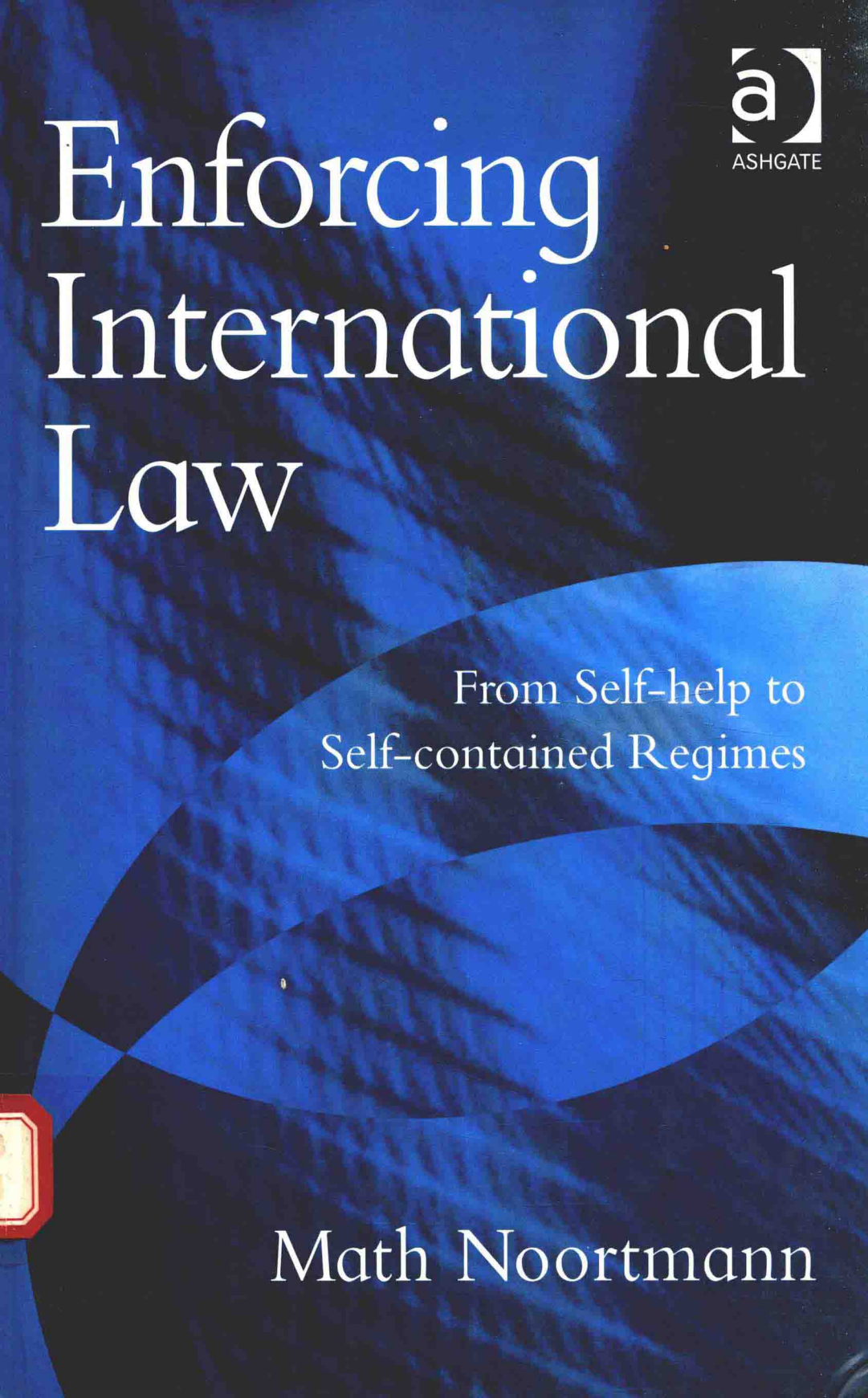
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From Self-help to Self-contained Regimes
Math Noortmann

Enforcing International Law

From Self-help to Self-contained Regimes

MATH NOORTMANN

ASHGATE

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This publication is based on my Ph.D. thesis, which was completed in 1997 but in contrast to Dutch tradition never published.

In contrast to my Ph.D. thesis, self-help and consensual dispute settlement are not perceived as a normative dichotomy, which should be assessed in terms of a subordination of the primitive institution of self-help to the – normatively speaking – dominant concept of "the peaceful settlement of disputes". In this publication, self-help and consensual settlement of disputes are understood as parallel and complementary developments in the evolution of the enforcement of international rules and norms; as different value systems that emerged at different points in time and place and function and develop side by side. In assessing the relationship between these two value systems, the concept of "self-contained regimes" has been adopted as a "third way" in which the relationship between self-help and consensual dispute settlement is institutionalized.

While the first two parts of this publication still reflect the legal and perhaps positivistic approach from the Ph.D. thesis, the third part seeks to draw from both legal as well as social sciences and international relations insights. The latter has definitely been the result of my encounter with these disciplines when I lectured international law at the Universities of Wageningen and Amsterdam respectively. In retrospect I owe my former colleagues at these institutions for their academic approach to global problems. This publication would have been written differently if I had not met them.

However, this publication would not have been written at all if my former teacher and friend Terry D. Gill had not encouraged me to pursue an academic career.

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Finally, I have to admit that I have learned to appreciate Julliette's anthropological cross-examination on the matters of methodology and theory. I wonder whether a legal scholar can ever satisfy the methodological hunger of his/her colleagues in the social and political sciences departments. At least I tried.

Math Noortmann
Utrecht

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Chapter 1

Introduction

> They actually say that they were prepared in the first place to submit the matter to arbitration. The phrase is meaningless when used by someone who has already stolen an advantage and makes the offer from a safe position; it should only be used when, before opening hostilities, one puts oneself on a real and not an artificial level with one's enemies ...
>
> It is laid down in a treaty that differences between us should be settled by arbitration, and that, pending arbitration, each side should keep what it has. The Spartans have never once asked for arbitration, nor have they accepted our offers to submit to it. They prefer to settle their complaints by war rather then by peaceful negotiation ...
>
> [w]ar could be avoided if Athens revoke the Megarian decree which excluded the Megarians from all parts in the Athenian Empire and from the Market of Attica itself.
>
> Thucydides, *History of the Peloponnesian War*, trans. by RexWarner (Harmondsworth: Penguin Classics, 1967), 34, 48 and 92.

Enforcement in International Law

Thucydides' account of the Epidamnusian dispute contains the – probably – oldest recorded normative and political arguments on the appropriateness of negotiation and arbitration over war, boycotts and other forms of self-help as methods to settle "international" conflicts. Contemporary international relations provide ample examples of conflicts and disputes, which – like the Epidamnusian one – at one time or another have been the subject of both unilateral measures of self-help as well as diplomatic and/or (quasi) judicial procedures in an attempt to settle an outstanding issue. As such, the debate on the appropriateness and the normative relationship between unilateral measures of self-help and consensual dispute settlement methods in international conflicts is anything but new. The arguments in the inter-Greek dispute on (perceived) treaty obligations and actual behaviour could equally serve the advocates of contemporary states defending or challenging the resort to unilateral measures of self-help or questioning the recourse to consensual means of dispute settlement.

The United States' counsel in the US v. France air services dispute formulated it as follows:

> France cannot justifiably argue that the arbitration provision of the agreement precludes any recourse to unilateral measures pending arbitration [since] France could have refrained from taking such action [in the first place] and requested arbitration.[1]

The Pakistani representative argued in a dispute with India before the International Court of Justice that:

> the party alleging material breach cannot act as a judge in its own cause and unilaterally suspend the treaty; the issue must be settled either by the consent of the parties or must be resolved through third-party settlement.[2]

Conflicts in which states have resorted to self-help, as well as to diplomatic and judicial means, have not only divided the parties to that conflict on questions concerning the appropriateness and legality of a specific course of action. Scholars seem to be equally divided on the question of whether and for what reason states should or must resort to coercion or cooperation. An interesting question is whether – considering the unique resemblance in the arguments and behaviour of the respective antique and contemporary adversaries – anything has changed over the past 25 centuries. De-contextualization, however, may not be taken for granted. Global economic interdependence, technical developments, sophistication of means of communication, existence of weapons of mass destruction, environmental and humanitarian threats and the proliferation of international actors and stakeholders, to mention only some of the more recent developments, cannot be disassociated from the political and normative structures.

International conflicts and disputes provide pick-and-choose arguments for both empirical as well as normative oriented scholars, who seek to argue in one direction or another. Coercive and non-coercive elements can equally be observed and detected. Ultimate settlements can be the result of both power politics as well as consensual agreements. The predominant cause of the ending of conflicts seems to lie in the eyes of the beholder or – to put it in analytical terms – in the eyes of the researcher and his or her disciplinary and methodological approach.

Both unilateral measures of self-help as well as methods of consensual dispute settlement can be considered as enforcement mechanisms in the broader sense of the word, especially in international relations and international law.

Instances of self-help in international relations are a double-edged sword for the realist. Self-help reinforces the power element in the realist paradigm while consensual dispute settlement stresses the lack of centralized enforcement mechanisms and the perceived primitivism of the international legal system. Centralized enforcement or rather the absence of centralized enforcement, however, is a key element in the realist and positivist conceptions of international law.

The lack of centralized means of enforcement in the international legal order has indeed provided many critical and cynical arguments as to the value and effectiveness of international law, amongst realists and positivists alike. International law is easily (dis)qualified as "primitive", "reflecting the state of nature" or "self-help system" in political science as well as legal literature. Where deviations and violations of substantial rules are so easily observed, as in international relations, it is not easy to argue that centralized enforcement is basically immaterial to the functioning and indeed the very existence of the international legal regime. As in any other normative system, the international public legal order is predominantly based on the subscription of its subjects to that order and its underlying values and norms rather than to each and every single rule that springs from bureaucratic processes, whether they are legal or political. The global normative system should be understood as a transnational "*contrat social*". The Roman civil law basis of international law can neither explain global public order processes nor can it assess nor account for the increasing number of participants in these processes.

Darwin's evolutionism applies to the process of development of political and legal systems as well. If there is no natural selection between the rules, procedures

and instruments that work and those that do not, mankind's ability to make rational choices has been greatly overestimated. However, if we perceive:

> human history in "generation time" rather than "clock time", hunting and gathering was the basic hominid way of life for about 250,000 generations, agriculture has been in practice for about 400 generations, and modern industrial societies have only existed for about 8 generations. ... The conditions of 250,000 generations do have an impact on the last 8.[3]

Assuming that socio-political systems evolve along the same lines as species, self-help as the traditional enforcement mechanism has been around for far more generations than organized or centralized enforcement and is still very dominant in modern global society. At the same time, we cannot but admit that for at least 200 generations other forms of enforcement have been developed.[4] Like hunting, farming and industrial generations co-exist and affect each other, so do socio-political regimes and enforcement systems. The contemporary relationship between various enforcement systems is at least problematic, but it is clear that self-help as the traditional enforcement mechanism and conceptions of international relations based on the paradigm of self-help are challenged, both politically and academically.[5]

Self-help and Self-constraint – A Problematic Relationship?

Throughout history, we can observe two interesting and perhaps related trends in the normative assessment of conflict and cooperation in international relations. One approach promotes and prefers a peaceful settlement of disputes while the other is essentially concerned with questioning the lawfulness and appropriateness of an unbridled right of self-help which includes the right to military force. Today, these trends have merged in the growing normative assumption that the obligation to settle disputes by "peaceful means" has a confining impact upon the right of states to resort to unilateral measures of self-help.

Notwithstanding a clear and general preference for the peaceful settlement of disputes and an increasing scepticism concerning the traditional institutions of self-help and reprisals in legal discourse, the very existence, as well as the scope and content, of a rule requiring the prior exhaustion of or prior resort to procedures for peaceful settlement, before any resort to self-help, is highly controversial. Judicial policy and legal prudence arguments regularly enter into the legal debate. From a broader, interdisciplinary and political perspective, the "sanctions" discourse is not confined to strictly legal arguments. Considerations of a humanitarian character, for example, which in particular have entered the UN sanctions discourse,[6] have equally been applied in the field of unilateral measures of self-help.[7]

The main legal problem is that international law traditionally recognizes both the right (or faculty) of states to safeguard their own rights through the resort to unilateral measures of self-help as well as the obligation of states to settle their disputes by accepted and recognized diplomatic and judicial methods. Both concepts are based on their own merits, which are presumed to be still valid in contemporary international law.

It is the primary purpose of this study to determine which rules and principles govern the relationship between the two notions of dispute settlement within the

larger framework of enforcement. The question to be addressed in this study may be formulated as follows: what is the relationship between self-help and self-constraint in the contemporary international normative order? Is the traditional right of states to resort to unilateral measures of self-help in cases of infringements of legal rights and interests conditioned by self-imposed obligations of constraint? Obligations of constraint are made operational through voluntary and compulsory mechanisms for the settlement of international disputes. Are states in particular obliged to seek or actually resort to dispute settlement mechanisms prior to (any) resort to unilateral measures of self-help?

Self-help and Self-constraint – Two Phenomena ... One Discourse

Those who have taken an interest in the normative development of international law have generally avoided addressing the institution of self-help. As a result, the relationship between self-help and consensual dispute settlement has until recently never been a basic issue in legal discourse. Political scientists, as well as lawyers, seem to assume that self-help and consensual dispute settlement are two completely distinct and unrelated phenomena in international relations. In the fields of international law and international relations the two institutions are studied in remarkable isolation.[8] Moreover, if the number of publications in a given discipline may be taken as an indicator for that discipline's predominant focus and discourse, one cannot fail to note the overwhelming legal literature in the field of the "peaceful settlement of disputes" and the overwhelming political science preoccupation with "sanctions as a foreign policy tool". To the extent that the relationship between self-help and consensual dispute settlement has been a serious issue in international legal and political science discourses, it has been subordinated to or considered to be part of the more general discourse on the law of treaties, state responsibility or foreign policy analysis.

The codification work of the International Law Commission on the law of treaties and the adoption of Article 65 of the Vienna Convention on the Law of Treaties of 1969 indicated a first substantial reconsideration of the itemistic approach towards self-help and dispute settlement. Article 65 stipulates *inter alia* that the parties to a dispute should "seek a solution through the means indicated in Article 33 of the UN Charter", if the target state objects to a suspension or termination of the treaty on the basis of Article 60 of the Vienna Convention.

The *Air Services Agreement* case demonstrated that states were willing to submit questions concerning the lawfulness of self-help to the judicial test. In 1978, the governments of France and the US differed in opinion on the question of whether the terms of the 1946 Air Services Agreement allowed Pan American Airlines to change gauge in London on its flight to Paris. The disagreement turned into a dispute, which became the subject of negotiations, measures of self-help and, finally, arbitration.[9] One of the questions submitted to the Arbitral Tribunal by France and the US concerned the lawfulness of the "countermeasures", which the US Civil Aeronautics Board (CAB) had initiated against Air France and the Union des Transports Aeriens (UTA). In the course of the proceedings, France submitted that the obligation to negotiate or arbitrate, as stipulated in the Air Services Agreement, limited the right of the US to employ countermeasures against French airlines.

However, neither the work of the International Law Commission (ILC), nor the entry into force of the Vienna Convention, which signalled that states were willing to accept qualified conventional limitations on their right to resort to self-help, nor the *Air Services Agreement* case triggered a substantial academic debate on the subject.

It was not until the ILC's work on the law of state responsibility[10] and especially the codification or, in any case, the progressive development of the concept of "countermeasures" that the relationship between self-help and dispute settlement gained considerable scholarly attention.[11] The Commission held in the initial stage of its work that the wrongfulness of unilateral measures of self-help was in principle precluded if these measures were taken in response to a prior international wrongful act.[12] The legal details, including the confinements posed on this right to take unilateral measures of self-help, were to be discussed in a later part of its work.

The stage for a heated legal debate was set when ILC's Special Rapporteur Arangio-Ruiz proposed that:

> *no* [countermeasures] by an injured State shall be taken prior to ... the exhaustion of *all* the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it is a party ...[13]

The qualified, but far-reaching proposal met with serious reservations and opposition within the International Law Commission, the ILC's Drafting Committee and members of the Sixth Committee of the United Nations General Assembly. The content of the requirement to pursue the peaceful settlement of the dispute was the "most controversial and debated" provision in the context of the drafting work on "countermeasures".[14] The International Law Commission did not follow Special Rapporteur, Arangio-Ruiz in his progressive development of the law. Arangio-Ruiz resigned as Special Rapporteur, to be succeeded by James Crawford who – pragmatically – reformulated Arangio-Ruiz's proposal in an attempt to secure the adoption of the draft and to make the draft politically acceptable. The "1996 *acquis*" included a completely reformulated provision on the "conditions relating to the resort to countermeasures."[15] This provision reflects Crawford's "instrumental approach to countermeasures, as well as (for the most part) the careful balance between the interest of the injured state and the responsible state achieved in the substantial provisions on countermeasures."[16] The final provision in the 2001 draft on state responsibility is only a scant reflection of what Arangio-Ruiz originally proposed.[17]

The legal discourse on the relationship between self-help and consensual settlement can be characterized as "principled" versus "pragmatic" or "idealistic" versus "realistic"; Arangio-Ruiz representing the "principled/idealistic" approach and Crawford representing the "pragmatic/realistic" approach. The debate in the International Law Commission reflects (in the opinion of the author) the traditional clash in legal discourse between the academic and the practitioner.

In the international relations discourse, the overwhelming interest in the phenomenon of self-help is outweighed by a remarkable lack of interest in addressing non-coercive foreign policy tools. Even in studies on "dispute resolution", the balance between coercion and conciliation as policy tools is missing. Patchen's work, with the promising title *Resolving Disputes between Nations; Coercion or*

Conciliation, is exemplary in this respect.[18] The sanctions debate mainly addresses the question of whether and how sanctions work.[19] The growing awareness that the "utility" of self-help can only be assessed in terms of "comparative utility", i.e. compared to other strategic options and policy alternatives, has not triggered a substantial debate on dialogue and other forms of consensual settlement as a valuable alternative to self-help. Preeg's list of "alternatives to [unilateral] sanctions" stresses the lack of "alternative" thinking in the international relations discourse on foreign policy tools. Four possible alternatives are identified: (1) no sanctions at all ("the Null Hypothesis"), (2) multilateral sanctions (3) aid (carrots instead of sticks) or (4) military intervention. Note that consensual dispute settlement is completely absent.[20] Princen, in his study *Intermediaries in International Conflict*, considers third party intervention and correctly concludes that "[t]hird party intervention – especially mediation – has received little attention in the study of international politics."[21] While the same conclusion is equally true for arbitration and adjudication, one cannot fail to observe an increasing attention for "legalized dispute resolution" in international relations studies.[22] Several factors have generated an attention shift. First of all, it is difficult not to observe the proliferation of international dispute settlement mechanisms since the beginning of the 1990s. The enormous expansion of the international judiciary has been qualified by one scholar as "the single most important event of the post-cold war age".[23] Secondly, the paradigmatic aversion of classical realists for normative, legal and moral elements in the analysis of international relations is relaxing. Notions of legitimacy and authority increasingly permeate the traditional focus on calculated, rationalized self-interest and power politics. International public order considerations increasingly enter the political scientists' vocabulary.[24] The dilemma international relations scholars are facing with respect to the relationship between calculated self-interest and power on the one hand and international public interest, principles and rules on the other hand is evident. Keohane's *After Hegemony* speaks volumes in this respect.[25] His structural institutionalism aims at a "modification" of realism rather than "replacing" it. The modification he seeks is to be found in the balance between "egoistic self-interest" and a "conception of self-interest in which *empathy* plays a role".[26] As such, Keohane has "no intention of debunking explanations resting on the assumption of self-interest".[27] Instead he seeks to "construct an alternative, and plausible, explanation [for behaviour that appears to be motivated on empathy] on the premises of egoism". Within the traditions of realism, however, he challenges the "presumption that in a self-help system empathy plays a subordinated role".[28] Whether empathy is based on calculated, egoistic or enlightened self-interest or whether it can be explained by rational choice theories is immaterial to the actual result of such behaviour as it is likely to promote consensual dispute settlement and cooperation over self-help.

Keohane's conception of the relation between "discord and co-operation" stresses two points: (1) international regimes are to be assessed as "intermediate factors", and (2) "the norms and rules of regimes can exert an effect on behaviour" of states. It is in this respect that international regime theory becomes relevant for the debate on the enforcement of international law. It is in the idea of "self-contained regimes" that the relationship between self-help and consensual dispute settlement finds its proper place.

The International Court of Justice's erroneous characterization of the law on diplomatic immunities as a "self-contained regime" triggered a short but intensive

debate on the conceptual value of assessing international law in terms of regime theory.[29] In particular Riphagen and Simma elaborated in the 1980s on this idea.[30] However, their ideas did not find their way into mainstream legal discourse. Being considered either too abstract or too theoretical, the regime approach in international law has met with unwarranted scepticism.

Method and Structure

The relationship between self-help and consensual dispute settlement is by and large ignored in both legal as well as international relations literature. Individually, these concepts have been the subject of considerable mono-disciplinary research.

In order to understand the relationship, it is necessary to draw on the insights from both legal as well as political science. Being inspired by and making use of both, the author, however, in no way pretends that this is the multi-disciplinary study he ultimately would like it to be. It is foremost a normative, legal assessment of the link between the two phenomena. However, the assumption that the concept of dispute settlement takes precedence over self-help or vice versa as a matter of normative consideration, or that these concepts inherently conflict and could be solved by the "simple" application of conflict rules, must be rejected. Any study concerning the link between both institutions and the restrictions, which existing obligation to settle disputes by "peaceful means" may or may not put on the faculty of states to resort to self-help mechanisms, should, accordingly, take full account of the independent conceptual features of both instruments. Furthermore, the apparent conflict between the right to self-help and the obligation to settle disputes by consensual means is not one which can be solved by exclusive reference to legal rules and principles. The question is very much determined by international legal as well as political processes and structures. Except for analysing legal developments, in order to assess the lawfulness of self-help in respect of existing obligations to settle disputes by consensual means, one also needs to consider the effectiveness of both mechanisms as law enforcement and foreign policy tools. This means that any study concerning the "lawfulness" of self-help in relation to the obligation to settle disputes by consensual means has to take due account of the fact that both mechanisms – with their own inherent possibilities and limitations – function within the specifics of the international legal and political system. From a legal perspective, one cannot ignore the fact that the international legal order lacks a centralized enforcement mechanism and that the *ultimate* remedy for the "injured" state lies in the concept of self-help. On the other hand, it must be admitted that the faculty to resort to self-help is no longer an unbridled one and that the obligation to settle disputes by peaceful means as formulated in various legal and political documents is gaining more and more substance. Moreover, given the economic and political interdependency in international relations, consensual dispute settlement mechanisms can be as effective or perhaps more effective then unilateral measures of self-help. Economic studies have time and again demonstrated that economic measures of self-help are only effective under specific requirements.

The author does not intend to find or formulate a legal rule. In the academic quest for clarification and understanding, every argument or source should be taken into

account without a preset understanding of hierarchy. Treaty obligations, which require states to resort to the settlement procedures agreed upon, prior to any resort to self-help, are as relevant as the (legal) opinions and practice of states as well as the more general principles of law, writings and judicial decisions. Due to these circumstances, the analysis encounters a considerable limitation. Therefore, this study does not pretend to provide the interested reader with a clear-cut rule nor does the author intend to provide an exhaustive overview of everything that has been said or done in this respect. The major findings are based on an analysis of scholarly work. For the purpose of clarification, examples from five different case studies have been incorporated in the text. These case studies are:

1. the India–Pakistan hijacking incident (1971)[31]
2. the Air Services Agreement dispute between France and the US (1978)[32]
3. the Tehran Hostages crisis[33]
4. the Nicaragua–US conflict (1981–90)[34]
5. the destruction of Korean Airlines flight 007 (1983).[35]

This study must be considered as a clarification of the various aspects that play a role in the assessment of the lawfulness and appropriateness of a particular type of self-help within the context of a particular dispute settlement procedure. At this point it should be clarified that the term "self-help" refers to any unilateral measures taken by individual states in response to a perceived international wrongful or undesirable act. These unilateral actions may be coordinated or unified. However, they do not constitute measures based upon a binding decision by an international organization. For example, the lawfulness of measures ordered or sanctioned by the Security Council of the United Nations – generally referred to as "sanctions" – fall outside the scope of this study.

The present study consists of three parts, each of which will be preceded by an introductory chapter and followed by a concluding chapter. Part 1 focuses on the institution of self-help. It analyses three different aspects of self-help: the objectives, which states seek by resorting to unilateral measures of self-help (Chapter 2), the mechanisms (Chapter 3) and the normative modalities (Chapter 4). In Part 2, I seek to interpret the content and limits of dispute settlement mechanisms as specific forms of self-constraint. First, the notion of self-constraint, as reflected in "the principle to settle disputes by peaceful means" and alternative dispute settlement mechanisms, will be discussed with respect to the perceived right to resort to self-help (Chapter 5). Secondly, the (possible) limitations that institutionalized dispute settlement mechanisms exercise upon the right to resort to self-help will be addressed (Chapter 6). Thirdly, an analysis of the implementation of "consented" outcomes will be undertaken in order to assess the effectiveness of institutionalized methods of dispute settlement (Chapter 7). Finally, in Part 3, I seek to demonstrate that self-help and self-constraint merge in normative orders, which can be characterized as self-contained regimes. Regime theory will be conceptualized in terms of international law in order to set an analytical framework for specific legal regimes (Chapter 8). The European Union (EU) and the World Trade Organization (WTO) will be analysed as two outstanding examples of self-contained regimes (Chapters 9 and 10 respectively). The dispute settlement instruments and enforcement mechanisms in these respective legal regimes will also be analysed.

Notes

1 *Case concerning the Air Services Agreement of 27 March 1946* (US/France) (9 December 1978) reprinted in Int'l Arb Awards, 18: 417; Memorial of the United States (18 September 1978), 41.
2 *Appeal relating to the Jurisdiction of the ICAO Council* (India/Pakistan), 1972 ICJ Pleadings 89, 384.
3 Thayer, B.A., *Darwin and International Relations; On the Evolutionary Origins of War and Ethnic Conflict*, (Lexington, KY: University Press of Kentucky, 2004).
4 Yongping, L., *Origins of Chinese Law; Penal and Administrative Law in its Early Development* (Oxford: Oxford University Press, 1998).
5 See e.g., Viotti P. R., & M.V. Kaupi, *International Relations Theory; Realism, Pluralism, Globalism*, ed. Robert Miller and Bruce Nichols (New York: Macmillan, 2nd rev. edn., 1993).
6 Gowlland-Debbas, V., *Collective Responses to Illegal Acts in International Law; United Nations Action in the Question of Southern Rhodesia* (Dordrecht: Martinus Nijhoff Publishers, 1990); Van Genugten W.J.M., and G.A. de Groot (eds), *United Nations Sanctions; Effectiveness and Effects in the Field of Human Rights, A Multi-Disciplinary Approach* (Antwerpen: Insertia, 1999).
7 See e.g., Preeg, E.H., *Feeling Good or Doing Good with Sanctions; Unilateral Economic Sanctions and the U.S. National Interest* (Washington, DC: CSIS Press, 1999) [hereinafter Preeg, *Feeding Good or Doing Good*]; and Zoller, E., *Peacetime Unilateral Remedies; An Analysis of Countermeasures* (Dobbs Ferry, NY: Transnational Publishers Inc., 1984) [hereinafter Zoller, *Peacetime Unilateral Remedies*].
8 Notable exceptions in this respect are: Zoller, *Peacetime Unilateral Remedies*, O.Y. Elagab, *The Legality of Non-Forcible Counter-measures in International Law* (1988) [hereinafter Elagab, *The Legality of Non-Forcible Counter-measures*], and the work of the International Law Commission on state responsibility, *Yearbooks 1976–96*.
9 See case concerning *Air Services Agreement of 27 March 1946* (US/France) (9 December 1978), Rep Int. Arb Awards, 18: 417 and Int. L Rep, 54 (1979): 337 [hereinafter *Air Services Agreement* case, page numbers refer to the Int. L Rep]. For an analysis of the case see Chapter 5.
10 The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts were adopted in second reading by the Commission in 2001. The UN General Assembly adopted a resolution to which the Draft Articles were attached. Throughout this study the articles will be referred to as the Draft or Articles on State Responsibility.
11 The *Air Services Agreement* case did not cause an overwhelming scholarly response. The main reason for the attention for the subject of this study is to be found in the renewed attention for the concept of countermeasures as triggered by the International Law Commission's work on state responsibility. See, e.g., Malanczuk, P., 'Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit, in *ZaöRV*, 45: 304 (1985) [hereinafter Malanczuk, "Zur Repressalie"].
12 See *YB Int. L Comm'n* 2 (2) (1979): 115.
13 See *Report of the International Law Commission to the UN General Assembly*, 47 GAOR Supp No. 10, UN Doc A/47/10 (1992) [hereinafter 1992 ILC Rep.] [emphasis added].
14 *Report of the International Law Commission on the Work of its forty-sixth session*, 6 May–26 Jul. 1996, UN Doc A/51/10, 159 [hereinafter referred to as 1996 ILC report].
15 Article 48 of the Draft Articles on State Responsibility provisionally adopted by the Commission on first reading reads:

1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in Article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this Chapter.
2. An injured State taking countermeasures shall fulfil the obligations in relation to the dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.
3. Provided that an internationally wrongful act has ceased, the injured State shall suspend when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.
4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure.

16 Crawford, J., *The International Law Commission's Articles on State Responsibility; Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), 16 [hereinafter Crawford, *International Law Commission's Articles*].
17 *Idem*, 288 and 297.
18 See Patchen, *Resolving Disputes between Nations: Coercion or Conciliation?* (Durham: Duke University Press, 1988).
19 See O'Sullivan M.L. *Shrewd Sanctions: Statecraft and State Sponsors of Terrorism*, (Washington DC: Brookings Institution Press, 2003) 24–32 [hereinafter O'Sullivan, *Shrewd Sanctions*].
20 See Preeg E.H., *Feeling Good or Doing Good*, 213–20.
21 Princen T., *Intermediaries in International Conflict*, Princeton: Princeton University Press, (1992) 18 [hereinafter Princen, *Intermediaries*].
22 See e.g. Keohane R.O., A Moravcsik and A-M Slaughter, "Legalized Dispute Resolution: Interstate and Transnational", in *International Dispute Settlement* edited by M.E. O'Connell. Dartmouth: Ashgate 469 [hereinafter Keohane "Legalized Dispute Resolution"].
23 Romano, quoted in Keohane "Legalized Dispute Resolution" 470.
24 See e.g. O'Sullivan, N., "Power, authority and legitimacy: a critique of postmodern thought", in *Political Theory in Transition*, edited by N. O'Sullivan, Routledge, London (2000).
25 Keohane R. O., *After Hegemony; Cooperation and Discord in the World Political Economy*, (Princeton: Princeton University Press, 1984) [hereinafter Keohane, *After Hegemony*].
26 *Idem*, 14, 124.
27 *Idem*, 123.
28 *Idem*, 125.
29 See *case concerning United States Diplomatic and Consular Staff in Tehran* (US/Iran), Merits, Judgement ICJ Rep. 1980, p. 27 at 38.
30 See, Riphagen, W., 1983. "Fourth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility)", *Yearbook of the International Law Commission 1983 Vol. II*, p. 1; Riphagen, W., "State Responsibility: New Theories of Obligations in Interstate Relations" in *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, eds Macdonald and Johnston (Dordrecht: Martinus Nijhoff Publishers, 1989); hereinafter Simma B., "Self-Contained Regimes" in *Netherlands Yearbook of International Law* 16