arises acutely. At the same time, pragmatically, one might say that precisely because proportionality is a flexible criterion, it can be applied to instances of equally shared responsibility.

4. Countermeasures and differentiated responsibility

4.1 Introductory remarks

If responsibility is not equally shared, but differentiated, the application of countermeasures in response to harmful outcomes poses problems of a different nature. Matters are fairly straightforward if countermeasures are taken against the 'principal wrongdoer': i.e. the state or organisation that is directly responsible for a breach of international law. This possibility exists and is in no way affected by the illegal contribution, of a 'lesser degree', of another state or organisation, to the wrongful conduct. The real problem concerns not countermeasures against the 'principal wrongdoer', but those taken against other actors that bear responsibility in another role, namely as an accomplice in the wrongful conduct, or as an instigator, or as an actor who ought to have prevented another actor's wrongful conduct. These instances are not very common. Countermeasures are fairly rare to begin with, and if a state or organisation relies on them, it would normally be expected, as a matter of practice, to direct them against the 'principal' target. However, some practice exists, and as principles of derivative responsibility

[55] *Air Service*, n. 13, para. 83.

emerge and become more accepted, the legal questions arise more acutely. In this regard, it may be worth reiterating the recent trend towards an affirmation of a general rule against complicity in wrongfulness, of obligations of non-recognition, and the increasing debate about duties of prevention. As noted above, while raising different problems, all of these can be viewed as instances of differentiated responsibility.[56] As ancillary responsibility is triggered by separate forms of conduct (aid and assistance, recognition, failure to prevent), the better view is that Article 47(1) of the ARSIWA and Article 48(1) of the ARIO (envisaging implementation measures against each of a plurality of actors responsible for *the same unlawful act*) do not apply.[57]

Still, actors that illegally recognise, or aid and abet, wrongful conduct of course remain in breach of international law. Should other actors be entitled to respond to that illegality by resorting to countermeasures? Pragmatically, one might say that the problem is unlikely to be of practical relevance; if they decide to resort to countermeasures, it seems counterintuitive that responding actors should target accomplices or other actors bearing lesser forms of responsibility. Yet this merely helps to put the problem in perspective, but does not solve it. When looking at the ILC's texts, the answer would seem rather clear. A violation of a rule against complicity, to take just one example, qualifies as an internationally wrongful act in the sense of the respective Articles 1 to 2 of the ARSIWA and the ARIO; and it is against wrongful conduct that countermeasures can be taken. In light of the previous discussion, it may be added that at present, the countermeasure would have to be tailored to be commensurate with the effects of the particular wrongful conduct against which it is directed – i.e. the aiding and abetting, the illegal recognition, etc. – but could not be a blanket response against the harmful outcome as such.[58] In this setting, perhaps even a flexible criterion such as proportionality could be expected to act as a meaningful limitation. Yet all these may be said to be side-issues. The real question is whether international law should accept a right to direct countermeasures against actors bearing lesser forms of responsibility. Would it not be sensible to limit, as a matter of law, the possibility of coercive responses, and to move to a system of 'staggered' responsibility that permits coercive responses only against the principal wrongdoers?

[56] See section 2.2.2.
[57] Cf. Aust, *Complicity and the Law of State Responsibility*, n. 29, pp. 288–290.
[58] Yet even that is discussed; cf. Aust, ibid., pp. 274 ff.

4.2 An emerging restriction on countermeasures against 'lesser wrongs'?

As forms of lesser, derivative responsibility – and principles of shared responsibility – are only gradually being developed, it would be wrong to expect international law to provide ready-made answers. In fact, present practice would not seem to yield clear indications at all. But, perhaps, change is underway. In retrospect, future generations of international lawyers may look back to the present decade as one in which – as part of a regime of differentiated responsibility – international law came to recognise restrictions on the availability of countermeasures against 'lesser wrongs'. Three rather different features of the present regime could be said to point in that direction, and could foreshadow the emergence of such a more restrictive regime.

First, the legal regime governing claims before international courts might support a restrictive approach.[59] The ICJ in particular – applying the so-called 'indispensable third party rule' (or '*Monetary Gold* principle') – has long refused to entertain claims against states bearing ancillary responsibility if the principal actor has not consented to the jurisdiction of the Court, and if in the course of the proceedings, the Court would be required to pronounce on the legality of that principal actor's conduct.[60] To be sure, the indispensable third party rule is controversial and is based on considerations of jurisdiction, not on a restriction of claims.[61] However, its application entails results rather similar to an exclusion of countermeasures against 'lesser wrongs': in specific settings, a form of enforcement that would otherwise be open becomes unavailable. One might readily say that the situations of heavily regulated judicial claims, on the one hand, and decentralised, 'private' countermeasures, on the other, are incomparable. But there is perhaps room for the argument that if, as a result, international courts have been hesitant to accept legal claims (which after all 'should not be considered an

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[59] See Chapter 8 of this volume, A.M.H. Vermeer-Künzli, 'Invocation of Responsibility', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___, and the collection of papers on *Procedural Aspects of Shared Responsibility in International Adjudication*, published in a themed section in (2013) 4(2) JIDS 277–405.

[60] See the ICJ's *Monetary Gold* and *East Timor* cases, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, ICJ Reports 1954, 19, at p. 32; and *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, at pp. 100–105, paras. 23–35, respectively. See further the discussion of the concept in the *Nauru* and *Nicaragua (Jurisdiction and Admissibility)* cases: see *Nauru*, n. 48, pp. 259–262, para. 55; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, ICJ Reports 1984, 392, para. 35; as well as, more recently, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, at para. 38.

[61] For a succinct summary of the Court's jurisprudence see L. Caflisch, 'Cent ans de règlement pacifique des différends interétatiques' (2001) 288 RCADI 245, at 406 et seq.; C.F. Amerasinghe, *Jurisdiction of Specific International Tribunals* (Leiden: Martinus Nijhoff, 2009), pp. 13–14 and pp. 50 et seq.

unfriendly act between States', but encouraged)[62] against 'side actors', there could perhaps be an argument also to restrict archaic responses by way of countermeasures.

Second, albeit more tentatively, there is at least some recent evidence that might suggest that responsibility for ancillary breaches should give rise to a more 'lenient' regime of remedies; this in turn might have repercussions at the level of law enforcement by way of countermeasures. The ICJ's merits judgment in the *Bosnian Genocide* case, while taking the notion of a 'duty to prevent' seriously, was cautious when pronouncing on the remedies triggered by such a breach by omission. Having determined the respondent state's responsibility for failure to prevent acts of genocide at Srebrenica, the Court needed to address the consequences of such a breach. It recalled the principle of reparation, but then went out of its way to make a specific point. In the words of the Court, while

> the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, (…) it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought [i.e. the prevention of genocide].[63]

And further:

> Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.[64]

This statement might be read to point towards a more general distinction between principal and ancillary breaches. And on that basis (which at present remains tentative), one might perhaps consider whether the regime of countermeasures should not also reflect the different levels of responsibility.

Third, within the framework of the ARIO, Article 48(2) provides the clearest indication of how a differentiated regime of responsibility could be 'translated' into the field of law enforcement. Notably, the provision distinguishes between 'primary' and 'subsidiary' levels of responsibility. For the purposes of implementation, Article 48(2) clarifies that '[s]ubsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not

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[62] Manila Declaration on the Peaceful Settlement of International Disputes, UN Doc. A/RES/37/10 (1982), Annex, para. 5.
[63] *Bosnian Genocide* case, n. 30, at para. 462.
[64] Ibid.

led to reparation.' As the Commentary suggests, this is designed to give effect, for the purposes of invocation, to provisions like Article 62 of the ARIO, which stipulates that under certain circumstances (dealt with separately in the subsequent section), member states can be subsidiarily responsible for conduct of an international organisation. The subsidiary character of a member state's responsibility, however, would seem to affect the regime of countermeasures. As the ILC's Commentary clarifies, while claims are being pursued against the primarily responsible organisation, those directed against the 'subsidiarily responsible entity' can only be made 'subject to the condition that the entity whose responsibility is primary fails to provide reparation'.[65] With respect to countermeasures, as long as that condition remains in place, no claim of reparation is due against the entity bearing subsidiary responsibility – and hence no countermeasures can be taken against it. In the end, then, the concept of subsidiary responsibility in the sense of Article 48(2) of the ARIO entails a result that is similar to that of the indispensable third party rule in ICJ proceedings: at least initially, law enforcement measures could only be taken against the principal wrongdoer, but not against those bearing lesser ('subsidiary') responsibility.

To summarise the preceding argument, perhaps there is room to consider whether in different fields of responsibility, concepts giving effect to differentiated regimes of responsibility are gaining ground. None of them concerns the regime of countermeasures directly, but for the reasons set out, they would seem to be related and perhaps merit consideration. To simply state that '[t]here are (…) no structural reasons which exacerbate the problem of countermeasures in the case of complicit States'[66] (or indeed other actors bearing ancillary responsibility) may thus be an over-simplification. Perhaps one might suggest that taken together, the three tendencies point towards modifications of the traditional regime, which needs to be adapted to accommodate degrees of responsibility.

4.3 Counterarguments

Still, the considerations set out in the preceding section remain tentative, and need to be tested. Upon their own terms, they can be rebutted without much difficulty; all it takes would be to state that 'they prove little', as they do not concern countermeasures specifically. As regards

[65] Article 48 ARIO, para. 3, n. 3. By contrast, the Commentary to the first reading provision had noted that 'Subsidiarity does not imply the need to follow a chronological sequence in addressing a claim', ARIO Commentary to Article 47(3) (first reading), para. 3, n. 16.
[66] Aust, *Complicity and the Law of State Responsibility*, n. 29, p. 288.

judicial proceedings, and the indispensable third party rule more particularly, one might go further and note that the ICJ's approach is not derived from general concepts of responsibility, but from a specific reading of the rules of jurisdiction; certainly not a necessary implication of consensualism, but a deliberate extension, and a controversial one at that.

Perhaps more significantly, there is at least some international practice indicating that states and international organisations do at times take meaningful enforcement action against states bearing ancillary responsibility. Research conducted does not yield examples of 'clear-cut' countermeasures proper. However, complicity, illegal recognition, and the like have at times been met with unfriendly acts or retorsions. Again, one might say that this does not offer conclusive proof in a debate intending to establish rules governing countermeasures. However, what seems clear is that some form of enforcement action against ancillary breaches of the law is considered. The following illustrative examples – each of which raises problems of its own – might thus be said to provide some evidence in point.

First, where collective sanctions have taken the form of boycotts against a certain state or practice in order to deprive it of international support, states violating the boycott have themselves been at times subjected to acts of retorsion and isolated themselves. Protests and boycotts against New Zealand following that country's sport exchanges with Apartheid South Africa would provide such an example.[67]

Second, the recognition by a member state of what in the view of an organisation was an illegal situation has been met with sanctions. Egypt's suspension from the Arab League in the wake of the Israeli-Egyptian peace treaty[68] (pursuant to which in Annex III, Article 1, the parties 'agree[d] to establish diplomatic and consular relations and to exchange ambassadors upon completion of the interim withdrawal') might be read in that way.[69]

Third, where an international sanctions regime requires states to prevent the proliferation of certain risks, the implementation of the duty to prevent may take rather 'robust' forms. The

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[67] On the background see J.L. Chappelet and B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: the Governance of World Sport* (London: Routledge, 2008), pp. 109–110.
[68] Peace Treaty between Israel and Egypt, 18 ILM 362 (1979), at 362.
[69] See K.D. Magliveras, *The Exclusion from Participation in International Organisations* (Dordrecht: Martinus Nijhoff, 1999), pp. 237–8; and briefly B. Simma and C.J. Tams, 'Article 60 (1969/1986) [Commentary]', in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: OUP, 2011), p. 1362.

United States-sponsored 'Proliferation Security Initiative' – comprising voluntary agreements, but also assertions of a right to act unilaterally – could be seen as evidence of this.[70]

Finally, where a state is seen as supporting internationally wrongful conduct by a non-state actor (as opposed to another state or organisation), that state may be targeted by rather forceful international sanctions. By way of illustration, it suffices to refer to the range of enforcement measures (UN sanctions, countermeasures proper, ICJ proceedings) against the Federal Republic of Yugoslavia in relation to conduct, typically by Bosnian Serbs, within Bosnia and Herzegovina.

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The preceding considerations suggest that at present, international law does not provide any clear-cut rules regarding countermeasures against ancillary breaches. International practice is sparse. Concepts or arguments that might justify a restriction of the right to take countermeasures are still in their infancy. Given that ancillary breaches are, after all, internationally wrongful acts in and of themselves, no such restriction should be presumed. It may be seen as a preferable approach *de lege ferenda*, but the ('preferable') regime has yet to crystallise. The better view is that, for the time being, countermeasures can be used in response to ancillary breaches of international law – that is, against states or international organisations failing to prevent conduct that they ought to have prevented; against states or international organisations recognising as legal a situation created by a 'serious breach (…) of an obligation arising under a peremptory norm of general international law';[71] or against states and international organisations aiding and assisting in the commission of a wrongful act.

It may be worth pausing to consider the implications of this assessment by considering hypothetical instances of violations of treaty-based duties to prevent genocide or racial discrimination. In the light of the ICJ's case law, for responsibility to arise, it 'does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.'[72] Precisely how many states or actors bear such responsibility for failure to prevent depends on the facts of each case; however, often the circle will be rather large. The preceding considerations suggest that against all these ancillary breaches, countermeasures are, in

[70] For details see Y.-H. Song, 'The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment' (2007) 38 ODIL101–45.
[71] Cf. Articles 40–41 ARSIWA, n. 2; Articles 41–42 ARIO, n. 3.
[72] *Bosnian Genocide* case, n. 30, at para. 438.

principle, available. Of course, in line with the general rules, countermeasures would have to remain proportionate. However, while that is agreed in principle, perhaps not too much should be expected from the concept of proportionality as it is so flexible, and in the field of countermeasures, it seems to be applied with particular flexibility. This in turn explains the 'appeal', *de lege ferenda*, of restrictions to the right to take countermeasures. As regimes of shared and differentiated responsibility emerge, we should not preclude that they will entail an exclusion of countermeasures against actors bearing 'lesser' forms of responsibility.

5. Countermeasures and responsibility for conduct carried out in the framework of an international organisation

Special problems arise if responsibility is shared between an international organisation and its member states. This scenario cuts across the two scenarios addressed so far, as responsibility may be shared equally or unequally. Clearly, it presents particular challenges, as the allocation of responsibility between an international organisation and its member states is difficult and controversial. Controversies about attribution of conduct, or about the proper object of legal claims, affect the legal regime of countermeasures, which presupposes the responsibility of the targeted actor and is designed to induce cessation/reparation. The scarcity of countermeasures taken against international organisations further complicates the assessment. All this suggests that the regime is still in flux.

That said, to a large extent, the particular challenges do not affect the regime of countermeasures proper. They need to be addressed within the framework of the rules of attribution, or in applying the principles of reparation to international organisations and their member states. As a law enforcement concept, countermeasures will 'implement' whatever result is reached. To take but one example, if the *Behrami*[73] decision was correctly decided, and the conduct in question could not be attributed to a European Convention on Human Rights member state, it would not be necessary to discuss coercive forms of law enforcement against member states; they had broken no law in the first place. The key question does not concern countermeasures, but the rules of attribution. By the same token, and in line with what has been suggested above, if member states are not liable for damages caused by 'their' international organisation, no reparation claims could be enforced against them, and

[73] *Agim Behrami and Bekir Behrami v. France*, App. No. 71412/01 (ECtHR, 2 May 2007).

countermeasures would have to be taken against the international organisation required to provide for reparation. All this suggests that there is limited room for legal argument about the regime of countermeasures. The real problems lie elsewhere.

Nevertheless, four points can briefly be made. First, Articles 13 to 18 and 57 to 61 of the ARIO do not endorse a 'blanket' responsibility of member states for activities of international organisations of which they are a member. However, they provide for rather broadly-defined categories in which both member states and international organisations bear responsibility in relation to acts of the other. In the light of what has been stated above, this would need to be reflected in the rules on countermeasures.

Second, as a general rule, Articles 13 to 18 and 57 to 61 of the ARIO do not introduce a hierarchy between the different forms of responsibility of member states and international organisations. However, as noted above, Article 62(1) of the ARIO is the exception that proves the rule. It mentions two relatively narrowly defined instances in which 'a State member of an international organization is responsible for an internationally wrongful act of that organization', namely if:

> (a) it has accepted responsibility for that act towards the injured party; or
>
> (b) it has led the injured party to rely on its responsibility.

In these instances, as made clear by paragraph 2, '[t]he international responsibility of a State (…) is presumed to be subsidiary.' As Article 62(2) of the ARIO is the only provision of the text that expressly uses this terminology ('subsidiary'), it may be assumed that in other instances of interaction between member states and international organisations (notably circumvention in the sense of Articles 17 and 61 of the ARIO), responsibility would not result in subsidiary responsibility. The exception set out in Article 62 of the ARIO therefore has a narrow scope of application.

Third, importantly, Article 48(2) applies the distinction between primary and subsidiary responsibility to the field of law enforcement. In no unclear terms, it notes that '[s]ubsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.' As noted above, this is an important provision that could guide the future development of the law in other areas of differentiated responsibility as well. However, in the absence of meaningful international practice, at present, its impact is uncertain.

Fourth, if it is accepted, then the distinction between primary and subsidiary responsibility might be of considerable relevance for the regime of countermeasures. Unlike other forms of law enforcement (notably proceedings before national or international courts), countermeasures are not subject to the complex limitations that in practice have complicated attempts to hold international organisations responsible. 'Immunity' is no bar; and unlike before some state-centred international courts, countermeasures can be taken against each international legal subject. This suggests that whereas with respect to judicial proceedings, international organisations may often not be promising targets, countermeasures could very well be directed against them. This in turn would mean that enforcing the law against the actor bearing primary responsibility could be quite meaningful – so that the subsidiary responsibility of member states in the sense of Article 62 need not become relevant.

6. Outlook

The regime of countermeasures is characterised by its flexibility. While developed in the bilateral, inter-state setting, it can generally be applied to instances of shared responsibility. In fact, as shown in the preceding sections, where multiple actors bear responsibility for a harmful outcome, they can usually be targeted individually. This is notably due to the approach adopted in Article 47(1) of the ARSIWA and Article 48(1) of the ARIO, which for instances of equally shared responsibility, is probably the correct one. Matters are more complex where responsibility is not shared equally, but in a differentiated way. In this scenario (i.e. scenario number 2 of the present Chapter), one might well discuss whether countermeasures should be available against actors responsible for ancillary breaches. As a matter of principle, the two ILC texts do not impose any limitation; only for the rather special case of subsidiary responsibility as set out in Article 62 of the ARIO are some member states shielded from countermeasures until redress has been sought from international organisations.

The general impression gained is that where multiple actors bear some form of responsibility for a harmful outcome, the injured state (or indeed states other than injured states – if the restrictive reading of Article 54 of the ARSIWA and Article 57 of the ARIO is rejected) has a wide measure of discretion in deciding against whom to direct countermeasures. This further increases the already considerable flexibility of the concept of countermeasures. In this respect, the present discussion confirms how difficult it is to reach agreement on restricting the regime of countermeasures. At the same time, it must not be forgotten that, notwithstanding the

regime's flexibility, countermeasures are used only rarely; the considerable academic debate masks their limited practical relevance in contemporary international law. This in turn affects the status of the two ILC texts on the matter: as far as shared responsibility is concerned, they do not provide much detail. And as far as countermeasures against multiple responsible states are concerned, the texts had to be drawn up on the basis of a very limited body of international practice. This makes them both more open to change, or more likely to channel developments – and it increases the need for a rigorous academic debate about the proper role of countermeasures.