Non-proliferation law and countermeasures

SAHIB SINGH

I. Introduction

Under the rules of present-day international law, and unless the contrary results from special obligations arising from particular treaties, notably from mechanisms created within the framework of international organisations, each state establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State’s view, results in the violation of an international obligation by another State, the first State is entitled ... to affirm its rights through ‘countermeasures’.1

Since this 1978 dictum by the arbitral tribunal in the Case Concerning the Air Services Agreement, there has been a concerted focus on the relationship between special treaty regimes and the taking of countermeasures as provided by customary international law. This chapter focuses on a particular aspect of this general enquiry: namely the extent to which non-proliferation law, and the special obligations and institutional mechanisms created by the governing treaties, enables, limits or otherwise modifies the right to resort to countermeasures under general international law.2 This examination permits a determination

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1 Case Concerning the Air Services Agreement of 27 March 1946 between the United States of America and France, 9 December 1978, XVII RIAA, 443, para. 81.

of the extent to which non-proliferation law is a special regime\(^3\) (as distinct from the notion of self-contained regimes\(^4\)).

The need for the present enquiry derives from both a scholastic lacuna and its relevance for contemporary non-proliferation practice. The former is rooted in the extensive institutional mechanisms contained in most major non-proliferation treaties. Such mechanisms enable verification and supervision of compliance, determinations of non-compliance and collective reactions to non-compliance. Is this what the *Air Services Agreement* arbitration was referring to when the tribunal carved out ‘mechanisms created within the framework of international organisations’ from the capability to resort unimpeded to the general international law right of countermeasures?\(^5\) Even presuming that one could answer this question in the affirmative, doctrinal arguments have been made indicating the insufficiency of such institutional mechanisms in dealing with cases of non-compliance. This, in turn, renders resort to unilateral measures ‘more likely’.\(^6\)

The second rationale for this chapter, that of practical relevance, is rooted in state practice indicating non-compliance with non-proliferation obligations, the (mal-)functioning of relevant treaty-specific institutional mechanisms and resort by actors to unilateral measures. A recent example is Iran’s arguable continuing non-compliance with its Safeguards Agreement and obligations contained in subsidiary agreements,\(^7\) as related to the Nuclear Non-Proliferation

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\(^7\) Outlining the case for Iranian non-compliance, see IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions 1737* (2006),
Treaty (NPT), as well as the subsequent resort to unilateral measures (alongside but independent from obligations imposed by Security Council Resolutions 1737 (2006) and 1929 (2010)), to ensure compliance by the USA, European States and Japan. At this purely pragmatic level, with enforcement clearly being integral to the non-proliferation system and recent practice demonstrating substantive recourse to unilateral self-help measures, the legal regime of countermeasures as specifically applied alongside established institutional mechanisms (such as the IAEA) is in need of delimitation and clarification.

Given this apparent need for clarification, the specific enquiry being undertaken by this chapter will be subject to the following structure. First, the contours of the present enquiry will be defined in a methodological section. This section (section II) will make important distinctions that are integral to reaching a conclusion on the pivotal question posed by this chapter and the book: does the non-proliferation regime stricto sensu comprise a special regime within international law? Second, section III will examine who may take countermeasures in non-proliferation law, special regard being given to the character of


8 Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161 (hereinafter NPT).
9 See, e.g., Executive Order 12959, 9 May 1995, 60 Fed. Reg. 24757. See also subsequent notices which annually renew the ban on investment in Iran and imports from the country, which are effected pursuant to the International Emergency Powers Act, 50 USC 1701–1706, and the National Emergencies Act, 50 USC 1622(d). An example of such a notice is Notice of 11 March 2009, 74 Fed. Reg. 10999.
non-proliferation obligations. Third, and finally, the paper will examine the range of rights, obligations and mechanisms that exist across the different rules of non-proliferation law, with a view to whether these limit or otherwise modify the ability to resort to countermeasures under general international law. This section will examine three main sources for such rules, rights, obligations and mechanisms: (a) the main non-proliferation treaties, including the NPT, the Chemical Weapons Convention (CWC)\textsuperscript{12} and the Biological Weapons Convention (BWC),\textsuperscript{13} among others; (b) those obligations imposed by relevant United Nations Security Council Resolutions (UNSC Res.) and the relevant consequences thereof; and (c) those primary rules governing non-proliferation, exceptions to these rules and the secondary rules implementing these within the World Trade Organization (WTO). Having examined when and how recourse is made to the general law of countermeasures, section IV will further examine the limitations and expansions of what countermeasures are permissible/impermissible in non-proliferation law.

The chapter will conclude, after the above review of non-proliferation provisions and the ambiguity of the present enquiry, that non-proliferation law cannot be considered a special regime with regard to countermeasures within the meaning intended by Joyner and Roscini.

\section*{II. Clarifications and limitations to the present enquiry}

Essential to doctrinal enquiry is the need to define its scope and limitations. This objectivization demarcates a value for the resulting work, independent of the inevitable subjective conclusions reached in the same: managing the expectations of the reader and grounding the author from reaching far-fetched conclusions.

In order to address the question of whether non-proliferation law is a special regime with regards to the taking of countermeasures, two issues require clarification. First, the present book (and consequently this chapter) has chosen to examine non-proliferation law as a special regime. Choosing non-proliferation law as a point of functional differentiation

\begin{itemize}
\item \textsuperscript{12} Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction 32 \textit{ILM} 800 (hereinafter CWC).
\item \textsuperscript{13} Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, 1015 UNTS 163 (hereinafter BWC).
\end{itemize}
has specific consequences and numerous limitations when considering diversities that may arise from different specific treaties (II. i). Second, determining the relationship between the procedures, rules, mechanisms and obligations contained in non-proliferation law and the general international law of countermeasures is necessarily a question of interpretation and bias-based presumptions (II. ii). Drawing attention to these presumptions and the uncertain nature of interpretation in the absence of application will, in turn, highlight the ambiguities of identifying the extent to which non-proliferation law is a special regime. Each issue will be addressed in turn.

### i. A question of non-proliferation law as a special regime or treaties as special regimes?

Joyner and Roscini have chosen to examine the extent to which specifically non-proliferation law is a special regime. This deliberate choice begs two questions: (a) what falls within the definition of ‘non-proliferation law’ for the purposes of the present enquiry, and (b) what are the consequences of choosing to evaluate specifically non-proliferation law, and not say a specific treaty and its related agreements, as a special regime?

For the purposes of the present book, Joyner and Roscini have drawn on an extremely broad definition of non-proliferation law:

‘non-proliferation law’ is defined herein to include all weapons of mass destruction (WMD) related treaties (i.e., chemical, biological, radiological and nuclear (CBRN) weapons-related treaties and missile-related treaties, due to their CBRN delivery relevance). Essentially, this term is intended to include WMD-related arms control treaties (treaties by which states agree to limit or reduce the amount and kinds of weapons they are entitled to possess); WMD-related disarmament treaties (treaties by which states agree to renounce entirely the possession of certain weapons and relinquish entirely existing stockpiles); WMD-related non-proliferation treaties (treaties that aim to prevent the spread of weapons); as well as WMD-related treaties limiting certain specific conduct, such as those banning weapon testing.

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14 e.g., evaluating the non-proliferation of biological weapons through examining specific treaty regimes such as the BWC and the 1925 Geneva Protocol. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65.

15 Joyner and Roscini, Introduction, p. 11.
Such a wide definition may be challenged.\textsuperscript{16} However, the present purpose of drawing attention to it is to highlight the diversity of the types of treaties contained under the umbrella term ‘non-proliferation’. This multiplicity of treaties is consequentially reflected in a multitude of rights, procedures and institutional mechanisms that are established by particular treaties. The right to resort to countermeasures in relation to non-proliferation obligations is dependent on relevant treaties and the specific obligations and types of institutional mechanisms created therein. The obvious danger is of extrapolating the special rule that is likely to be treaty specific to being one that could demonstrate the special nature of non-proliferation law. Such an extrapolation is unjustified and of little practical relevance. This problem is one that has been highlighted by the International Law Commission (ILC), in its Report on Fragmentation,\textsuperscript{17} and by academics:\textsuperscript{18} both have noted that differentiation along the lines of topical areas such as ‘international human rights law’ and ‘international environmental law’ ‘may perhaps seem altogether too abstract to be of much relevance’.\textsuperscript{19} In seeking to demonstrate the special nature of non-proliferation law any identified special rules or mechanisms related to countermeasures may be over-extended and taken out of their immediate, treaty-specific context.\textsuperscript{20}

\textsuperscript{16} e.g., Robinson has elsewhere argued that classifying the BWC and CWC under the rubric of non-proliferation, as Joyner and Roscini do, is reductive and inaccurate. J. Robinson, ‘Chemical and Biological Weapons’, in N. Busch and D.H. Joyner (eds.), Combating Weapons of Mass Destruction: The Future of International Nonproliferation Policy (Athens, Ga.: University of Georgia Press, 2009), p. 86. From a policy perspective, Joyner has also been sympathetic to the arguments made by Robinson. See D.H. Joyner, International Law and Proliferation of Weapons of Mass Destruction (Oxford University Press, 2009), pp. 83–84. Furthermore, there is the argument that this definition does not do justice to the valid distinction between non-proliferation law and counter-proliferation law. See ibid. 246 and 250 (also, generally, Chapter 6, above).


\textsuperscript{19} ILC Report on Fragmentation, p. 70, para. 133.

\textsuperscript{20} The arbitrariness of classifying a specific rule on countermeasures as one of ‘non-proliferation law’ is best highlighted by Arts. 22 and 23 of the Dispute Settlement Understanding (DSU) under the WTO, which permits countermeasures for breach of WTO obligations (see section IV. i. c, below). The necessity to maintain a treaty-specific context has been highlighted by Ago. See Fifth Report on State Responsibility, by Mr. Robert Ago, Special Rapporteur – the Internationally Wrongful Act of the State, Source
author counsels against this. The discovery of any specialized rules modifying, limiting or otherwise impacting on the right to take countermeasures should only be stated to be truly reflective of a particular treaty regime – and must be considered given this context.²¹

ii. The danger of presumptions in examining the specialness of the non-proliferation legal regime

Evaluating whether non-proliferation law contains (or whether, more specifically, particular non-proliferation treaties contain) specialized rules on the taking of countermeasures, or such specific legal rules or institutional mechanisms which may affect the application of the general law of countermeasures, necessarily requires an analysis of the relationship between the former and the latter.²² In turn, analysis of this relationship is an exercise in treaty interpretation.²³ The only possible exception to this would be when a specific treaty explicitly excludes²⁴ the application of the general law of countermeasures; a scenario entirely inapplicable to non-proliferation law and treaties.²⁵ Even in cases of explicit modification of or derogation from the general law of countermeasures, interpretation retains its necessity to determine the extent to which the special rule modifies or derogates from the general rule. For example, does the special rule only affect one specific part of the general law on countermeasures (i.e., invocation based on determination of breach, invocation based only in response to a specific type of breach,²⁶

²¹ ILC Report on Fragmentation, 72, para. 135.
²² For clarification and deriving from the analysis in section IV. i. a, below, the specific legal rule in this regard should also include any non-proliferation obligations and not merely non-proliferation treaties. The author has countermeasures under the DSU in mind, where the underlying substantive obligation may govern WMD.
²⁴ Requirement of express or explicit derogation or exclusion found in Arangio-Ruiz, Fourth Report, para. 125(b); and Elettronica Sicula S.p.A. (ELSI), Judgment, ICJ Reports 1989 42, para. 50.
standing to bring countermeasures etc.) while leaving all other requirements to which it does not speak to general international law?

It is precisely this endemic reliance on interpretation in the context of the fragmentation discourse that allows the introduction of presumptions and bias in analysing whether non-proliferation law is a special regime. Interpretation of particular non-proliferation provisions and determining the extent to which they interact with (modify, apply, derogate from, exclude etc.) the general international law of countermeasures depends on one’s perspective. Particularists, non-proliferation law specialists, are likely to approach the question with the presumption in favour of limiting the role of general international law. Universalists, general international lawyers, are likely to favour the presumptive and broad application of general international law. Therefore the extent to which this chapter can yield an answer to the question of whether non-proliferation law is a special regime (and to what extent) depends ‘on whether we choose a universalistic or a particularistic perspective, whether we first see the universe or the planets . . . [since each] tends to yield different results.’

This second methodological clarification should therefore highlight the inherent ambiguity that accompanies what this chapter sets out to achieve. However, that is not to diminish its overall resolve and purpose.

Therefore, when digesting the next three sections, the reader should be aware of (a) taking any special rules limiting or modifying the resort to countermeasures out of its treaty-specific context and extrapolating it to a generalization about non-proliferation law, and (b) the inherent ambiguity of presumptuous perspectives that come with determining the extent of the interrelationship and separateness of non-proliferation law (the particular) and the general law of countermeasures (the universal). Both these points are essential to understanding non-proliferation

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27 See, e.g., Crawford, Third Report, para. 147. It is arguable that the ILC Articles on State Responsibility are in toto premised on a universalist perspective.

28 Simma and Pulkowski, ‘Self-Contained Regimes’, 506. The article is the source of this second methodological clarification, although the article’s authors apply their analysis to the case of arguable self-contained regimes. The present chapter’s analysis is more susceptible to the presumption highlighted above, since it is more dependent on analysing the extent of interaction between special law and general law, which is tangential to Simma and Pulkowski’s enquiry, which sought to analyse the binary distinction of application/non-application of general international law in relation to specific self-contained regimes. For further analysis of the continuous oscillation between universal and particular perspectives in fragmentation discourse, see Singh, ‘The Potential of International Law’.
law as a special regime, the nature of that regime and the limitations of developing such an understanding.

III. Non-proliferation law and standing to take countermeasures

This section will address the question of who may take countermeasures. This question is premised on the understanding that most non-proliferation treaties are multilateral, and such treaties largely contain collective obligations. The present author does not consider such treaties to contain bundles of bilateral rights (with the possible exception to those identified in section IV). Furthermore, this question does not seek to prejudge either (a) whether general non-proliferation treaties, which contain no specific rules governing countermeasures, permit resort to countermeasures, or (b) those specific rules regulating countermeasures found in some treaties – both of which will be addressed in section IV, below. This question of standing to take countermeasures can be regulated by specific treaty provisions or, in their absence, residual general rules of standing. Given that non-proliferation law lacks the former (except, arguably, four such provisions highlighted in section IV. i. b–c, below), one is required to examine the manner in which the residual general rules on standing apply, given the identifiable special characteristics of non-proliferation obligations.

Reverted deductive logic determines that a consequence of asking who may take countermeasures is the antecedent question far more specific to the current enquiry: Are collective non-proliferation obligations predominantly possessive of a specific character (self-existent, interdependent etc.), enabling dominant resort to a particular rule within the general rules of standing to take countermeasures? This question also begs its own, namely what classification of obligations enables the resort to countermeasures, what type of countermeasures are permitted and which particular rules of the general rules on standing to take countermeasures are utilized and what

29 See section IV. i. b–c. This relates in particular to those special rules such as Arts. 22 and 23 DSU and specific UNSC Resolutions, as well as Art. XII(3) CWC and Art. V(3) CTBT.
30 e.g., Art. 35 Universal Postal Convention, 364 UNTS 3; Art. 4(4) Multilateral Agreement on Non-Scheduled Air Services in Europe, 310 UNTS 229; Art. 8, State of the International Regime of Maritime Ports, 58 LNTS 301 (each of which provides the right to take certain countermeasures to all parties of the treaty).
are its effects? However, should the italicized question above be answered in the positive, then this would certainly go some way towards identifying a special characteristic of the non-proliferation regime. This should not be equated with the conclusion that it may contribute to determining non-proliferation law as a special regime.

In accordance with the ILC Articles on State Responsibility, a state only has unequivocal standing to take countermeasures where it is an ‘injured state’. A state may be so considered if it sustains an injury as envisaged by the three situations delineated in Article 42 ILC Articles. The definitional delineations made by Article 42, and therefore the right to invoke responsibility and resort to countermeasures, are dependent on the nature of the underlying obligation and its breach. A fundamental differentiation made by Article 42 is that it gives standing to breaches of both bilateral obligations and specific types of collective obligations (Article 42(a) and (b), respectively). The key point to note is that Article 42 does not provide standing to invoke a breach of all collective obligations. Rather, there exists a certain subset of collective obligations, whose breach can only be invoked in a limited manner and not through countermeasures – these are contained in Article 48. For the purposes of the present section, we are only concerned with multilateral treaties containing collective obligations, falling within the scope of Article 42(b) ILC Articles. So two key questions arise for the purposes of the present enquiry:

(A) In accordance with general international law, which collective obligations contained in multilateral treaties, upon their breach, permit resort to countermeasures and what are the attributes of such obligations?

(B) Do non-proliferation treaties contain those type of collective obligations whose breach enables a resort to countermeasures (identified in A), and if such obligations are generally predominant in such treaties, is this indicative of a degree of specialness of non-proliferation law?

Each will be considered in turn.

33 Ibid., Art. 49. The articles leave open the question of whether a state not defined as such may take countermeasures in relation to certain types of multilateral obligations. See Ibid., Arts. 48 and 54.
34 It should be noted that focus on multilateral treaties containing collective obligations is deliberate. Countermeasures in bilateral treaties are necessarily bilateral; countermeasures in multilateral treaties with collective obligations may enable countermeasures by all states parties to that treaty.
i. Classification of obligations contained in multilateral treaties and their attributes

a. Ancestry of the classification of multilateral obligations: Fitzmaurice and the law of treaties

The classification and sub-categorization of obligations that is undertaken by the ILC Articles on State Responsibility finds its ancestry in the ILC’s work on the law of treaties, and in particular the work of Special Rapporteur Sir Gerald Fitzmaurice. Drawing upon previous work regarding the distinction between contract and lawmaking treaties to establish the foundational concept of reciprocity, he considered three classifications of multilateral obligations: (a) reciprocal; (b) self-existent and; (c) interdependent. This classification of obligations had legal consequences upon the termination/suspension of treaties and conflicts between treaties.

Reciprocal obligations were those that provided ‘for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually’. In contrast, Fitzmaurice’s ‘self-existent’ and

‘interdependent’ obligations are devoid of reciprocity since all states concerned with such obligations had the same interest in observing them. In common, these two types of obligations constitute mutually exclusive subsets of collective obligations. Yet, the fundamental difference between them is that interdependent obligations have to be performed between the parties, while self-existent obligations can be applied independently, by each of the parties to the collective obligation.

Fitzmaurice defined self-existent obligations as follows:

Neither juridically, nor from the practical point of view is the obligation of any party dependent on a corresponding performance by the others. The obligation has an absolute rather than reciprocal character – it is, so to speak, and obligation owed to the world rather than towards particular parties. Such obligations may be called self-existent.

It has been uncontroversially understood that this definition extends to include human rights treaties and broadly ‘those of the social or humanitarian kind, the principal object of which is the benefit of individuals’ and standard-setting environmental obligations. Almost certainly, treaties and obligations of such a type (e.g., humanitarian, environmental etc.) are not exhaustive of the matter. Indeed, when classifying an obligation as self-existent, one must be guided by the definitional foundations of this subcategory: namely that guiding characteristic that goes to the heart of defining ‘self-existent’ obligations. This guiding characteristic is undoubtedly that such obligations must be performed independently, irrespective and in total disregard of corresponding performance by other parties. Upon this reasoning, to delimit self-existent obligations on the basis of their functional content (i.e., humanitarian etc.) is unnecessarily narrow. Rather, ‘the category comprises all obligations that are to be performed


The term ‘integral’ has also been used to describe this category of obligation. As under the ILC Articles on State Responsibility, this article shall avoid this classification. Cf. Crawford, ILC Commentaries, p. 257 n. 706; Crawford, Third Report, paras. 91 and 106 (b) n. 195. The term interdependent obligation is also in conformity with Fitzmaurice’s classification and terminology. Fitzmaurice, Third Report, p. 27.

Tams, Enforcing Obligations, pp. 55–56.

Fitzmaurice, Third Report, p. 54, para. 126.

Fitzmaurice, Fourth Report, p. 46 n. 12. Fitzmaurice also broadly saw as applicable the following: ‘obligation of any country to maintain certain standards of working conditions or to prohibit certain practices in consequence of the conventions of the International Labour Organisation; or again under maritime conventions as regards standards of safety at sea.’ Fitzmaurice, Second Report, para. 125. Cf. Fitzmaurice, Third Report, p. 44, para. 92.
independently, irrespective of their content. This is notably the case for all obligations requiring States to adopt a uniform conduct. This includes, for example, the duty to harmonise national laws.\(^43\)

In direct contrast, interdependent obligations are defined by their ability to establish a performance-related co-dependency between all parties to the obligations. The clearest introduction is provided by Fitzmaurice who distinguishes interdependent obligations from self-existent ones by working through the example of disarmament treaties, which is adopted and extrapolated in the final version of the draft articles in 1966:

The difference between the self-existent type, and the rubric (b) type [interdependent obligations] ... can easily be seen by comparing the cases mentioned in paragraph 125 above with that of a treaty on disarmament. In the latter case, and unless the contrary is expressly provided by the treaty, the obligation of each party to disarm, or not to exceed a certain level of armaments, or not to manufacture or possess certain types of weapons, is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others.\(^44\)

... [There are] special types of treaty, e.g., disarmament treaties, where a breach by one party tends to undermine the whole regime of the treaty as between all the parties. In the case of a material breach of such a treaty ... it could not suspend the performance of its own obligations under the treaty vis-à-vis the defaulting State without at the same time violating its obligations to other parties. Yet, unless it does so, it may be unable to protect itself against the threat resulting from the arming of the defaulting State. In these cases, where a material breach of the treaty by one party radically changes the position of every party with respect to the further performance of its obligations.\(^45\)

Interdependent obligations may therefore be defined as those in which ‘performance by any party is necessarily dependent on an equal or corresponding performance by all other parties’.\(^46\) Given the inextricable

\(^{43}\) Approach taken by Tams, *Enforcing Obligations*, pp. 57–58 (emphasis in original). See also for rejection of a narrow categorization, Simma, ‘From Bilateralism to Community Interest’, 337.

\(^{44}\) Fitzmaurice, Second Report, p. 54, para. 126 (emphasis added). He also provides other examples (ibid., n. 73).


\(^{46}\) Fitzmaurice, Second Report, p. 31 (Draft Art. 19.1(ii)(b)).
link between equal performance of such an obligation by all parties to it, any one state’s non-compliance may put into question the very purpose of the obligation – and where it forms part of a larger regime, the purposive and effective functioning of that system.\footnote{Draft Articles on the Law of Treaties, p. 255. Cf. L.-A. Sicilianos, ‘The Relationship between Reprisals and Denunciation or Suspension of a Treaty’, \textit{European Journal of International Law}, 4 (1993), 348.} The innate nature of interdependent obligations is that they are ‘dominated by a sort of global reciprocity’\footnote{L.-A. Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’, \textit{European Journal of International Law}, 13 (2002), 1135.} and must be confined to those obligations ‘scrupulous performance of which by all states bound by them constitutes a condition \textit{sine qua non} for the functioning of the system they set up’.\footnote{Ibid. 1134.}

The distinction between interdependent and self-existent obligations is important to maintain, for, as will be seen, they may mutually exclude specific obligations from the other category.\footnote{Pauwelyn, ‘The Typology of Multilateral Treaty Obligations’, 923–924.} However, as will also be seen in the next section, interdependent obligations are not only central to the invocation of responsibility by all parties to the obligation, but are by their very nature obligations that attract decentralized responses to breaches (section III. i. b, below). For this reason, and for their overwhelming presence in non-proliferation treaties, they are central to determining the predominant application of certain rules (within the general rules) of standing to take countermeasures in this area of law (section III. ii, below).

\begin{itemize}
\item[b.] ILC Articles on State Responsibility: using Fitzmaurice’s classifications for standing to invoke responsibility
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The ILC Articles on State Responsibility drew heavily from Fitzmaurice’s typology of multilateral obligations.\footnote{See, e.g., Crawford, \textit{ILC Commentaries}, p. 259; Crawford, Third Report, p. 40, para. 91 and n. 175.} However, the purpose of this importation was to allow the ILC to develop a functional methodology for determining which states (or group of states) were to be provided with the right to invoke the responsibility of the defaulting state and, for example, act by the taking of countermeasures.\footnote{Previous to Crawford importing the distinction was the problematic draft Art. 40, which failed to cover breaches of all possible obligations and did not differentiate between different levels of legal interest of states. For a discussion of previous problems, see B. Simma, ‘Bilateralism and Community Interest in the Law of State Responsibility’, in Y. Dinstein and T. Tabory (eds.), \textit{International Law at a Time of Perplexity: Essays in Non-Proliferation Law and Countermeasures} 209.

this the ILC distinguished invoking states between those who had protected legal interests ('injured states' – Article 42) and those whose collective interests (but not legal interests) may have been infringed ('a state other than an injured state' – Article 48).

These two methodological manoeuvres had two consequences. First, the ILC made a logical connection between interdependent obligations, breach of which allowed all parties to the obligation to be considered injured states, thereby identifying a broad range of states capable of taking countermeasures (as among all the other rights of recourse available upon invocation of responsibility). Second, the ILC introduced an element of uncertainty about which collective obligations would enable a state to resort to the full panoply of rights of recourse upon invocation of their breach. The line between interdependent obligations, as a subcategory of collective obligations, and obligations protecting the collective interest was blurred.53 A ready example is that nuclear-weapon-free-zone treaties were considered an example of those containing interdependent obligations, protected by Article 42(b)(ii) ILC Articles, and also as an example of those within the collective interest obligations protected by Article 48(1)(a). The tension between Article 42(b)(ii) and Article 48(1)(a) ILC Articles is not a debate to be had here, but it should make the reader wary when classifying obligations contained in a particular treaty. Resort to first principles, the definition and core characteristics of different types of obligations (see section III. i. a, above), is a necessity.54

Article 42(b)(ii) ILC Articles articulates the relationship between standing to invoke responsibility and interdependent obligations. The latter is a 'special category of obligations, breach of which must be considered as affecting per se every other State to which the obligation is owed'.55 Necessarily any breach of such an obligation radically changes the position of every other party in respect to the further performance of that obligation. Accordingly, every state to which the interdependent obligation is owed has


54 Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue', 1424 (noting the overlap in treatment of nuclear-free-zone treaties in the different ILC Articles on State Responsibility, but not resorting to first principles and definitional characteristics of interdependent obligations moving forward).

55 Crawford, ILC Commentaries, p. 259.
standing to invoke the responsibility of the defaulting state, including resort to countermeasures. Article 42(b)(ii) presumes that a diverse and broad decentralized response to such interdependent obligations arises from the nature of the obligations themselves. This is strongly rooted in a similar treatment under the law of treaties.  

Therefore, the nature of interdependent obligations permits a broad decentralized response, giving standing to all parties to the obligation to take countermeasures in the case of breach of a necessarily collective obligation. This contrasts with those special rules that only permit bilateral countermeasures and/or those obligations that are reciprocally bilateral in nature. The question is now whether non-proliferation treaties contain such interdependent obligations, and, if so, to what extent.

### ii. A typology of non-proliferation obligations and the potential prevalence of interdependent obligations as indicative of a special regime

Fitzmaurice and Crawford have both provided disarmament and nuclear-weapon-free-zone treaties as clear-cut examples of agreements of an interdependent nature. This has led non-proliferation law specialists to state, loosely, and incorrectly, that the character of non-proliferation treaties means that any breach of the obligations contained therein permits recourse to countermeasures through Article 42(b)(ii). This approach incorrectly collapses the fundamental distinction between treaties and obligations, and that of the law of treaties with the law of state responsibility. While it may be true that interdependent obligations ‘usually arise under treaties establishing particular [treaty] regimes’, not all obligations under such regimes are innately of an interdependent nature nor can they be presumed to be. When examining a treaty to identify interdependent obligations, one must seek to determine the exact nature of the obligation in question and evaluate whether a breach of said obligation would affect per se every other party state’s future performance of that same specific obligation.

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56 See Fitzmaurice, Second Report, p. 31; Draft Articles on the Law of Treaties, 255.
59 This interpretation is consistent with the ILC’s wish to keep this category of obligations and invocation under Art. 42(b)(ii) ‘narrow in its scope’. Cf. *ibid*. The same
It is therefore necessary first to construct a rough typology of different types of specific obligations contained in non-proliferation treaties, before then examining whether from first principles they qualify as interdependent obligations. Should a prevalence of interdependent obligations be found to exist, it may be stated that non-proliferation law may be considered as containing special characteristics, inasmuch as it predominantly gives standing to all states parties to such treaties to take countermeasures. In short, it may be determined to be an area of law that permits broad, collective forms of decentralized enforcement.

a. A typology of non-proliferation obligations

The author considers that across the variety of non-proliferation treaties there exist four categories of obligations of relevance. This typology is far from exhaustive and should be considered quite crude, serving only the purpose of the present enquiry.

(i) **Substantive obligations** – these prohibit states, varyingly, to: develop, produce; acquire, retain, possess; use; receive transfer of, transfer to, provide; and assist, encourage or induce another state to some of those obligations previously mentioned. In addition to the obligation to destroy WMDs.\(^{60}\)

(ii) **Substantive peaceful use obligations** – these are positive obligations, normally to undertake: to facilitate in the fullest exchange of equipment, materials and scientific information in the peaceful uses of...
the relevant WMD, and to make available the potential benefits of any peaceful application.

(iii) Verification/safeguard obligations – these procedural obligations non-exhaustively include: reporting possession, location, intended transfers, new plants, access to facilities for inspection and clarification process.

(iv) National implementation obligations – such obligations require states to establish domestic legislation or systems of law in accordance with domestic constitutional processes; ensuring accordance with specific obligations (both procedural and substantive) outlined in a non-proliferation treaty. These will not be explored below.

These categories should not be considered as exhaustive nor mutually exclusive. It should not be surprising that a certain category of obligations have an inbuilt overlap with another: most predominantly between category (i) substantive obligations and category (iii) procedural obligations. Examples include Article III(2) NPT and substantive obligations relating to the destruction of chemical weapons contained in Article V(8) and the Verification Annex to the CWC, whereby rates and sequencing of destructions are clearly procedural obligations. In such cases, one can still delimit the procedural aspects and substantive aspects of particular obligations. Indeed, in evaluating the level or significance of a breach, it is stated that this is a necessity.

61 e.g., Art. IV(2) NPT; Art. X(1) BWC; Art. 8(2) African NFZT. These positive obligations should be distinguished from the general right to use certain WMDs for peaceful purposes (e.g., Art. IV(1) NPT; Art. X(2) BWC; Arts. I and II(1)(a) CWC; Art. 17, Latin America NFZT; Art. 8(1) African NFZT).

62 e.g., Art. V NPT.

63 e.g., Art. III(1) NPT; IAEA, The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Nonproliferation of Nuclear Weapons, Doc. No. INFIRC/153; Model Additional Protocol, Doc. No. INFCIRC/540; e.g., Agreement between Iran and the Agency for the Application of Safeguards in Connect with the Treaty on the Non-Proliferation of Nuclear Weapons, Doc. No. INFCIRC/214, 13 December 1974 (hereinafter Iran Safeguards Agreement); Arts. III(1), IV(4)–(7), V(6) and V(9) CWC; Arts. IV(3)–(4), IV(7), IV(11), IV(30), IV(43) and IV(53) CTBT; Part II(16) (18) (23), Protocol to the CTBT; Arts. 4(b), 8, 9, 10, Annex 2 and Annex 4, South Pacific NFZT; Arts. 12–16, Latin America NFZT; Arts. 5 and 10–13, Southeast Asia NFZT; Arts. 6(a), 6(d), 9 and 13, African NFZT.

64 e.g., Art. III(1) read alongside Arts. 7(a) and 32 Iran Safeguards Agreement; Art. VII(1) CWC; Art. IV BWC; Art. III(1) CTBT. These can arguably qualify as absolute, although this is open to debate.
b. Character of non-proliferation obligations: determining the prevalence of interdependent obligations

Given the stated typology of non-proliferation obligations, it remains to be determined which of categories (i) to (iv) can be qualified, from first principles, as interdependent obligations. Namely, which categories of non-proliferation obligations, upon breach, will enable all parties to the relevant multilateral treaty recourse to take countermeasures?

This question will, of course, require the above-stated definitional foundations of interdependent obligations (section III. i. a) and avoid the pitfalls of other commentators. However, as also previously noted, the core characteristic of interdependent obligations differs when one considers if from a treaty-law-based perspective, in contrast to the law of state responsibility. From a treaty law perspective, the core characteristic is that a breach of a specific treaty obligation of an interdependent nature renders future performance of the treaty by all other parties to it impossible, indeed breach of a specific obligation threatens the entire structure of the treaty. However, from a state responsibility law and Article 42(b) (ii) perspective, the determining characteristic of an interdependent obligation is that a breach of specific obligation would per se affect and undermine every other state’s future performance of solely that same specific obligation. The central problem is that Professor Crawford has directly imported the core characteristic of interdependent obligations under treaty law into the law of state responsibility. Gaja notes that this should not ‘create inconsistencies’, but as will be seen in this chapter’s attempt to characterize the four categories of non-proliferation obligations, it creates confusion and logical anomalies.

Category (i) – substantive obligations Substantive non-proliferation obligations should be clear-cut examples of those classifiable as interdependent. Indeed, while exploring disarmament and nuclear-weapon-free-zone treaties, Fitzmaurice envisaged certain substantive obligations, contained therein, as exemplary of his interdependent category. These

65 Crawford, ILC Commentaries, pp. 41 and 260. For a similar view within the context of state responsibility, cf. Sicilianos, ‘Classification of Obligations’, 1134. In the context of treaty law for a similar conclusion, see Sicilianos, ‘Reprisals and Suspension’, 348. Also, see text accompanying nn. 47 and 48, above.

66 Gaja, ‘The Concept of an Injured State’, p. 946 (‘Still the partial reproduction of the text from the Vienna Convention in the ARSIWA seems the result of expediency, rather than logical coherence. The solution arrived at allows the use of an accepted formulation, to express what is in fact a relatively new concept’); Crawford, Third Report, para. 91.
included the obligation to disarm and the prohibitions on manufacturing and possession. His explanation of these particular obligations indicated that he believed that a breach of any one of them would result in necessary non-performance of the same obligation by other states parties to the obligation. This cannot be said of all the substantive obligations contained in category (i) above: breach of a particular obligation would not necessarily undermine the future performance of that particular obligation by other parties.

A clear example is that of the obligations not to transfer WMDs, nor to assist, encourage, or induce other states in their acquiring or manufacturing of WMDs. Should state A breach its obligation not to transfer WMDs to state B, states C to Z, parties to the treaty, would not in turn feel that they are unable to perform the particular obligation prohibiting the transfer of WMDs to other states. Rather, states C to Z cannot remain arsenal free, and would seek to non-perform different obligations, seeking to possess or expand possession of WMDs through acquisition or manufacturing. Given the apparent asymmetry between those obligations being breached, and those obligations in danger of future non-performance, if one were to adopt a narrow approach then only certain substantive obligations may be qualified as interdependent (e.g., prohibitions to develop, produce, manufacture, acquire, retain, possess, use, destroy and receive). Again, it is the tension of the characteristics given to interdependent obligations under treaty law and the law of state responsibility that rears its head. The stated example, adopting a narrow approach, is reflective of a strict application of the law of state responsibility methodology (as contained in Article 42(b)(ii) and indicated by Gaja). A broad approach, based on the law of treaties, and incorporated into the law of state responsibility in a passing statement by Crawford, would reach a different conclusion to the example cited above. While the narrow approach may exclude the prohibition on transfer as qualifying as an interdependent obligation, the broad approach would argue that

67 Fitzmaurice, Second Report, p. 54, para. 126 ('the obligation of each party to disarm, or not to exceed a certain level of armaments, or not to manufacture or possess certain types of weapons, is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others') (emphasis added).
68 e.g., Art. I NPT; Art. III BWC; Art. I(1)(a) CW.
69 e.g., Art. I NPT; Art. III BWC; Art. I(1)(d) CW; Art. I(2) CTBT; Art. I(2) PTBT; Art. 3(c) South Pacific NFZT; Art. 1(2) Latin America NFZT; Art. 3(4)(b) Southeast Asia NFZT; Arts. 3(c), 11 and Art. 2 Protocol I and Arts. 1 and 2 Protocol 2 African NFZT.
70 See text accompanying n. 65, above.
irrespective of whether a breach of this obligation is likely to induce non-performance of the same obligation it would threaten the entire structure of the treaty and, therefore, undoubtedly qualify as interdependent in nature (see, e.g., Article XXII (3) CWC).  

So, that which appears clear is not.

**Category (ii) – peaceful use obligations** In direct contrast, positive peaceful use obligations, as defined in category a.(ii) above, certainly cannot be qualified as interdependent. This is merely a matter of logic. Should WMD possessive states not fulfil their obligation to help non-possessive states in developing peaceful uses and technology for the relevant WMD, then the latter are hardly capable of reciprocal non-compliance of the same obligation (qualifying, perhaps, as synallagmatic obligations), let alone whether the positive peaceful use obligations is of such a nature that it will undoubtedly induce reciprocal non-performance. Furthermore, it is often argued that such peaceful use obligations were central to securing the conclusion of the main multilateral treaties. This, however, is irrelevant for evaluating whether or not the obligation is interdependent, and, even under the broad approach (treaty law based), breach of these provisions would not threaten the entire structure of the treaty.

**Category (iii) – verification/safeguard obligations** Given that most cases of non-compliance in the operation of non-proliferation treaties are those relating to procedural verification and safeguard obligations, identifying whether they are of an interdependent nature takes on a specific practical importance. It should be abundantly clear that if one adopts the narrow approach, then one can certainly conclude that safeguard and verification obligations are not interdependent in nature, since non-compliance by one state will not undermine future performance by all other states parties to that obligation. There is also the

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71 Art. XII(3) CWC may not be strictly qualified as a rule governing countermeasures, since it governs lawful measures as recommended by an institutional body. The present author would disagree with such a reading. See also Art. V(3) CTBT and section IV. i. b, below.

72 e.g., under Art. 5 NPT.


understanding that some procedural obligations can be purely bilateral in nature (see text accompanying n. 155, below). The question remains whether, under the broad approach, breach of such obligations would necessarily result in undermining the entire structure of the treaty? Other authors have answered yes. In the present author’s opinion, such a conclusion and its supporting arguments are at best vaguely argued and at worst arbitrary.

The stated supporters of the proposition that safeguards and verification obligations are interdependent have developed their argument in three steps: (a) the safeguards system was, in some cases, part of the basic bargain upon which the treaty was concluded – it was therefore intentionally central to the treaty’s structure; (b) because such obligations are extensively complemented by institutional frameworks, in most cases, they are part of a collective commitment which envisages verification and determination of non-compliance at its core; and (c) breach of safeguard and verification obligations are a gateway to a breach of substantive obligations.

With due respect to the proponents of these arguments, only argument (c) has the potential for argumentative merit, and, even then, only when developed properly. Argument (a), as similarly suggested above, is irrelevant to the determination of whether certain obligations are interdependent in nature. Argument (b) seems an entirely arbitrary criterion upon which to evaluate a set of obligations’ interdependent nature – rather than concentrating on the content and nature of the obligations per se, this approach looks at the supportive framework and context of such obligations. Ultimately, neither (a) nor (b) answers the central question of whether a breach of safeguard and verification

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79 Dekker, The Law of Arms Control, p. 339: ‘Clearly, violations of institutional law may deprive the States Parties of the possibility of establishing whether non-compliance with the substantive law of the arms control treaty has occurred. For that reason, this type of violation may lead to the frustration of the fulfillment of the object and purpose of arms control treaties, even if account is taken of the fact that supervision is not considered to be an end in itself.’
80 See n. 74, above.
obligations would undermine the entire treaty structure. Argument (c) comes close; by linking verification obligations to substantive ones it should be understood that there may be specific verification obligations whose breach, if of sufficient gravity, may endanger the entire treaty regime by undermining knowledge of substantive breaches. This brings up two sub-issues: the type of verification obligation involved and the type of breach involved. First, one must differentiate those procedural verification obligations that have a distinct and direct connection to substantive obligations (e.g., the obligation to disclose and report and the existence of a facility utilizing WMDs for peaceful purposes\(^{81}\)) and those that do not (e.g., reporting within a specific timeframe\(^{82}\)). Second, one must consider that for the first type of obligation just submitted the significance of the breach involved is critical. Should it be a case of technical non-compliance which is manifest,\(^{83}\) of a verification obligation that is strongly linked to substantive ones, then this is hardly sufficient to enable standing for all states parties to that obligation to take countermeasures. The significance of the breach is a point made by both Crawford and Gaja:

In practice interdependent obligations covered by paragraph (b) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other states involved, and it is desirable that this subparagraph be narrow in its scope.\(^{84}\)

Where the breach is not significant, the states affected will still have legal entitlements, but only so far as provided by article 48 ARSIWA.\(^{85}\)

From the preceding analysis it should be clear that the only case that exists for verification obligations being interdependent in nature is under the broad, treaty law based, approach. Even then only a specific subset of verification obligations, that is, those with a distinct link to substantive obligations, in cases of a significant breach, enable all states party to the obligation to take countermeasures.

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\(^{81}\) e.g., Art. 8(b)(ii) Iran Safeguards Agreement.  
\(^{82}\) e.g., Art. V(9)(b) CWC.  
\(^{84}\) Crawford, ILC Commentaries, p. 260 (emphasis added).  
\(^{85}\) Gaja, ‘The Concept of an Injured State’, p. 945.
iii. Conclusion on standing to take countermeasures

The preceding section aimed to examine the extent of any specialness of the non-proliferation legal regime in relation to standing to take countermeasures. The following conclusions can be drawn from the analysis of both general international law and non-proliferation law. First, only interdependent obligations enable a decentralized response upon breach, allowing all states parties to the obligation in question to take countermeasures upon invocation of responsibility of the defaulting state. Second, identification of obligations that qualify as interdependent is problematic owing to the practical implementation of the concept in treaty law and state responsibility law. This has led the present author to develop a narrow (state responsibility based) and broad (treaty law based) approach to identifying which non-proliferation obligations qualify. Third, the majority of substantive non-proliferation obligations qualify as interdependent under the narrow approach, while the rest would only qualify under the broad approach. Fourth, only a small minority of procedural verification obligations may qualify as interdependent based on a broad approach, and decentralized countermeasures may only then be taken upon a significant breach of such procedural non-proliferation obligations.

Given the above four conclusions, it can be stated that there is a predominance of interdependent obligations in non-proliferation treaties, at least comparative to most other treaties. Accordingly, within the limits identified in the above analysis, non-proliferation law is more inclined to enable a decentralized response, allowing all states parties to non-proliferation treaties to take countermeasures for the breach of certain obligations. Due regard must be had to this special characteristic. However, its significance in the context of identifying a special regime is limited, if not entirely doubtful.

IV. Diverse non-proliferation rules that affect when resort to countermeasures under general international law is made and what their content may be

This section will consider two further issues. First, when states parties to non-proliferation treaties may take recourse to countermeasures under general international law (IV. i). This will necessarily require an examination of particular rules contained across non-proliferation treaties. Second, what countermeasures can be taken should general
international law be considered applicable (IV. ii). The premise of this section, and both sub-issues, is that the general international rules governing countermeasures are 'residual and may be excluded or modified'; a point identified in the *Case Concerning the Air Services Agreement.* Yet, analysis and common sense dictate that the relationship between specific non-proliferation treaty provisions or mechanisms and general international law is one of gradation: different non-proliferation rules have varying degrees of specialness. Each special rule may modify the application of the general law of countermeasures to a different degree. Yet, it is in determining the degree of modification, and therefore specialness of non-proliferation law, that one may fall fallible to the presumptions highlighted in section II. ii, below – for this is an essentially indeterminate exercise in interpretation. Some authors have attempted to phrase the same enquiry in terms of absolutes in order to remove the role of previously highlighted presumptions. The present author does not consider this possible, especially given the categories of non-proliferation rules being examined in this section – each set with their own varying degrees of specialness.

Category 1: *Non-proliferation rules which are silent as to their compatibility with the application of the general law of countermeasures.*

Category 2: *Non-proliferation rules which expressly dictate their application alongside the general law of countermeasures.*

Category 3: *Non-proliferation rules which not only implicitly dictate, but also specifically exclude, the application of the general law of countermeasures.*

Each will be examined in turn in subsection i below. At this junction is should be noted that categories 1–3 are not mutually exclusive, in that a specific treaty may contain different provisions which are each identifiable under categories 1 and 2: the CWC and CTBT being relevant examples.

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86 Crawford, *ILC Commentaries,* p. 283. See text accompanying n. 1, above.
87 See text accompanying n. 1, above.
88 This is consistent with, but slightly more specific than, the approach the ILC adopted in Art. 55 of the ILC Articles on State Responsibility. Cf. Crawford, *ILC Commentaries,* p. 308. See, as more relevant, drawing on the normative strength of specific rules, ILC Report on Fragmentation, 80, para. 151.
89 Dekker, *The Law of Arms Control,* p. 348. Similarly, see n. 25, above.
i. When countermeasures may be taken: determination by categories of non-proliferation rules with varying degrees of specialness

a. Category 1: non-proliferation rules which are silent as to their compatibility with the application of the general law of countermeasures

The clear majority of non-proliferation treaties do not contain provisions that govern a state’s ability to resort to countermeasures. Not only are category 1 rules the clear majority across non-proliferation law, but they are typified by the presence of an extensive institutional framework that governs both compliance and enforcement of relevant non-proliferation obligations. The central question is whether the existence of such treaty institutional frameworks may preclude or condition the resort to countermeasures under general international law. The arbitral tribunal’s dictum in the Case Concerning the Air Services Agreement made precisely this point, and it bears repeating as well as closer scrutiny:

Under the rules of present-day international law, and unless the contrary results from special obligations arising from particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State’s view, results in the violation of an international obligation by another State, the first State is entitled . . . to affirm its rights through ‘countermeasures’.  

Commentators have used this dictum to condition the resort to countermeasures under general international law (whether through imposing procedural or substantive prerequisites), owing to the mere presence of extensive institutional frameworks. Such an approach has a certain appeal from a policy perspective: ad hoc machinery may be more

90 The term *lex specialis* is deliberately avoided. The ILC states that ‘[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernable intention that one provision is to exclude the other.’ Cf. Crawford, *ILC Commentaries*, p. 307. Here only categories 1 and 3 could be classifiable under this definition of the *lex specialis* principle, the former due to arguable intention and the latter through explicit exclusion. Category 2 may fall within this, but only to the extent that any inconsistency between the rules can be shown.

91 *Case Concerning the Air Services Agreement of 27 March 1946* (emphasis added).

organized, targeted and effective in monitoring violations of non-proliferation treaty obligations and organizing responses thereto. However, it is contended that such a broad-brush approach is a misguided reading of the *Air Services Arbitration* dictum: a close reading reveals three points of note.

First, derogations from the general international law right to resort to countermeasures may be imposed by special obligations that may or may not derive from treaty-specific institutional frameworks. It is notable that the dictum refers to obligations and not rights: namely the rule in question must have a mandatory functionality. States must therefore be required to utilize an *institutionally mandated procedure*, upon instances of non-compliance, within a treaty. Second, to fall within the carve-out of the dictum, such special obligations have to be *contrary* to the rules governing countermeasures under general international law. This requirement indicates that there must be a degree of incompatibility between the general and special obligations. What this degree of incompatibility is indiscernible from the dictum. Third, the mere existence of a treaty-specific institutional framework for compliance and enforcement is not enough to ensure derogation from, modification of, or pre-conditioning of, the general international law of countermeasures – unless of course recourse to it is obligatory. To this end, the degree of enforcement capability within the institutional framework is irrelevant. Therefore, while the dictum does show a significant tendency towards upholding the

*Law,* 3 (1992), 136 (arguing that treaty mechanisms are provided a primary role, while general law becomes operational on the failure of the latter); S. Sur (ed.), *Verification of Current Disarmament and Arms Limitation Agreements: Ways, Means and Practices* (Aldershot: United Nations Institute for Disarmament Research, 1991), p. 28 (arguing for conditioning of resort to general international law based on treaty mechanisms); Arangio-Ruiz, Fourth Report, p. 40, para. 112.

93 See, generally, Simma, ‘From Bilateralism to Community Interest’, 104.

94 This is somewhat akin to the inconsistency requirement of the *lex specialis* principle. See n. 90, above.

95 It is unclear whether an obligation has specifically to exclude recourse to other rights under general international law (extreme incompatibility as used by the tribunal in *Eureka v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 (UNCITRAL), paras. 253–254, 273–274), or whether any inconsistency between two rules is enough. The former seems to be the position adopted by Dekker, *The Law of Arms Control*, p. 347.

96 This is close to the conclusion reached by Special Rapporteur Arangio-Ruiz. See Arangio-Ruiz, Fourth Report, p. 40, para. 114).

97 The tribunal considered the degree of enforcement of an institutional framework within the context of whether the initiation of judicial proceedings precludes resort to countermeasures under general international law. *Case Concerning the Air Services Agreement of 27 March 1946*, 445, para. 94).
relevance and functioning of a treaty-specific regime, this cannot be an overarching consideration when one considers whether the same treaty posits procedural or substantive prerequisites to the taking of countermeasures. Rather, the first two points established above are the relevant determining criteria for whether a treaty regime may establish derogations from, or pre-requisites to, the taking of countermeasures under general international law.

Relevance of extensive treaty-specific institutional frameworks  Given the lessons learnt from the Air Services Arbitration, let us first consider, at a general level, whether the extensive treaty institutional frameworks, as a whole, may pre-condition resort to countermeasures under general international law. The majority of non-proliferation treaties are characterized by reference to extensive ad hoc institutional mechanisms. The nature of such references may differ considerably. Some treaties operate upon an internally established or internally cohesive institutional framework, such as the CWC, CTBT and NPT. Such treaties may also refer to the institutional framework of the United Nations (UN) as a supervisory mechanism. Others only have a reference to UN organs, while others still have taken reference to external systems such as the IAEA. The most relevant treaties for the present subsection, the CWC, CTBT and NPT, all establish two tiers of institutional frameworks: the primary tier for monitoring and compliance falling to internally cohesive bodies, and, where the first tier is unable to, the secondary tier of UN organs for dealing with compliance issues. However, as a general rule, these non-proliferation treaties, and others, do not make it obligatory to remedy a breach of the treaty by resort to the established treaty-specific mechanism. More importantly, not one non-proliferation treaty mandates recourse to such ad hoc institutions to the exclusion of all other remedies. This non-obligatory nature derives from (a) the institutional

98 E.g., Art. III(1) NPT; Art. XII(7)(c) Statute of the International Atomic Energy Agency, 276 UNTS 3 (hereinafter IAEA Statute); Art. VIII(c)(36) and Art. XII(2) and (3) CWC.
99 Arts. VI and VII BWC; Art. V(3) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151 (hereinafter ENMOD Convention).
100 Art. 14(3) Southeast Asia NFZT. It should be noted that the IAEA was technically established outside the framework of the NPT and has broader functions, but has so effectively been made co-extensive with the NPT regime that it is for the purposes of this chapter treated as an ‘internal’ institutionalized framework.
machinery, as a general rule,\textsuperscript{101} not being obligated to undertake measures in cases of non-compliance (as opposed to having discretion to choose which measures are undertaken) and (b) states not being obligated to take resort to such ad hoc institutions in the face of non-compliance\textsuperscript{102} (as opposed to being required to follow the ‘requests’ or ‘recommendations’\textsuperscript{103} of the institutional treaty bodies, upon determination of breach and determination of response measures by body). Therefore, at a very general level, given that there is no identifiable obligation upon states to initiate treaty-specific institutional mechanisms, the latter cannot constitute (as a whole) a derogation from or precondition to the institution of countermeasures under general international law.\textsuperscript{104} The lack of any specific obligation mandating recourse to treaty institutional frameworks upon non-compliance renders such frameworks foul of the first criterion of the test laid down in the \textit{Air Services Arbitration}, manifesting its carve-out inapplicable. States are permitted to take recourse to unilateral countermeasures under general international law unimpeded.

The second point of consideration then becomes whether treaties containing such extensive ad hoc institutional frameworks, and even

\begin{footnotesize}
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\item There is a notable exception (see text on following page); see Art. II(B)(26)(g) CTBT. See also Art. V(1) CTBT. The other exception is the relationship between the primary and secondary institutional machinery in the NPT-IAEA. The IAEA is obligated to report non-compliance to the UN Security Council (‘shall’) under Art. XII(7)(c) IAEA Statute. This does not prejudge the question of what the IAEA asks of the UN Security Council.
\item See, for UN Organs, Art. VI(a) BWC (states ‘may’ lodge a complaint to the UN Security Council in cases of suspected non-compliance).
\item The questionable obligatory character of institutional body ‘requests’ or ‘recommendations’ is important if a state wishes to undertake countermeasures under general international law while a treaty-specific institutional body is seized of the matter and has made recommendations or requests. The position of the present author of provisions such as: Art. VIII(c)(36) CWC (Executive Council may ‘request’ state action); Art. XII(2) and (3) CWC (Conference may ‘recommend’ collective measures); Art. II(c)(41) CTBT (Executive Council may ‘request’ state action); and Art. V(3) CTBT (Conference may ‘recommend’ collective measures) are that they are not necessarily obligatory, even if they carry a sanction.
\item It should be noted that while this determination relates to the state’s obligation to initiate institutional procedures, once such procedures have already begun there remains no bar to resorting to countermeasures. Indeed, should treaty-specific bodies seek to undertake measures against state members, in accordance with relevant treaty provisions, such measures are per se lawful and governed by the international law of responsibility for international organizations. See, in particular, ILC, \textit{Draft Articles on the Responsibility of International Organization, with Commentaries, 47–48} (Art. 22, Commentaries, paras. 3 and 5), \textit{ILC Yearbook} (2011), vol. 2 (part 2).
\end{enumerate}
\end{footnotesize}
those that do not, contain specific provisions that may constitute procedural preconditions. There are two types of provisions that are relevant: (a) provisions relating to a decentralized process for a determination of a breach of a non-proliferation treaty, and (b) provisions concerning consultation between states parties. Both will be considered in turn.

**Determination of breach provisions** A natural part of non-proliferation treaties that contain an extensive institutional framework are processes for assessing compliance and mechanisms for the determination of treaty breaches. As is well known, under general international law, countermeasures may only be taken against a state that is responsible for a breach of an international obligation. The central question that arises is as follows: if a state chooses to take countermeasures, may it undertake a unilateral assessment of the existence of breach (which is of course subject to objective determination)\(^\text{105}\) as is its right under general international law, or must the state first take recourse to treaty mechanisms which will definitively determine the existence of a breach?

Non-proliferation treaties contain provisions that seek to clarify the existence of a breach through multilateral and bilateral procedures. The former include those where a treaty body is empowered to collect information and determine the existence of a breach, while the latter are primarily those such as challenge inspections – which while at the first instance may be a bilateral measure, are implemented through a collective treaty procedure. Clear examples include Articles IX (2), (3) and (8) CWC and Articles IV(c) and (d) CTBT – both of which exist among a sophisticated internally coherent treaty-specific institutional framework. However, similar procedures exist outside treaties with extensive institutional machinery, and in such cases constitute the only real teeth that such treaties may possess.\(^\text{106}\)

However, again the central problem that arises is that such determination of breach procedures are not always mandatory, and, as such, do not impose an obligation upon states to take recourse to them.\(^\text{107}\) Article IX(2) CWC states that 'States Parties should, whenever possible, first make every effort to clarify and resolve, through the exchange of


\(^{106}\) See the elaborate procedure contained in Annex 4, South Pacific NFZT; Annex IV, African NFZT (determination of breach, complaints and challenge inspections procedure); Art. 13 and Annex, Southeast Asia NFZT.

information and consultations, any matter which may cause doubt about compliance with this Convention.’ Article IV(c)(29) CTBT contains similar non-binding language. Challenge site inspections are also framed in terms of rights, and therefore optionally invokable by a state seeking to take countermeasures. In contrast, the South Pacific and African NFZTs do contain limited mandatory requirements, extending only to bilateral measures of clarifying the breach with the alleged violating state. All non-proliferation treaties are devoid of an obligation requiring a state to determine the existence of a breach through collective mechanisms such as treaty-specific institutions. Even in cases such as the IAEA where non-compliance procedures are so utterly extensive, one will still find it difficult to pinpoint a state party obligation to utilize the organization’s extensive non-compliance determination procedures. Indeed, such an obligation is entirely absent despite considerable state involvement in the determination of breach procedures.

Therefore, given their non-obligatory nature, determination of breach procedures contained in non-proliferation treaties cannot constitute procedural prerequisites for a state seeking to take countermeasures under general international law.

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108 See, e.g., Art. IX(8) CWC: ‘Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party’.

109 Art. 1, Annex 4, South Pacific NFZT: ‘A Party which considers that there are grounds for a complaint that another Party is in breach of its obligations under this Treaty shall, before bringing such a complaint to the Director, bring the subject matter of the complaint to the attention of the Party complained of and shall allow the latter reasonable opportunity to provide it with an explanation and to resolve the matter’ (emphasis added); Art. 1, Annex IV, African NFZT: ‘A Party which considers that there are grounds for a complaint that another Party or a Party to Protocol II is in breach of its obligations under this Treaty shall bring the subject matter of the complaint to the attention of the Party complained of and shall allow the latter thirty days to provide it with an explanation and to resolve the matter’ (emphasis added).

110 See, e.g., Art. 2, Annex 4, South Pacific NFZT; Art. 2, Annex IV, African NFZT; Art. IX(3) CWC; Art. 13 and Annex, Southeast Asia NFZT; Art. IV(c)(31) CTBT.


112 Contrary to the assertions of Dekker, The Law of Arms Control, p. 344 (arguing that a state’s freedom to judge the existence of a breach should be limited by treaty mechanisms) and Calamita, ‘Sanctions, Countermeasures, and the Iranian Nuclear Issue’, 1430.
Consultation provisions  Certain non-proliferation treaties, such as the BWC and ENMOD Convention, contain provisions mandating that states parties are obligated to undertake consultations if problems arise regarding application of the relevant treaty.\textsuperscript{113} However, despite possessing an obligatory character and being arguably inconsistent with certain aspects of the general law countermeasures, such specific consultation provisions have been discarded as hampering the resort to countermeasures under the terms of general international law.\textsuperscript{114} The tribunal in the Air Services Arbitration made this determination when it considered both a treaty-specific consultation obligation and the general international law obligation to negotiate.\textsuperscript{115} Despite this, and equally applicable to the proceeding sections on the relevance of extensive treaty-specific institutional frameworks and determination of breach procedures, the relevance of such provisions may operate in the examining the proportionality of countermeasures taken. Therefore, while none qualifies as a strict procedural prerequisite to the taking of countermeasures under general international law, despite convincing policy arguments to the contrary, all such aspects of non-proliferation treaties may be instrumental in establishing extra criteria for adjudicating the proportionality of countermeasures taken.\textsuperscript{116}

Indeed, given the above analysis, it is hard to see anything but a secondary role in relation to the taking of countermeasures for non-proliferation treaties that contain no specific rules on the latter, but contain extensive institutional mechanisms for compliance and verification.\textsuperscript{117}

\textsuperscript{113} See, e.g., Art. V BWC; Art. V(1) ENMOD Convention: ‘The States Parties to this Convention undertake to consult one another and to cooperate in solving any problems which may arise in relation to the objectives of, or in the application of the provisions of, the Convention.’

\textsuperscript{114} See Art. 52(1)(b) ILC Articles on State Responsibility, which require the offer to negotiate, but do not mandate actual negotiations or determine how they must be carried out (except of course under normal good faith requirements). Importantly, Art. 52(1)(b) does not preclude the taking of certain countermeasures during negotiations (see Art. 52(2)).

\textsuperscript{115} Case Concerning the Air Services Agreement of 27 March 1946, paras. 87–93.


\textsuperscript{117} Contra Koskenniemi, ‘Breach of Treaty or Non-Compliance?’, 136.
b. Category 2: non-proliferation rules which expressly dictate their application alongside the general law of countermeasures

In contrast with the majority of non-proliferation treaty regimes examined in the preceding subsection, there is a small minority of rules that expressly govern the taking of certain countermeasures. The identified rules are:

**Article XII(3) CWC**
In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under the Convention, in particular by Article I, the Conference may recommend collective measures to State Parties in conformity with international law.

**Article V(3) CTBT**
In cases where damage to the object and purpose of this Treaty may result from non-compliance with the basic obligations of this Treaty, the Conference may recommend to State Parties collective measures which are in conformity with international law.

These provisions are relatively unique in that they not only affirm that some non-proliferation obligations contained in each are interdependent, but also institutionalize resort to third-party countermeasures. Five points can be taken from these provisions. First, they only relate to a breach of obligations fundamental to the treaty (i.e., ‘basic obligations’ for the CTBT and Article 1 obligations for the CWC). Arguably they only relate to those obligations contained in the treaty that can be classified as interdependent. Second, such a breach of fundamental treaty obligations must damage (or for the CWC, more restrictively, ‘damage seriously’) the object and purpose of the relevant treaty. This point is largely peripheral and superfluous, given that any breach of an interdependent or fundamental obligation will necessarily damage the object and purpose of the treaty. Third, the provisions dictate that a treaty-specific institution ‘may recommend’ resort to third-party countermeasures. This is a significant step towards institutionalizing and bringing into the multilateral fold a unilateral resort. This encouraging aspect of

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118 See n. 71, above and accompanying text. However, these feature may be somewhat subject to circular reasoning: namely the small number of obligations which may be classed as interdependent, only in part to the fact they are identified alongside the resort to collective countermeasures.

119 See section III. ii .b, below for more on interdependent obligations in non-proliferation treaties.
bringing collective enforcement within the framework of international institutions\textsuperscript{120} must be tempered by two observations: not only does the provision only enable a non-binding ‘recommendation’ by a treaty institution, but it does not prohibit states from taking actions independent of any treaty body determination of the issue. Fourth, the provisions relate to ‘collective measures’ – a misguided term that requires clarification. Such provisions relate to countermeasures that may be taken by third states, that is, states other than those directly injured, which by their definition are unilateral, even if taken for collective ends (i.e., upholding the central tenets of a non-proliferation treaty). Fifth, and finally, they require that any countermeasures taken pursuant to a treaty institution’s recommendation be taken ‘in conformity with international law’. Given that the international law governing third-party countermeasures is currently in a state of limbo,\textsuperscript{121} this is a rather idiosyncratic criterion. A constructive interpretation would argue that the international law governing the legality of third-party countermeasures is in a state of limbo, but the substantive conditional requirements of such countermeasures (presuming valid \textit{prima facie} legality) are determined in accordance with current customary international law.

All in all, taking into account the above points, both provisions are extremely narrow in their applicability to the law governing countermeasures. They could arguably be determinative of the procedure to be undertaken for third-party countermeasures: imposing the procedural pre-requisite of a treaty institution’s ‘recommendation’ before resort to such measures is permitted. However, these provisions do not govern countermeasures taken in response to breaches of non-proliferation obligations that are not classifiable as interdependent (the vast majority of them). Nor do they govern those countermeasures taken by a directly injured state (i.e., within the scope of Article 42(a) and (b)(i) ILC Articles). Yet, in any case, they do constitute special rules for the purposes of the present inquiry – indicative of those which expressly govern their relationship with general international law.


\textsuperscript{121} Art. 54 ILC Articles on State Responsibility (savings clause); critique of the traditional position offered by Tams, \textit{Enforcing Obligations}. 
c. Category 3: non-proliferation rules which not only implicitly dictate, but also specifically exclude, the application of the general law of countermeasures

While categories 1 and 2 have been concerned with non-proliferation rules contained in non-proliferation treaties that impact on the taking of countermeasures, no category 3 rules are contained in treaties obviously classifiable as belonging to the regime of non-proliferation law.\(^{122}\) Indeed, the two rules that will be examined are part of the World Trade Organization (WTO) and UN Security Council legal regimes. They are marked by a strong degree of specialness, in comparison to the previous rules considered, for they arguably expressly or implicitly exclude all resort to specific countermeasures taken under general international law. The following analysis will first consider the taking of countermeasures under the WTO Dispute Settlement Understanding (DSU), and then any prohibitions that arise through specific UN Security Council Chapter VII resolutions.

**WTO rules on non-proliferation law and countermeasures**  The primary role of WTO rules in regard to non-proliferation law is its effect on national export mechanisms for weapons technologies. The export of WMDs is a particularly troubling issue given the dual-use problem that occurs with many components of such weapons.\(^{123}\) As is well known, the WTO system, typified by Articles I and XI of the GATT, offers a wide system of protection to imports and exports prohibiting a large array of restraints and extending most-favoured-nation (MFN) treatment. These prohibitions on restraining the import and export of weapons-related technologies are problematic for dual-use items: namely those items that possess peaceful civilian uses alongside their weapons-related functions. Given pressing non-proliferation initiatives and concerns at the time of the drafting of the GATT, it does contain a security exception to the stated prohibition on export and import restraints – therefore, in limited circumstances, enabling states legally to prevent the export or import of

\(^{122}\) Please take recourse to the clarifications provided in section IV.ii, below.

certain weapons-related technologies. Article XXI of the GATT, and in particular subsections (b)(i) and (ii) lay out the pertinent security exceptions, enabling a state to take measures prohibiting the import or export of nuclear, chemical and biological weapons and relevant material from which they are derived.\textsuperscript{124} However, given (a) that a number of countries have adopted national export regulatory mechanisms to determine which dual-use items they can import and export\textsuperscript{125} and (b) the ambiguity in scope of the untested security exception: challenges to the legality of national export measures may be made within the framework of the WTO dispute settlement procedures.\textsuperscript{126} It is within these parameters that the potential for a breach of the GATT and corresponding state resort to countermeasures must be considered. It is with this that we come to look at the nature of rules governing countermeasures in the WTO system.\textsuperscript{127}

The Dispute Settlement Understanding does not directly refer to countermeasures, but rather permits states to suspend the application of concessions as a last resort under Articles 3.7 and 22, which in relevant parts state the following:

\textbf{Article 3.7 DSU}

The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the

\textsuperscript{124}Art. XXI GATT states, in part, ‘Nothing in this Agreement shall be construed: (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to fissionable materials or materials from which they are derived; (ii) relating to the traffic in arms, ammunitions and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or . . .’.

\textsuperscript{125}Most notable is the Export Administration Act (1979) in the USA and the system developed known as the Enhanced Proliferation Control Initiative. For a discussion of such national measures and their breadth, see Joyner, \textit{International Law and Proliferation of Weapons of Mass Destruction}, chap. 3; D. Joyner, ‘The Enhanced Proliferation Control Initiative: National Security Necessity or Unconstitutionally Vague?’, \textit{Georgia Journal of International and Comparative Law}, 32 (2004), 107. For other jurisdictions, see Beck et al., \textit{To Supply or to Deny}.

\textsuperscript{126}The potential for challenges to national measures (prior to the WTO DSU) is the infamous USA–Czechoslovakia Dispute of 1949, where the USA refused to export certain dual-use drills to Czechoslovakia – an action challenged by the latter as inconsistent under the GATT rules. There was no resulting case. For more, see Joyner, \textit{International Law and Proliferation of Weapons of Mass Destruction}, pp. 132–136.

application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

Articles. 22.1–2 DSU

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

Owing to the presence of these provisions, as well as the exclusive dispute settlement clause contained in Article 23 of the DSU, the ILC has taken the approach that the WTO regime is an express derogation from, and excludes, the general international law of countermeasures. Others have argued that there is no such exclusion or derogation and Article 23 cannot be read to prohibit recourse to additional remedies under general international law. Indeed, it would be pertinent to point out that it is hard to decipher whether Article 22 DSU should be considered as lex specialis on

128 Art. 23 DSU states, in relevant parts, ‘When Members seek the redress of a violation . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding.’


rules governing reparations or countermeasures; given that both are aimed at ensuring compliance and cessation of the breach, this latter rationale cannot be used to support a determination on where the lex specialis attaches in terms of the rules on state responsibility. Yet, even if one was to join the dominant position that the WTO system comprises a strong lex specialis on the law countermeasures, several issues remain to be resolved.

First, it may be reasoned that ‘WTO members [are not permitted] from unilaterally resolving their disputes in respect of WTO rights and obligations’. While it is clear that state A’s WTO rights may be suspended as a countermeasure under Article 22 DSU, in response to a breach of WTO obligations, can they also be suspended for a breach of obligations contained in other treaties? Furthermore, even if state A breached WTO obligations, does not the US-Section 301 panel decision leave open the question of whether a state B can take the countermeasure of suspending non-WTO obligations (e.g., obligations contained in other treaties between the parties)? Second, it is relatively clear from Articles 3.7 and 22 DSU that countermeasures are only permitted (a) when a recommendation by the DSB has been made and (b) upon implementation, in the case of non-compliance, and after certain procedural steps, when the countermeasure has been authorized by the DSB. These are procedural prerequisites that derogate definitively from the general international law of countermeasures, constituting condition precedents for non-proliferation law in the context of the WTO regime. Yet, this potentially lengthy process does not speak to the need for urgent countermeasures (as will be likely in the case of a severe WMD threat) – as one sees in Article 52(2) ILC Articles (section IV. ii. c, below). Third, given both the ambiguities concerning dual-use technologies and defining the application of the security exception, the likelihood is that one may be faced with a non-violation complaint (i.e., where there has been no actual violation but the benefits under the GATT have been impaired or nullified) rather than a violation complaint, which if upheld and not rectified will definitively enable a resort to countermeasures. The problem is that in order to be defined as a countermeasure, a measure must be taken in response to a previous breach of an international


133 Pursuant to XXIII(b) of the GATT.
obligation. However, a non-violation complaint, if upheld, does not in fact establish a breach of any international obligation – even under the ad hoc system of the GATT (even if it does eventually provide standing to suspend concessions). Therefore, while non-violation complaints require the showing of harm, this cannot be equated with a breach. Accordingly, it is dubious to classify any authorized suspension of obligations in response to an unremedied non-violation impairment as a countermeasure. Despite the rarity of non-violation complaints, it is apparent their likelihood of arising in a non-proliferation context renders this a valid theoretical concern for the purposes of the present chapter. Fourth, despite the imposition of strict procedural conditions on the taking of countermeasures, the WTO regime sustains a close relationship with general international law on the substantive conditions that must be met to ensure the legality of any measures. Indeed, this dependence is a necessity in some ‘hard cases’ in which the agreements are silent.

Given the above analysis, it should be uncontroversial to state that Articles I, XX and XXI(b) of the GATT constitute rules which can govern exports and imports of WMDs as well as fall under the umbrella of non-proliferation law; and Articles 3.7, 22 and 23 of the DSU constitute *strong lex specialis* rules on countermeasures, both introducing strong procedural requirements on invoking states. It may also be stated that the scope of the WTO regime on countermeasures is not as well defined, nor as particularly strong a case for a self-contained regime, as first thought. The relationship between WTO provisions and a state’s right to non-perform other treaty obligations is of central importance for future analysis. For the purposes of the present chapter it suffices to note that in the WTO certain rules constitute special rules on countermeasures in the area of non-proliferation law.

134 See Art. 26.1(b) DSU.

135 GATT panels have found non-violations through nullification and impairment in only four out of fourteen instances in which they have been argued. They are an ‘exceptional remedy’. See Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper, Complaint by the United States*, WT/DS44/R, para. 10.402.


138 This of course does not automatically translate to saying that non-proliferation law is a special regime in the context of the law of countermeasures – due to the clarifications identified in section IV.ii, below and as obviously applicable to the analysis on WTO law.
The UN Security Council Resolution 1929 (2010) and countermeasures

In contrast to the WTO regime, where explicit provisions governing countermeasures were examined, the present subsection will look at how, despite the absence of any rules explicitly governing countermeasures, the UN Security Council has *implicitly and effectively eroded* available measures through the taking of coercive disarmament steps. While such coercive steps have largely been targeted at specific countries (most notably North Korea and Iran, of late), they *effectively removed* valid countermeasures from the array of rights that a maligned state may otherwise use. Furthermore, some measures in their effect not only prevent available countermeasures from being used between states but also by states towards international organizations.

Bowett eloquently outlined the problematic in relation to the UN Security Council and the taking of countermeasures:

*For, in principle, the Security Council could either authorize countermeasures or prohibit counter-measures. In either case the question will arise whether such a decision by the Council will be regarded as conclusive of the legality, or illegality, of the measures taken. There is an apparent illogicality in making the right of a state to take countermeasures subject to carefully formulated conditions, but leaving the Security Council free to authorize institutionalized counter-measures, subject to no conditions. It is this illogicality which has seemingly worried the Special Rapporteur.*

This section will contend that the Council has implicitly and effectively restricted the right of Iran to resort to specific countermeasures. It does not argue the case for Iranian countermeasures, nor does it posit that Iran has invoked the right to countermeasures in a specific case. It does argue that Iran has the ability to justify specific actions by countermeasures, and that these have been curtailed by positions taken by the Security Council and the IAEA. This section will further show that Council action in the field of non-proliferation law has *effectively*, if not explicitly, removed the right to resort to such countermeasures that may entail the non-performance of specific provisions of certain

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non-proliferation treaties. The latter has been achieved by the Council adding another layer of obligations which are identical to those contained in non-proliferation treaties, except their source is not said treaties, but rather Chapter VII UNSC resolutions. Each will be considered in turn.

In UN Security Council Resolution 1929 (2010), the following two seemingly innocuous provisions were included:

[In tenth preambular paragraph]
Noting with concern that Iran has taken issue with the IAEA’s right to verify design information which had been provided by Iran pursuant to the modified Code 3.1, and emphasizing that in accordance with Article 39 of Iran’s Safeguard’s Agreement Code 3.1 cannot be modified nor suspended unilaterally and that the IAEA’s right to verify design information provided to it is a continuing right . . .

[In operative paragraph]
5. Decides that Iran shall without delay comply fully and without qualification with its IAEA Safeguards Agreement, including through the application of modified Code 3.1 of the Subsidiary Arrangement to its Safeguards Agreement, calls upon Iran to act strictly in accordance with the provisions of the Additional Protocol to its IAEA Safeguards Agreement that it signed on 18 December 2003, calls upon Iran to ratify promptly the Additional Protocol, and reaffirms that, in accordance with Articles 24 and 39 of Iran’s Safeguards Agreement, Iran’s Safeguards Agreement and its Subsidiary Arrangement, including modified Code 3.1, cannot be amended or changed unilaterally by Iran, and notes that there is no mechanism in the Agreement for the suspension of any of the provisions in the Subsidiary Arrangement;\(^\text{141}\)

At first blush, the cited parts of Resolution 1929 seem far more relevant from a treaty law perspective\(^\text{142}\) rather than that of the law of countermeasures. Even though the Council’s approach to treaty obligations is of considerable importance to how states may approach the question of countermeasures, there are two fundamental problems with the Council’s approach in Resolution 1929.

First and foremost, the Council takes a rather inconsistent position on whether Iran may suspend performance of any provisions of its Subsidiary Arrangements, as part of its Safeguards Agreement. While


the cited preambular paragraph states that Code 3.1 of the Arrangement cannot be modified or suspended unilaterally owing to Article 39 of Iran’s Safeguard Agreement, operative paragraph 5 merely notes that there is no mechanism for suspension of Agreement or Arrangement provisions contained in the former. Yet, paragraph 5 also relies on Article 39 of the Agreement (alongside Article 24) to argue that neither the Agreement nor the Arrangement can be amended or changed unilaterally. The inconsistencies are troubling.

(a) Between two different but apparently declarative statements of the law, or an interpretation thereof, the Council has changed its position regarding Iran’s ability to suspend the provisions of its Arrangement: from outright prohibition, in its tenth preambular paragraph, towards a note that there are no mechanisms for suspension contained in the Agreement, in operative paragraph 5. This dilution can be partially explained by the following point.

(b) The Council used the same provision of the Safeguards Agreement, Article 39, first to argue that both unilateral suspension and modification of the Arrangement’s provisions is prohibited (in preambular paragraph) and then to argue that Article 39 only prohibits unilateral modification or amendment: suddenly no mention was made of Iran’s ability to suspend the application of certain Arrangement provisions. The Council’s clear retraction of its position on Iran’s ability to suspend its obligations is perhaps misguidedly well informed – given the content of Article 39 (the provision apparently supporting the prohibition on suspension): it only relates to extensions or changes to the Subsidiary Arrangement through mutual agreement between Iran and the IAEA.\(^{143}\) It does not, in any way, shape or form, consider the ability of either party to suspend its obligations. The Council’s tenth preambular paragraph, that suggested as much, imports the same irregular and, quite frankly, incorrect reasoning put forward by the IAEA in March 2009: reasoning that assumes that one can conflate the competence to amend a treaty with the competence to suspend performance of its

\(^{143}\) Iran’s Safeguard Agreement. Art. 39 states, in part, ‘The Subsidiary Arrangements may be extended or changed by agreement between the Government of Iran and the Agency without amendment of this Agreement’ (emphasis added). Equally, Art. 24, cited in para. 5 of the Resolution 1929, is entitled ‘Amendment of Agreement’ and concerns only amendments of the Agreement.
provisions. Not only is this plainly wrong if one were to interpret the Iran Safeguards Agreement and the Subsidiary Arrangement, but it is also severely misguided as a matter of the international law of treaties. The treaty provisions address amendment and modification; they cannot be extended to reach a statement of law governing the suspension of specific provisions – a matter that cannot be conflated with the suspension of the treaty.

The inconsistencies highlighted in (a) and (b) leave Iran’s ability to suspend parts of its Safeguards Agreement and Subsidiary Arrangement in a precarious position. While the tenth preambular paragraph is not binding and the innocuous statement concerning suspension in operative paragraph 5 is not decisive, certainly the former may be used to bolster a position that the IAEA is clearly sticking by (namely prohibiting a unilateral Iranian modification or suspension of the Agreement and Arrangement). This is clearly a dangerous proposition: for it not only removes the Iranian right to suspend its performance of certain provisions in the name of countermeasures but goes so

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144 See Statement by the Legal Adviser, Meeting of the Board of Governors, March 2009, paras. 1–2 of Analysis: 'The implementation of the provisions of Subsidiary Arrangements can only be amended or suspended with the agreement of both parties to them ... The provisions cannot be amended or suspended unilaterally by the state. Thus Iran’s failure to provide design information in accordance with the modified Code 3.1 as agreed to by Iran in 2003 is inconsistent with Iran’s obligations under the Subsidiary Arrangements to its Safeguards Agreement' (emphasis added). Also cited in Joyner, 'The Security Council as a Legal Hegemon', 13.


146 The Vienna Convention on the Law of Treaties treats amendment or modification of treaties differently from suspension. The VCLT has two entirely different parts for each (Parts IV and V, respectively). Indeed, we are not concerned with this differentiation, since the Resolution is not concerned with suspension of the treaty but rather suspension of its provisions (or performance thereof).

147 The Council does not go so far as to preclude recourse to suspension measures contained in general public international law, only noting that no such measures exist in the Safeguards Agreement.

148 An important distinction should be made between suspension of a treaty and suspension of the performance of a provision. The Council and the IAEA refer to the suspension of a treaty (the Safeguards Agreement and the Subsidiary Arrangement) and of the provisions contained therein. See also, Crawford, Third Report, paras. 324–325 (looking on the distinction and link between suspension of a treaty and countermeasures). On the topic of whether the Subsidiary Arrangement may be qualified as a treaty, see D. Joyner, ‘The Qom Enrichment Facility: Was Iran Legally Bound to Disclose?’, Jurist Legal News and Research (2010), available at http://jurist.law.pitt.edu/forumy/2010/03/qom-enrichment-facility-was-iran.php (accessed 2 April 2012) (arguing that the Arrangement is not a treaty).
far as to create a general position applicable to all states parties – a position which has not otherwise been contested by other IAEA states parties. Without seeking fully to argue the particulars of the Iranian case, this sort of measure may have a particular relevance given Iran’s treatment by the IAEA – especially following its referral to the UN Security Council on 4 February 2006. The arguable case is that such a referral was not in compliance with the IAEA’s own statute, and inconsistent with previous IAEA practice in cases of clear non-compliance. Should it be possible to construct an arguable case for a breach by the IAEA, then Iranian recourse to a suspension of its performance of the rights and obligations owed to the IAEA would constitute an operational right to take recourse to countermeasures. The Council’s actions clearly proceed effectively to limit such recourse to a potential Iranian countermeasure. Despite this profound effect, it is too early to state that the Council has laid down a clear, coherent and applicable rule on the matter. What is has done is to go some way to support an incorrect position on the law – taken by the IAEA.

Second, and far more simply, it is contended that Security Council action in the area of non-proliferation law has removed any effective ability of states to resort to countermeasures in the face of unjust treatment. This has been achieved by the Council incorporating, as binding on member states, obligations identical to those contained in major non-proliferation treaties. This has the effect of making these same obligations being owed to different international legal actors.

The argument to make in this regard is that in accordance with Art. XII(7)(c) IAEA Statute the referral to the UN Security Council is only permitted upon a determination of non-compliance. Such a determination by the Board of Governors has to be made on the basis of an inspector’s report demonstrating said non-compliance. Not only was there no dispositive proof that there had actually been non-compliance by Iran but the Board of Governors’ determination of non-compliance was made without any corroborating report by inspectors. For a description of the situation and conflicting legal approaches, see Joyner, *International Law and Proliferation of Weapons of Mass Destruction*, pp. 50–54; Calamita, ‘Sanctions, Countermeasures, and the Iranian Nuclear Issue’, pp. 1400–1402; Fry, ‘Dionysian Disarmament’, pp. 271–272; Joyner, ‘Security Council’, 11–13.

Consequently, even if Iran felt aggrieved and took suitable countermeasures against the IAEA due to a previous breach, this would not preclude it from being in breach of the same obligations as owed to the UN Security Council. A clear example is demonstrable by operative paragraph 5 of UNSC Resolution 1929 (2010), where it ‘calls upon Iran to act strictly in accordance with the provisions of the Additional Protocol to the IAEA Safeguards Agreement that it signed on 18 December 2003’. The Council bound Iran by the provisions of the Additional Protocol by virtue of this resolution, and its wording. It did not make it party to the treaty, nor did it presume that Iran was at any point previously bound by the Additional Protocol by virtue of treaty law. Therefore, any countermeasure that may be taken by Iran against the IAEA would absolve it of international responsibility against the Agency, but it would simultaneously be in breach of its obligations to the Security Council – where its wrongful acts would not be precluded. This phenomenon of creating identical but differently sourced obligations is also prevalent among a number of other non-proliferation Council resolutions.

The preceding analysis has revealed that there are no direct rules on countermeasures in Security Council resolutions in the area of non-proliferation law. However, it should also be observed that UNSC Resolution 1929 (2010) may be read to have explicitly rejected the right of Iran to undertake a specific countermeasure. A more reasonable interpretation is that the resolution does not do this, but does lend support to the IAEA’s legal position which explicitly rejects Iran’s right to take recourse to the specific countermeasure of suspending the performance certain procedural treaty provisions. It is therefore problematic to state that Security Council action has given rise to special rules on countermeasures. Yet, its limiting effects on maligned states to resort to this general international law right cannot be doubted – even if it only forces them to make a tough political choice on which rights to obey and which not.

This concludes the analysis of relevant rules affecting when there is a right to resort to countermeasures. Different considerations have

\[151\] For an identical reading, see Wood, 'The Law of Treaties and the UN Security Council', 249.

emerged from different categories of non-proliferation rules. These categories have ranged from mild specialness to strong forms of lex specialis, yet it is impossible to state the existence of categorical special rules across non-proliferation law. What has emerged is a modest conclusion that non-proliferation law’s relationship with the right to resort to countermeasures under general international law is highly dependent on the specific treaty regime. Some treaties are silent on the role of countermeasures, but contain extensive mechanisms to determine a breach and compliance therewith. Others contain specific rules, which only govern a narrow type of countermeasures, while others still contain strong, settled, but not fully determinate rules concerning non-proliferation law. The question now becomes not whether there is a right to resort to countermeasures under general international law, or under special rules, or even when this right is triggered, but what countermeasures may be taken – given the above rules.

ii. What countermeasures are permissible in non-proliferation law?

Having previously addressed the questions of who may take countermeasures and also partially when they may be taken, this subsection will complete the analysis of the latter and also identify what countermeasures can be taken. This enquiry has two aspects: one that centres on revisiting the nature of the obligations contained across different parts of non-proliferation law, and a second examining the role of urgent countermeasures and their relationship with certain non-proliferation provisions that lay down procedural prerequisites for the taking of countermeasures. Each aspect contains entirely different issues, with different conceptual foundations. Section III concluded that a small minority of substantive non-proliferation obligations could be considered as interdependent, under a law of state responsibility approach. A breach of these obligations enables a decentralized response, allowing all states parties to the obligation in question to take countermeasures. However, section III also concluded that not all substantive non-proliferation obligations, nor procedural ones, could be considered as interdependent (see, generally, section III. iii). Such an analysis was premised on the majority of non-proliferation treaties that contain collective

153 Note that section III, above explicitly examined only the nature of obligations in identifiable non-proliferation treaties. Section IV has highlighted a number of non-proliferation obligations that may not be entirely collective in nature.
obligations. Section IV. i should have clarified that some non-proliferation obligations are conceivably bilateral. Examples highlighted include those owed by Iran, and other states parties, to the IAEA, those owed by specific states to the UN Security Council; and those owed as between each state party to each other bilaterally under the WTO. The question of whether an obligation is bilateral or collective in nature is a prerequisite to determining both who may take countermeasures and whether such countermeasures are permissible. Bar the cited examples, the vast majority of non-proliferation obligations are collective. The consequences of this will be examined in subsections (a) and (b), below, both of which relate to potential limitations on what type of countermeasures may be taken.

a. The apparent preclusion of reciprocal countermeasures for collective non-proliferation obligations

There is an important consequence in finding that the majority of non-proliferation obligations are collective: a state party taking countermeasures in response to a breach of collective obligations is almost precluded from taking reciprocal countermeasures comprising non-performance of a similar or the same collective obligations contained in the same multilateral treaty. The caveat of almost precluded is important to

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154 Crawford defined these as those that ‘are expressed (or necessarily implied) to relate to matters of the common interest of the parties’. Crawford, Third Report, para. 92.

155 It is uncontroversial to state that IAEA Safeguard Obligations are bilateral insofar as they are contained in a bilateral Safeguards Agreement and Additional Protocol. These bilateral obligations may, however, become collective through the presence of extraneous treaty provisions. A clear example is the NPT framework. While under Art. III(1) NPT it is arguable that bilateral IAEA–state safeguard obligations may be collectivized, this is only so where the important caveat that such obligations are ‘for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons’.

156 This is a slightly looser definition of ‘reciprocal countermeasures’ than that provided by Riphagen and Crawford. See, Crawford, Third Report, paras. 327–329 and n. 65. See also Crawford, ILC Commentaries, p. 282.
note. By way of example, should state A breach any provisions contained in the CWC, and should it be presumed that state B has standing to take countermeasures, then state B is still technically capable as a matter of law to take measures of non-performance of collective obligations contained in the CWC against state A. The law of state responsibility shall preclude the wrongfulness of state B’s actions inasmuch as it may incur responsibility in regards to state A. However, given that the measure involves non-performance of a collective obligation, it shall not preclude state A’s wrongfulness for its breach of obligation, which it incurs vis-à-vis all other states parties C to Z of the NPT.

The understanding that state B is technically capable as a matter of law to take countermeasures in this scenario against state A, but may retain responsibility for its actions as regards third states, arises out of a degree of legal ambiguity.\(^{159}\) The inherent problem of taking countermeasures as regards collective obligations is that they do not per se preclude the taking of reciprocal countermeasures but they require the invoking state to make an acute political decision\(^ {160}\) between enforcing its right and incurring responsibility to third states. The problem is far more paradoxical for interdependent obligations, a subset of collective obligations, inasmuch that while breach of these obligations enables a decentralized response through third-party countermeasures, an invoking third state is clearly ‘restricted’ in its right to take recourse to reciprocal countermeasures.\(^ {161}\) The normative desirability to sustain treaty regimes based

\(^{159}\) Art. 49(1) of the ILC Articles states that state B ‘may only take countermeasures against a State which is responsible for an internationally wrongful act’. Therefore, state B may only take the countermeasure against state A, but this does not preclude that such a countermeasure may affect the rights of third states. The ILC Commentary takes the position that ‘Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breach by the countermeasure, the wrongfulness of measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.’ Cf. Crawford, *ILC Commentaries*, p. 285.

\(^{160}\) While clearly invoking a right is always a political decision, the nature of the political decision in the described instance is particularly acute. See, generally, H. Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 1933). The relationship between reciprocal countermeasures and interdependent obligations has long been a source of issue in the law of state responsibility. See, generally, for a discussion, J. Crawford and S. Olleson, ‘The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility’, *Australian Year Book of International Law*, 21 (2001), 7. Furthermore, interdependent obligations cannot be
on collective (and, more specifically, interdependent) obligations has led commentators to reject the right to states to undertake reciprocal countermeasures *ab initio*. However, this should not be mistaken as the current state of law. The only viable and technical limitation on the resort to reciprocal countermeasures for collective obligations is *political*.

b. Self-existent obligations as limitations on the object of countermeasures in non-proliferation law

In contrast, an absolute limitation on the taking of any type of countermeasure emerges from the existence of certain self-existent non-proliferation obligations. Where the general international law of countermeasures may be considered applicable, as is the case for most non-proliferation treaties (see, section IV.i.a), it is clear that countermeasures could not in any event relate to several fundamental substantive obligations by virtue of Article 50(1) of the ILC Articles. These exceptions cannot be contested from a general international law standpoint, nor, in some cases, from a *lex specialis* perspective. An example of the latter concerns countermeasures not infringing on the obligations not to threaten to use or to use force – these have been codified in specific non-proliferation treaties.

The central point of contestation is determining which obligations fall into the category of being so fundamental that they may not be considered subject to countermeasures. Some commentators have suggested that *all* self-existent obligations cannot be subject to countermeasures. The case has therefore been put forward from exempting environmental obligations, non-fundamental human rights obligations, among others, from the object of countermeasures. This approach has some appeal from a principled approach to self-existent obligations, and would bear considered as necessarily 'intransgressible', effecting their automatic preclusion from the object of countermeasures. Cf. Crawford, *ILC Commentaries*, p. 291.

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163 The political element is sharpened when one considers that if a state A breaches an interdependent obligation not only may all states parties take countermeasures but they may suspend performance of the treaty under Art. 60(2)(c) VCLT.

164 e.g., Art. 11 African NFZT (prohibition on armed attacks); Art. 1, Protocol 2, South Pacific NFZT (prohibition on threatening to use, or using, nuclear weapons); Arts. 3(1) and (2), Southeast Asia NFZT (prohibition to test, use or station nuclear weapons).

165 See, e.g., Pauwelyn, 'The Typology of Multilateral Treaty Obligations', 924.

166 See, generally, for environmental obligations, U. Beyerlin, 'State Community Interests and Institution-Building in International Environmental Law', *Heidelberg Journal of...*
relevance for a number of non-proliferation treaties that contain environmental obligations. Indeed, the prevalence of anti-dumping provisions in non-proliferation treaties may justify a fifth category of obligation to be added to the non-exhaustive list drawn up in section III. ii. a, above. Yet, however much a principled approach may require a broader understanding of self-existent obligations to be adopted, the problem that occurs is that the ILC did not decide to base its Article 50(1) analysis on the notion of self-existent obligations. In this respect, the following analysis differs significantly from that of interdependent obligations and Article 42(b)(ii), above. The ILC’s starting point for determining exceptions to obligations the object of countermeasures was in fact first peremptory norms and then those which emerged by lex specialis. It was only later in the ILC debates that fundamental substantive obligations were listed, and these were limited due to certain expressions of will by states. However, in drawing up these substantive obligations, their self-existent character was not a functionally determinative criterion in the ILC’s work. To the extent that there may have been any reference, the ILC Commentary talked of ‘intransgressible’ obligations within the meaning referred to in the Legality of the Threat or Use of Nuclear Weapons advisory opinion – but this reference is far from clear. Indeed, it is arguable that attributes the court gave to ‘intransgressible’ obligations are far narrower and more demanding than the attributes that Fitzmaurice gave to self-existent or absolute obligations.

One may therefore be sympathetic to a persuasive principled argument that examines the core tenets of self-existent obligations (as the present author is – to a degree), in which case environmental obligations contained in non-proliferation treaties are precluded from being the object of countermeasures. Such an approach becomes more appealing if one accepts that the ILC’s determination is not dispositive of the matter, and, even if it did not base its approach on the self-existent


167 e.g., obligations prohibiting the dumping of radioactive waste: Art. 7(a)–(b) African NFZT; Art. 3(2) Treaty on a Nuclear-Weapon-Free Zone in Central Asia; Art. 7(1) South Pacific NFZT; Art. 3(3) Southeast Asia NFZT. See also Roscini, ‘Something Old, Something New’, 612.

168 See Tams, Enforcing Obligations, pp. 57–58 for an excellent example of how this may be done.

169 Crawford, ILC Commentaries, p. 51.

nature of obligations, it should have done. However, even if this was accepted, it cannot also be accepted that all environmental obligations are of a standard-setting character, and certainly the approach to environmental obligations in certain NFZTs seems to support such an assertion. The point of contestation is therefore murky and requires more in-depth analysis than can be provided here. Suffice to say that the above analysis reveals that there are equally valid arguments for precluding countermeasures in regards to environmental obligations contained in non-proliferation treaties as there are for permitting them.

c. The potential expansion of the general law of countermeasures: urgent countermeasures in non-proliferation law

Having examined two possible sources of limitation on what countermeasures may be taken, this next point of analysis will examine what type of countermeasures may extraordinarily be permitted, given the content of the non-proliferation rules identified in section IV. i. That section examined different non-proliferation rules which may constrain, modify or exclude countermeasures under general international law. However, owing to the character of these rules there is a need to examine a specific type of countermeasure that may retain significant relevance for non-proliferation law: urgent countermeasures.

The examination of institutional treaty mechanisms, certain specific treaty specific countermeasure rules and those arising under the WTO and the UN Security Council, revealed the potential for specific treaty regimes laying down extensive procedural prerequisites before resort to countermeasures under the treaty or under general international law may be permitted. Although the present author contends that institutional treaty mechanisms and their accompanying rules do not establish procedural prerequisites as regards the determination of a breach and subsequent treatment of the breach, certain authors hold a different position (see, section IV. i. a, above). In some cases, the argument for the existence of procedural prerequisites is relatively strong – as in the case for the WTO, or for countermeasures of general interest under the CTBT and CWC (where a treaty body recommendation is first required) (see, section IV. i. b–c, above).

A central tension emerges from the above conclusion and the following central propositions on the law of countermeasures: (a) urgent countermeasures are not distinguishable from ‘normal’ countermeasures
under international law;\textsuperscript{171} (b) countermeasures must be regarded as equivalent to interim measures of protection;\textsuperscript{172} and (c) facile recourse to countermeasures must be tempered by certain procedural requirements.\textsuperscript{173} The tension manifests itself as follows: if some non-proliferation rules do lay down onerous procedural prerequisites, and are therefore not limited as under Article 51(1) ILC Articles, nor expeditious, then how can states take recourse to countermeasures as an effective interim measure. The need for urgent countermeasures under general international law permits a state to set aside the obligation to offer to negotiate (Article 52(2)), but if non-proliferation law lays down – as it does in some cases – more onerous procedural prerequisites, then what mechanism is there to set these aside in the name of urgency? The problem is that there is no clear way to manage this issue.

The nature of non-proliferation law also lends itself to countermeasures that must, in some cases, be taken in a time-sensitive manner (e.g., to prevent an international actor from obtaining WMD material etc.). The central problem is not merely the existence of procedural prerequisites, but that they are clearly not expeditious enough to do justice to such a scenario and there is no available rule in international law to set them aside where they apply. The Article 52(2) rule setting aside the obligation to offer to negotiate in cases of urgent countermeasures, while applicable to general international law, does not allow one to set aside treaty-specific procedural prerequisites. Accordingly, in the view of the present author, there are two ways to reconcile these issues. First, undertake a watered-down reading of the procedural requirements contained in non-proliferation treaties: in reaching the determination that apparent procedural prerequisites in non-proliferation treaties containing extensive institutional treaty mechanisms were not binding requirements, the present author has done precisely this. However, this approach is a little more difficult for those rules contained in Article XII(3) CWW, Article V(3) CTBT and the WTO. In such cases, the possibility for a watered-down reading is negligible. Rather, one must


\textsuperscript{172} Crawford, ‘Counter-measures as Interim Measures’, 68 (identified as his sixth principle); Arts. 49(3), 52(3) and 53 ILC Articles on State Responsibility (recognizing the temporary and reversible nature of countermeasures).

\textsuperscript{173} Art. 52(1)(a)–(b) ILC Articles on State Responsibility.
resort to the second approach of reconciliation. Second, should the procedural prerequisites of such treaties be unable to function in an *expeditious* manner,\(^{174}\) and therefore the way they should, then one must consider this a *procedural failure* by the treaty regime,\(^{175}\) triggering a fallback onto the general rules of international law governing countermeasures.

Frankly, neither the first nor the second is satisfactory as normative readings of doctrine, but what must emerge from this legal analysis is a way to reconcile the need for urgent countermeasures in non-proliferation law with the apparent obstacles in specific treaty regimes to meet such a need. The present author advocates for a degree of liberalism in the reading of that which determines under what conditions urgent countermeasures are permissible.

### iii. Conclusion

The present chapter has attempted to introduce a comprehensive approach to examining countermeasures in non-proliferation law. It has also done so with a view to examining the existence of special rules on three central questions: *who* may take countermeasures, *when* may such countermeasures be taken and *what* countermeasures are permissible. It was hoped that from an examination of these three areas, and the rules contained therein, a thesis on whether non-proliferation law was a special regime might emerge. It is regrettable to say that one has not. What has emerged is the identification of certain special characteristics in specific areas and a few, highly specific, rules which perhaps mark a special approach to countermeasures. However, these findings cannot be extrapolated to reach a more general conclusion on non-proliferation law being a special regime.

The central findings of this chapter have been (1) that non-proliferation treaties, in general, contain certain substantive obligations that may be qualified as interdependent. However, the majority of provisions (procedural, substantive positive peaceful and some substantial) cannot be so qualified, thus disabling a decentralized approach to

\(^{174}\) This expeditious requirement was identified by Crawford, ‘Counter-measures as Interim Measures’, 68: ‘Thus the purpose of the counter-measures should be regarded as met if (a) the *expeditious* procedure for determining the legality of the conduct in question is triggered’ (emphasis added).

\(^{175}\) The concept of a procedural failure by a regime was considered by the ILC in its ILC Report on Fragmentation, paras. 188–189.
countermeasures for the majority of provisions upon breach. (2) non-proliferation treaties and other treaties (e.g., WTO) contain provisions which curtail, modify or exclude the general international law of countermeasures to extremely varying degrees. These rules are of a varying degree of specialness at a general norm level, and in some cases highly case-specific (e.g., the UN Security Council, IAEA and Iran). The central point to note is that despite the presence of extensive treaty-specific institutions, the general law of countermeasures governs in most cases. (3) That given the largely collective nature of non-proliferation obligations, and the considerable presence of interdependent obligations, reciprocal countermeasures are in some cases effectively precluded, while environmental obligations could also be excluded from the object of countermeasures in non-proliferation law. Finally, it was found that urgent countermeasures should fall within the legal regime of non-proliferation law, but whether and how the law permits this is ambiguous.

It appears that in the context of non-proliferation law, the law of countermeasures has been of little use in elucidating a general thesis on whether the former is a special regime. This is quite an unremarkable result indicative only of the unnecessary hype that one finds in the rhetoric of fragmentation discourse. Nevertheless, it is hoped that this chapter will have contributed to clarifying the problematic underpinnings of certain state responsibility issues and identifying the applicable laws concerning countermeasures and non-proliferation law – and how one might approach them with a degree of legal pragmatism.