The Problem of Enforcement in International Law

Countermeasures, the non-injured state and the idea of international community

Elena Katselli Proukaki

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List of abbreviations

ACP	African, Caribbean and Pacific group of states
AJIL	*American Journal of International Law*
Aus.JIL	*Austrian Journal of International Law*
AVR	Archiv des Völkerrechts
AYIL	*Australian Journal of International Law*
BYIL	*British Yearbook of International Law*
CLP	current legal problems
CFSP	common foreign and security policy
CYIL	*Canadian Yearbook of International Law*
EC	European Community
ECom.HR	European Commission of Human Rights
EConv.HR	European Convention of Human Rights
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	*European Court Reports*
ECSC	European Coal and Steel Community
EEC	European Economic Community
EHRLR	*European Human Rights Law Review*
EJIL	*European Journal of International Law*
EPC	European political cooperation
EPIL	*Encyclopedia of Public International Law*
EU	European Union
FPRY	Federal People's Republic of Yugoslavia
FRY	Federal Republic of Yugoslavia
GA	General Assembly
GLJ	*German Law Journal*
HILJ	*Harvard International Law Journal*
HLR	*Harvard Law Review*
HRLJ	*Human Rights Law Journal*
HRQ	*Human Rights Quarterly*
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission

ILM	International Legal Materials
IYIL	*Italian Yearbook of International Law*
JAIL	*Japanese Annual of International Law*
Max Planck YBUNL	*Max Planck Yearbook of United Nations Law*
MJIL	*Michigan Journal of International Law*
NJIL	*Nordic Journal of International Law*
NYIL	*Netherlands Yearbook of International Law*
NYUJInt'lL&Pol	*New York University Journal of International Law and Policy*
OAS	Organization of American States
PASIL	*Proceedings of the American Society of International Law*
PCIJ	Permanent Court of International Justice
RIAA	*Reports of International Arbitral Awards*
RdC	*Recueil des Cours de l'Académie de Droit International*
SA	South Africa
SAYIL	*South African Yearbook of International Law*
SC	Security Council
SFRY	Socialist Federal Republic of Yugoslavia
SU	Soviet Union
TEU	Treaty of the European Union
UN	United Nations
UNCLT	United Nations Conference on the Law of Treaties
UNYB	*United Nations Yearbook*
UNTS	United Nations Treaty Series
USA	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention of the Law on Treaties
VJIL	*Virginia Journal of International Law*
WCR	*World Court Reports*
WLR	*Weekly Law Reports*
WWI	World War One
WWII	World War Two
YbECHR	*Yearbook of the European Convention on Human Rights*
YbILC	*Yearbook of the International Law Commission*
ZaoRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

Preface

The evolution of the concepts of *jus cogens* norms and obligations owed to the international community as a whole, as developed in international legal theory and practice, has had a strong impact on the work of the International Law Commission for the codification of the law on state responsibility. The acceptance that not all primary international norms are of the same gravity or significance because of the nature of the rights they seek to protect could not but influence the legal consequences to derive from the violation of such norms. However, the categorization of internationally wrongful acts to serious and less serious raises significant questions concerning the enforcement of these 'superior' norms through countermeasures and also the subjects entitled to invoke the responsibility of the wrongdoing state in case of their infringement. This becomes even more compelling in the absence of effective and compulsory centralized mechanisms for the protection and enforcement of the most fundamental interests of the international community.

The adoption of the 2001 Final Articles on State Responsibility has far from concluded the debate over the entitlement of states other than the individually injured to resort to countermeasures, which falls at the heart of this book. While the ILC has found that state practice supporting a right to third-state countermeasures in response to the violation of these collective interests is still inconclusive, the book challenges these conclusions and demonstrates, through extensive analysis of state practice, that a right to solidarity measures has become an integral part of the international legal order.

The book starts with an analysis of how the notion of fundamental community interests emerged in international legal thinking and in the law on state responsibility, and proceeds to a detailed account of evidence in support of a right to countermeasures by third states in their protection. It further considers the interrelationship between the right to solidarity measures and obligations emanating from self-contained regimes amidst claims of risks of fragmentation of the international legal order and explores in some depth the significance of proportionality as a necessary legal restriction of such right.

Foreword

There is a lot of talk about 'The International Community' these days but it can hardly be said that the promiscuity of the conversation has done much to enlighten us about what 'The International Community' is and how it works. It is sometimes a term of the simple realism – reflecting the fact that politicians of consequence invoke 'The International Community' as though it was a concrete thing and, accordingly, it falls to commentators to supply the unexplicated features of the concept (or concede that the statesmen are talking nonsense). This is a burden for political scientists, one which many of them are ready to assume. At the other extreme, 'The International Community' is a utopian construct; a regime of international perfection where everyone can pursue the good life in conditions of perpetual peace and security. This is a task for the imaginations of political philosophers: they also are up for the task. Not willing to be left out, there is a considerable community of international lawyers who invoke the notion of 'The International Community'. A truly realistic inquiry would reveal substantial deficiencies in sustaining the legal characteristics of 'The International Community'; a utopian prescription would lack the normative foundation which some international lawyers still regard as an essential characteristic of any system of law.

But international lawyers will not be left out. Fired by ideas of international justice (not ones wholly discerned within the rules and principles of extant international law) and appalled by the unjust conditions which prevail in so much of the world, they invoke 'The International Community' to justify some exercises of power and to demand the execution of some duties which seem to serve good ends. Those who have reservations about the project are dismissed as churls or cynics. It will be clear where I stand, though I should prefer 'cautious' and 'sceptical' as the preferred terms of use. Simply, there is a lot of work to be done to turn either the malleable, political references to 'The International Community' into a legally literate notion or to implement the high aspirations for a universally better world into the practical legal means to justify or structure the decisions necessary to do justice. The problem, of course, is States, with their central role in the international legal system and their tight control over the guns and money required to stop things getting worse and make things get better. The international legal system in which States have operated has been predominantly based on a civil or private model of legal relations – bilateral and delictual. The claims

of 'The International Community' would introduce public law elements into these arrangements; innovations harder to adopt when the legislative powers in international law are so constrained and limited, and the supplementary initiatives which courts might take are so circumscribed by the rules on jurisdiction. It takes energetic investigation, great organisational capacity and acute legal imagination to make a positive contribution to the elucidation of the public law of public international law which might persuade States of its utility.

Dr Katselli Proukaki has brought these qualities to this much expanded and reconsidered version of her PhD thesis. I was her supervisor and learnt once again the lesson that supervisors soon lose control over the work of their students. Dr Katselli Proukaki has demonstrated an impressive independence in developing, maintaining and refining her ideas. She is, of course, aware of all the reservations expressed in the preceding paragraphs but she has been driven by a commitment to find what there is in the law which might be useful to her project – a peaceful world, in which human rights are broadly and widely enjoyed. The results are set out in what follows. The method is to look at the practice, some of it familiar, some not so well-known, over a long period through the lens of public law. She is not so unrealistic as to imagine a system which would fit within the paradigm of a domestic legal order but she is able to conclude that some of the more controverted limitations of international law are not so disabling to the pursuit of common interests as is sometimes maintained. She dispatches the hesitations of the International Law Commission about the legality of third-party countermeasures in response to serious breaches of peremptory norms as being unnecessarily timid, when the legal materials are examined as a whole. The attention which she gives to countermeasures is explained partly by the conceptual significance of the topic – a role for a materially uninjured State in the implementation of international law – but also because these 'serious breaches' are attacks on the values which she holds to be most important and which, in many cases, will only be prevented from being consolidated or getting even worse by actions which impose real costs on the perpetrators.

The work which Dr Katselli Proukaki has started here will keep her and many others in challenging inquiry for the remainder of their careers. One can not but admire the aspiration and, whatever one's caution, hope for the persuasiveness of the project where it matters – in the council rooms of Governments.

Colin Warbrick
Honorary Professor
Birmingham Law School

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