

THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW

The use of third-party countermeasures is an increasingly common phenomenon in international relations, yet their legal position remains uncertain. Providing the first systematic and comprehensive study of this key concept in international law, Martin Dawidowicz explores the position of third-party countermeasures and their safeguards regime based on the development of ideas on countermeasures in the UN International Law Commission and a thorough examination of State practice. The book clarifies the position of third-party countermeasures in international law, and in doing so it challenges some widely held assumptions about the likely impact of a regime of third-party countermeasures on international relations. It will be of interest to international law and relations scholars and students, diplomats, policy makers, international civil servants and NGOs in the field of human rights.

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Cambridge University Press
978-1-107-01479-4 — Third-Party Countermeasures in International Law
Martin Dawidowicz
Frontmatter
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THIRD - PARTY
COUNTERMEASURES IN
INTERNATIONAL LAW

MARTIN DAWIDOWICZ



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UNIVERSITY PRESS

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CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi – 110002, India
79 Anson Road, #06–04/06, Singapore 079906

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education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107014794
DOI: 10.1017/9781139046602

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First published 2017

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Dawidowicz, Martin, author.

Title: Third-party countermeasures in international law / Martin Dawidowicz.
Description: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University
Press, 2017. | Series: Cambridge studies in international and comparative law ; 131 |
Includes bibliographical references and index.

Identifiers: LCCN 2017007127 | ISBN 9781107014794 (hardback)

Subjects: LCSH: Third party countermeasures (International law) | United Nations.

International Law Commission. Draft Articles on the Responsibility of States for
Internationally Wrongful Acts. | BISAC: LAW / International.

Classification: LCC KZ4085 .D39 2017 | DDC 341.5–dc23

LC record available at <https://lcn.loc.gov/2017007127>

ISBN 978-1-107-01479-4 Hardback

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FOREWORD

In this study, Martin Dawidowicz examines one of the great, unresolved questions of current international law: the position of third-party countermeasures. The topic is a difficult and controversial one. The construction of a multilateral public order is based not so much on logic as some mixture of high hope and limited experience. The construction may rest on the imposing pseudo-Roman columns of *jus cogens* and obligations *erga omnes* – *les grandes verticales* – but these were largely based on assertion rather than actual performance. It seems that this ambitious construction may have reversed the Roman scheme that it is society that requires and generates the law: *ubi societas, ibi jus*. Nowadays it may seem that international law seeks to develop more rapidly than international society may allow, including in the field of communitarian law enforcement. However, as this study shows, the position is not quite so bleak – the present state of play embodies hope, no doubt, but also a deal of experience.

For the use of otherwise unlawful unilateral sanctions of a peaceful character taken in defence of communitarian norms – i.e. third-party countermeasures – is an increasingly common phenomenon in international relations. They are often resorted to by a large (and increasingly diverse) number of States acting in concert as part of a broader strategy to deal with major assaults on multilateral public order. There is much here that requires careful, thorough and sober analysis. Martin Dawidowicz provides all this.

This is – remarkably – the first study on third-party countermeasures in international law which addresses the topic in a systematic and comprehensive way, based on the turbulent and even occasionally idiosyncratic development of ideas on countermeasures in the International Law Commission, resulting in the compromise ‘solution’ found in Article 54 ARSIWA. Both sides of the argument in this fraught debate are given due consideration. The study rightly places emphasis on the greatest area of uncertainty – State practice – which has received too little attention.

This approach has yielded a substantial harvest which is presented for the reader's consumption in a lucid, thoughtful and convincing manner. It makes a significant contribution to our understanding of the position of third-party countermeasures in international law. In doing so, it successfully challenges some widely held assumptions about the likely impact of a regime of third-party countermeasures on international relations.

Peace Palace, The Hague
May 2016

James Crawford

PREFACE

Popular legend has it that Jack Kerouac wrote *On the Road* in three weeks, typing it almost nonstop in one big coffee-fuelled burst of creative energy on a 120-foot scroll – replacing regular sheets of paper just interrupted his flow – cooped up in a New York City apartment in 1951. At least this is what Kerouac said in 1959 when asked by TV talk-show host Steve Allen about how long it had taken to write it: ‘Three weeks’. ‘How many?’ replied Allen, adding, in disbelief, ‘That’s amazing!’ In reality, Kerouac’s book had a much longer and bumpier journey, complete with multiple rewrites. And there were always roadblocks slowing down his creative flow – sometimes even to a complete halt – before sputtering off and gradually gaining steam again towards the final destination. And so it is with this book. It has spent many years on the road: from Oxford to Cambridge, Paris, New York, Washington, DC, Geneva and, finally, back to Oxford.

This personal journey has benefitted from the guidance of many companions along the way to whom I am much indebted. At Oxford, Catherine Redgwell supervised the incipient seed of this work as a master’s thesis with great care and infectious charm, and set me on my way, in a northeasterly direction, on the X5 bus to Cambridge.

My arrival in Cambridge to complete a PhD thesis – of which this book is an updated and substantially revised version – was generously supported by the Gates Cambridge Trust and Trinity College, for which I am most thankful. To add to my good fortune, I had the great privilege of being supervised by Professor James Crawford, then Whewell Professor of International Law (now judge of the ICJ). James opened up ever-new horizons in characteristically succinct, but deeply profound and meaningful, ways. He is an inspirational figure in many ways and not only in matters of international law. I am deeply grateful for his guidance and generous support.

My PhD thesis was examined by Professors Giorgio Gaja (now judge of the ICJ) and Guglielmo Verdirame, who subjected it to a thorough and

searching analysis, and made thoughtful and perceptive comments which are gratefully acknowledged. I would also like to extend my gratitude to Santiago Villalpando, from whom, during my time in the UN Office of Legal Affairs, I learnt a great deal about the workings of the Sixth (Legal) Committee of the General Assembly and the International Law Commission.

The book was completed during my time as Departmental Lecturer in Public International Law at the University of Oxford. I am most thankful to my Oxford colleagues Catherine Redgwell, Frank Berman, Dan Sarooshi, Dapo Akande and Antonios Tzanakopoulos for providing such a welcoming and intellectually stimulating environment in which to complete this work. My gratitude also extends to Finola O'Sullivan, Elizabeth Spicer and others at Cambridge University Press, not least for so patiently allowing a seed of inspiration to take root and grow into a tree of publication.

Finally, I am especially grateful to my family for their love and support throughout the years and for making all of this possible. Above all, I am grateful to Paz whose love and friendship has been the greatest gift of this journey. This book is dedicated to her.

Oxford
May 2016

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ABBREVIATIONS

ACHR	American Convention on Human Rights, 22 November 1969, 1144 UNTS 123
ACP	African, Caribbean and Pacific Group of States
ADP	ILC Articles on Diplomatic Protection, ILC Report (2006), UN Doc. A/61/10, 24
ADP Commentary	Commentary to the ILC Articles on Diplomatic Protection, ILC Report (2006), UN Doc. A/61/10, 26
AFDI	Annuaire français de droit international
Ago, Second Report	R. Ago, Second Report on State Responsibility, YbILC (1970), vol. II, 177
Ago, Third Report	R. Ago, Third Report on State Responsibility, YbILC (1971), vol. II/1, 199
Ago, Fifth Report	R. Ago, Fifth Report on State Responsibility, YbILC (1976), vol. II/1, 3
Ago, Eighth Report	R. Ago, Eighth Report on State Responsibility, YbILC (1979 and 1980), vol. II/1, 3, 13
AJCIL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
AJPIL	Austrian Journal of Public International Law
Ann. IDI	Annuaire de l'Institut de droit international
Arangio-Ruiz, Third Report	G. Arangio-Ruiz, Third Report on State Responsibility, YbILC (1991), vol. II/1, 1
Arangio-Ruiz, Fourth Report	G. Arangio-Ruiz, Fourth Report on State Responsibility, YbILC (1992), vol. II/1, 1
Arangio-Ruiz, Fifth Report	G. Arangio-Ruiz, Fifth Report on State Responsibility, YbILC (1993), vol. II/1, 1
Arangio-Ruiz, Sixth Report	G. Arangio-Ruiz, Sixth Report on State Responsibility, YbILC (1994), vol. II/1, 3
Arangio-Ruiz, Seventh Report	G. Arangio-Ruiz, Seventh Report on State Responsibility, YbILC (1995), vol. II/1, 3

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ARSIWA	ILC Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report (2001), UN Doc. A/56/10, 26
ARSIWA Commentary	Commentary to the ILC Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report (2001), UN Doc. A/56/10, 31
ARV	Archiv des Völkerrecht
ASIL Proc.	American Society of International Law Proceedings
AU	African Union
BIT	Bilateral Investment Treaty
BYIL	British Yearbook of International Law
CESCR	Committee on Economic, Social and Cultural Rights (ICESCR)
Chinese JIL	Chinese Journal of International Law
CJICL	Cambridge Journal of International and Comparative Law
CLJ	Cambridge Law Journal
Crawford, First Report	J. Crawford, First Report on State Responsibility, YbILC (1998), vol. II/1, 1
Crawford, Second Report	J. Crawford, Second Report on State Responsibility, YbILC (1999), vol. II/1, 3
Crawford, Third Report	J. Crawford, Third Report on State Responsibility, YbILC (2000), vol. II/1, 3
Crawford, Fourth Report	J. Crawford, Fourth Report on State Responsibility, YbILC (2001), vol. II/1, 1
CSCE	Conference on Security and Cooperation in Europe
CTS	Consolidated Treaty Series
CYIL	Canadian Yearbook of International Law
DARIO	ILC Draft Articles on the Responsibility of International Organizations, ILC Report (2011), UN Doc. A/66/10, 54
DARIO Commentary	Commentary to the ILC Draft Articles on the Responsibility of International Organizations, ILC Report (2011), UN Doc. A/66/10, 69
Dept. of State Bulletin	Department of State Bulletin (US)
Diss. Op.	Dissenting Opinion
Draft Articles [1996]	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted on first reading in 1996, ILC Report (1996), UN Doc. A/51/10, 58

Draft Articles Commentary	Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted on first reading in 1996:
	Art. 1 YbILC (1973), vol. II, 173
	Art. 3 YbILC (1973), vol. II, 179
	Art. 19 YbILC (1976), vol. II/2, 95
	Art. 30 YbILC (1979), vol. II/2, 115
	Art. 37 YbILC (1983), vol. II/2, 42
	Art. 39 YbILC (1983), vol. II/2, 43
	Art. 40 YbILC (1985), vol. II/2, 25
	Arts. 47–48 YbILC (1996), vol. II/2, 65
	Arts. 49–50 YbILC (1995), vol. II/2, 64
	Arts. 51–53 YbILC (1996), vol. II/2, 65
	Art. 58 YbILC (1995), vol. II/2, 78
DRC	Democratic Republic of the Congo
Dugard, First Report	J. Dugard, First Report on Diplomatic Protection, YbILC (2000), vol. II/1, 205
EC	European Community
EC Bull.	Bulletin of the European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ed(s).	edition/editor(s)
EEC	European Economic Community
EJIL	European Journal of International Law
EU	European Union
EU Bull.	Bulletin of the European Union
FCN	Friendship, Commerce and Navigation (treaties)
FCO	Foreign and Commonwealth Office
Fitzmaurice, Second Report	G. Fitzmaurice, Second Report on the Law of Treaties, YbILC (1957), vol. II, 16
Fitzmaurice, Fourth Report	G. Fitzmaurice, Fourth Report on the Law of Treaties, YbILC (1959), vol. II, 37
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
G7	Group of 7
G77	Group of 77
GA	United Nations General Assembly

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GATS	General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 15 April 1994, 1869 UNTS 183
GATT	General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 15 April 1994, 1867 UNTS 187 (GATT 1994); 30 October 1947, 55 UNTS 187 (GATT 1947)
GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
HRC	Human Rights Council (United Nations)
HRQ	Human Rights Quarterly
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171
ICESCR	International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3
ICJ	International Court of Justice
ICJ Rep.	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ICJ Statute	Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDI	Institute of International Law (Institut de droit international):
	IDI, 1880 Oxford Resolution, ‘Manuel des lois de la guerre sur terre’, available at www.justitiaetpace.org
	IDI, 1887 Heidelberg Resolution, ‘Déclaration concernant le blocus en dehors de l’état de guerre’, available at www.justitiaetpace.org
	IDI, 1934 Paris Resolution, ‘Régime des représailles en temps de paix’, available at www.justitiaetpace.org

	IDI, 1989 Santiago de Compostela Resolution, ‘The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States’, available at www.justitiaetpace.org
	IDI, 2005 Krakow Resolution, ‘Obligations <i>Erga Omnes</i> in International Law’, available at www.justitiaetpace.org
IJMCL	International Journal of Marine and Coastal Law
ILC	International Law Commission
ILC Report	Annual Report of the International Law Commission
ILM	International Legal Materials
ITLOS	International Tribunal for the Law of the Sea
IYIL	Italian Yearbook of International Law
JCSL	Journal of Conflict and Security Law
Keesing’s	Keesing’s Contemporary Archives / Keesing’s Record of World Events
LJIL	Leiden Journal of International Law
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
Mich. JIL	Michigan Journal of International Law
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
NYJILP	New York University Journal of International Law and Politics
OAS	Organization of American States
OAU	Organization of African Unity (now AU)
OIC	Organisation of Islamic Cooperation (previously Organization of the Islamic Conference)
OJ	Official Journal (European Union)
OSCE	Organization for Security and Co-operation in Europe
ÖZÖR	Österreichische Zeitschrift für Öffentliches Recht
PCIJ	Permanent Court of International Justice
QIL	Questions of International Law
RBDI	Revue belge de droit international
RdC	Recueil des cours de l’Académie de droit international de la Haye
RDI	Rivista di diritto internazionale

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RDILC	Revue de droit international et de législation comparée
Res.	Resolution
RGDIP	Revue générale de droit international public
RIAA	United Nations Reports of International Arbitral Awards
Riphagen, Preliminary Report	W. Riphagen, Preliminary Report on State Responsibility, YbILC (1980), vol. II/1, 107
Riphagen, Second Report	W. Riphagen, Second Report on State Responsibility, YbILC (1981), vol. II/1, 79
Riphagen, Third Report	W. Riphagen, Third Report on State Responsibility, YbILC (1982), vol. II/1, 22
Riphagen, Fourth Report	W. Riphagen, Fourth Report on State Responsibility, YbILC (1983), vol. II/1, 3
Riphagen, Fifth Report	W. Riphagen, Fifth Report on State Responsibility, YbILC (1984), vol. II/1, 1
Riphagen, Sixth Report	W. Riphagen, Sixth Report on State Responsibility, YbILC (1985), vol. II/1, 1
Riphagen, Seventh Report	W. Riphagen, Seventh Report on State Responsibility, YbILC (1986), vol. II/1, 1
SADC	Southern African Development Community
SC	United Nations Security Council
SELA	Latin American and Caribbean Economic System (Sistema Económico Latinoamericano y del Caribe)
Sep. Op.	Separate Opinion
SFRY	Socialist Federal Republic of Yugoslavia
Sixth Committee	UN General Assembly, Sixth (Legal) Committee
UK	United Kingdom
UN	United Nations
UNC	Charter of the United Nations, 26 June 1945
UNCC	United Nations Compensation Commission
UNCHR	Commission on Human Rights (United Nations)
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
UNHCHR	United Nations High Commissioner for Human Rights
UNJY	United Nations Juridical Yearbook
UNTS	United Nations Treaty Series
UNYB	United Nations Yearbook
US	United States
U.S.C.	United States Code

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USD	United States dollar
VCCR	Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261
VCDR	Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331
VJIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
Waldock, Second Report	H. Waldock, Second Report on the Law of Treaties, YbILC (1963), vol. II, 36
Wood, Second Report	M. Wood, Second Report on Identification of Customary International Law, 22 May 2014, UN Doc. A/CN.4/672
Wood, Third Report	M. Wood, Third Report on Identification of Customary International Law, 27 March 2015, UN Doc. A/CN.4/682
Wood, Fourth Report	M. Wood, Fourth Report on Identification of Customary International Law, 8 March 2016, UN Doc. A/CN.4/695
WTO	World Trade Organization
Yale LJ	Yale Law Journal
YbECHR	Yearbook of the European Convention of Human Rights
YbILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht