UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/CN.4/L.608/Add.5
18 July 2001

Original: ENGLISH

International Law Commission
Fifty-third session
Geneva, 23 April-1 June and 2 July-10 August 2001

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION

Rapporteur: Mr. Qizhi He

CHAPTER V

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

Addendum

E. Text of the draft articles on Responsibility of States for internationally wrongful acts (*continued*)

2. Text of the draft articles with commentaries thereto (*continued*)

CHAPTER II

COUNTERMEASURES

(1) This Chapter deals with the conditions and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures, otherwise contrary to the international obligations of an injured State vis-à-vis a responsible State, that may be taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralised system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognised both by governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.[1] This is reflected in article 23 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term "reprisals" was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.[2] More recently the term "reprisals" has been limited to action taken in time of international armed conflict; i.e., it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance

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[1] For the substantial literature see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational Publishers, 1984), pp. 179-189; O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 37-41; L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, L.D.G.J., 1990) pp. 501-525.

[2] See, e.g., E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington, Carnegie Institution, 1916), Bk. II, ch. XVIII, § 342.

with modern practice and judicial decisions the term is used in that sense in this Chapter.[3] Countermeasures are to be contrasted with retorsion, i.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargos of various kinds or withdrawal of voluntary aid programs. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present Articles. The term "sanction" is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the United Nations Charter refers only to "measures", even though these can encompass a very wide range of acts, including the use of armed force.[4] Questions concerning the use of force contrary to the Charter and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand the Articles are properly concerned with countermeasures as defined in article 23. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the Vienna Convention on the Law of Treaties. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.[5] Countermeasures involve conduct taken in derogation from a

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[3] See *Air Services Agreement of 27 March 1946 (United States v. France)*, *R.I.A.A.*, vol. XVIII, p. 416 (1979), at p. 416, para. 80; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, *I.C.J. Reports 1986*, p. 14, at p. 102, para. 201; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997,* p. 7, at p. 55, para. 82.

[4] Charter of the United Nations, Arts. 39, 41, 42.

[5] Cf. Vienna Convention on the Law of Treaties, 23 May 1969, *U.N.T.S.*, vol. 1155, p. 331, arts. 70, 73, and on the respective scope of the codified law of treaties and the law of State responsibility see introductory commentary to Part One, Chapter V, paras. (3)-(6).

subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This Chapter does not draw any distinction between what are sometimes called "reciprocal countermeasures" and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[6] There is no requirement that States taking countermeasures are limited to suspension of performance of the same or a closely related obligation.[7] A number of considerations support this conclusion. First, for some obligations, e.g., those relating to the protection of human rights, reciprocal reactions would be most unlikely to have any instrumental effect of inducing the responsible State to comply with its own obligations. Moreover these obligations are not owed only to one other State. Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures. The notion of reciprocal countermeasures, adopted as a limitation on the right to take countermeasures, would place a premium on outrages by the responsible State to which the injured State was not prepared (and should not be permitted) to descend. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Services* arbitration.[8]

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible

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[6] See *Yearbook ... 1985*, vol. II, Part 1, p. 10.

[7] Contrast the exception of non-performance in the law of treaties, which is so limited: see introductory commentary to Part One, Chapter V, para. (9).

[8] *R.I.A.A.*, vol. XVIII, p. 416 (1979).

countermeasures (article 50 (1) (a)). Secondly, countermeasures are limited by the requirement that they are directed at the responsible State and not at third parties (article 49 (1) & (2)). Thirdly, since countermeasures are intended as instrumental - in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment - they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (articles. 49 (2) (3), 53). Fourthly, countermeasures must be proportionate (article 51). Fifthly, they must not involve any departure from certain basic obligations (article 50 (1)), in particular those under peremptory norms of general international law.

(7) This Chapter also deals to some extent with the procedural incidents of countermeasures. As a statement of codification and progressive development of the rules of State responsibility, the Articles cannot themselves establish new systems of compulsory dispute settlement for disputes giving rise to or concerning the taking of countermeasures. This is a matter for States themselves. What the Articles in their present form can do is allow for appropriate diplomatic action aimed at resolving such disputes, and take into account existing or agreed third party dispute settlement procedures. Thus countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (article 50 (2) (a)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (article 50 (2) (b)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (article 52 (3)).

(8) The focus of the Chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This Chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48 (1) to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interests of the victims (article 54).

(9) In common with other chapters of these Articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the W.T.O. dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.[9]

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Commentary

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part 2, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.[10] Countermeasures are not intended as a form of punishment for wrongful conduct but as an instrument for achieving compliance with the obligations of the responsible State under Part 2. The limited object and exceptional nature of countermeasures are indicated by the use of the word “only” in paragraph 1 of Article 49.

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[9] See W.T.O., Understanding on Rules and Procedures governing the Settlement of Disputes, arts. 1, 3 (7), 22.

[10] For these obligations see articles 30 and 31 and commentaries.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, in the following passage:

> "In order to be justifiable, a countermeasure must meet certain conditions… In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State."[11]

(3) Paragraph 1 of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.[12] In this respect there is no difference between countermeasures and other

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[11] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997,* p.7, at pp. 55-56, para. 83. See also *"Naulilaa"* (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa)*, *R.I.A.A.*, vol. II, p. 1013 (1928), at p. 1027; *"Cysne" (Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war)*, *R.I.A.A.*, vol. II, p. 1035 (1930), at p. 1057. At the 1930 Hague Codification Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 128.

[12] The Tribunal's remark in the *Air Services* case, to the effect that "each State establishes for itself its legal situation vis-à-vis other States", (*R.I.A.A.*, vol. XVIII, p. 416 (1979), at p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the Tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The Tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

circumstances precluding wrongfulness.[13]

(4) A second essential element of countermeasures is that they "must be directed against"[14] a State on account of its committing an internationally wrongful act, in circumstances where the wrongful act is continuing or at least the State has not complied with its obligations of reparation under Part Two of the present Articles.[15] The word "only" in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. 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 breached by the countermeasure, the wrongfulness of the 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.[16]

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this Chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter - i.e., if the injured State has not undertaken to them that the transit rights shall remain unaffected - they cannot complain. Similarly if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt.[17] Such indirect or secondary effects cannot be entirely avoided.

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[13] See introductory commentary to Part One, Chapter V, para. (8).

[14] *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997,* p.7, at pp. 55-56, para. 83.

[15] Ibid. In *Gabčíkovo-Nagymaros Project* the Court held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Slovakia's response was directed against it on that ground.

[16] On the specific question of human rights obligations see article 51 (1) (b) and commentary.

[17] Art. 50 of the United Nations Charter recognises this possibility in the context of measures taken under Chapter VII. It is equally true in the context of countermeasures.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and paragraph 2 of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to "obligations" in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures irrespective of their severity or consequences.[18]

(7) The phrase "for the time being" in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.[19] Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State "under Part Two". It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act but they may also be taken to ensure reparation, provided the other conditions laid down in Chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this

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[18] See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

[19] This notion is further emphasised by paragraph 3 and article 53 (termination of countermeasures).

remedy plays in the spectrum of reparation.[20] In normal situations, satisfaction will be symbolic, nominal or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern is adequately addressed by the notion of proportionality set out in article 51.

(9) Paragraph 3 of article 49 is inspired by article 72 (2) of the Vienna Convention on the Law of Treaties, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognised by the Court, although it found it was not necessary to pronounce on the matter. After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> "It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the responsible State to comply with its obligations under international law, and that the measure must therefore be reversible."[21]

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. In some cases, countermeasures may unavoidably cause collateral damage that cannot be reversed even after the lifting of the countermeasures, although it may be possible to resume compliance with the underlying obligation. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the Articles. The phrase "as far as possible" in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

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[20] See commentary to article 37, para. (1).

[21] *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997,* p.7, at p. 57, para. 87.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of fundamental human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) under any applicable dispute settlement procedure in force between it and the responsible State;

(b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Commentary

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which by reason of their character must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations concerned in particular with the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) Paragraph 1 of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations, (b) obligations for the protection of fundamental human rights, (c) obligations of a humanitarian character prohibiting reprisals and (d) other obligations under peremptory norms of general international law.

(4) Subparagraph (1) (a) deals with the prohibition of the threat or use of force as embodied in the United Nations Charter, including the express prohibition of the use of force in Article 2 (4). It excludes forcible measures from the ambit of permissible countermeasures under Chapter II. Other forms of coercion, whether political or economic, may be encompassed within other categories referred to in article 50 (1) and their lawfulness for the purposes of this Chapter is always subject to the overriding condition of proportionality.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly of the United Nations proclaimed that "States have a duty to refrain from acts of reprisals involving the use of force."[22] The prohibition is also consistent with prevailing doctrine as well as a number of authoritative pronouncements of international judicial[23] and other bodies.[24]

(6) Subparagraph (1) (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the *"Naulilaa"* arbitration, the Tribunal stated that a lawful countermeasure must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[25] The International Law Association in its 1934 resolution stated that in taking countermeasures a State must "s'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique".[26] This has been taken further as a result of the development since 1945 of international human

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[22] General Assembly resolution 2625 (XXV) of 24 October 1970, first principle, para. 6. The Helsinki Final Act of 1 August 1975 also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration of Principles embodied in the first "Basket" of that Final Act reads: "Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force."

[23] See esp. *Corfu Channel*, *Merits, I.C.J. Reports 1949*, p. 4, at p. 35; *Military and Paramilitary Activities in and against Nicaragua*, *I.C.J. Reports 1986*, p. 16, at p. 127, para. 249.

[24] See, e.g., Security Council resolution 111 (1956), resolution 171 (1962), resolution 188 (1964), resolution 316 (1972), resolution 332 (1973), resolution 573 (1985) and resolution 1322 (2000). Also see General Assembly resolution 41/38 (20 November 1986).

[25] *"Naulilaa"* (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa)*, *R.I.A.A.*, vol. II, p. 1013 (1928), at p. 1026.

[26] *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 709.

rights standards. In particular the relevant human rights treaties identify certain inviolable human rights which may not be suspended or derogated from even in time of war or other public emergency.[27]

(7) The issue of the effect of measures taken against a State on individuals or on the population of the State as a whole has been discussed in the context of the impact of Security Council economic sanctions on civilian populations and especially on children, a subject which falls outside the scope of the present Articles.[28] It may be noted, however, that General Comment 8 (1997) of the Committee on Economic, Social and Cultural Rights covers the case of measures imposed by individual States or groups of States as well as those imposed by the Security Council. The General Comment stresses that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[29] and goes on to state that:

> "…it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country."[30]

Analogies can be drawn from other elements of general international law. For example, Additional Protocol I of 1977, article 54 (1) stipulates unconditionally that "Starvation of civilians as a method of warfare is prohibited."[31] Likewise, the final sentence of article 1 (2) of

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[27] See International Covenant on Civil and Political Rights, 1966, art. 4, *U.N.T.S.*, vol. 999 p. 171; European Convention on Human Rights and Fundamental Freedoms, 1950, art. 15, *U.N.T.S.*, vol. 213, p. 221; American Convention on Human Rights, 1968, art. 27, *I.L.M.* vol. 9 p. 99 (1970).

[28] See article 59 and commentary.

[29] E/C.12/1997/8, 5 December 1997, para. 1.

[30] Ibid., para. 4.

[31] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 8 June 1977, *U.N.T.S.*, vol. 1125, p. 3. See also arts. 54 (2) ("objects indispensable to the survival of the civilian population"), 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), 8 June 1977, *U.N.T.S.*, vol. 1125, p. 609, art. 4.

the two United Nations Covenants on Human Rights states that "In no case may a people be deprived of its own means of subsistence".[32]

(8) Subparagraph (1) (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60 (5) of the Vienna Convention on the Law of Treaties.[33] The subparagraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[34]

(9) Subparagraph (1) (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (d) reiterates for the purposes of the present Chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in Chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to "other" obligations under peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (b) and (c) stand on their own. Subparagraph (d) allows for the recognition of further peremptory norms which may not be the subject of countermeasures by an injured State.

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[32] Art. I (2) of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, *U.N.T.S.*, vol. 993, p. 3, and art. I (2) of the International Covenant on Civil and Political Rights, 16 December 1966, *U.N.T.S.*, vol. 999, p. 171.

[33] Art. 60 (5) of the Vienna Convention on the Law of Treaties precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This paragraph was added at the Vienna Conference on a vote of 88:0:7.

[34] See K. J. Partsch, "Reprisals", *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1986) vol. 2, p. 330 at pp. 333-334; S. Oeter, "Methods and Means of Combat", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford, Oxford University Press, 1995) pp. 475-479, with references to relevant provisions.

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50 (1) (d). In particular a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[35] Under the dispute settlement system of the WTO, the prior authorization of the Dispute Settlement Body is required before a Member can suspend concessions or other obligations under the WTO agreements in response to a failure of another Member to comply with recommendations and rulings of a WTO panel or the Appellate Body.[36] Pursuant to Article 23 of the WTO Dispute Settlement Understanding (DSU), Members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations".[36*bis*] To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible",[37] they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, paragraph 2 provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures in force between it and the responsible State, and obligations with respect to diplomatic and consular

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[35] On the exclusion of unilateral countermeasures in E.U. law, see, for example, Cases 90 and 91/63, *Commission v. Luxembourg & Belgium* [1964] E.C.R. 625 at p. 631; Case 52/75, *Commission v. Italy* [1976] E.C.R. 277 at p. 284; Case 232/78, *Commission v. France* [1979] E.C.R. 2729; Case C-5/94, *R. v. M.A.F.F., ex parte Hedley Lomas (Ireland) Limited,* [1996] E.C.R. I-2553.

[36] See WTO Dispute Settlement Understanding, arts. 3.7, 22.

[36*bis*] See *United States - Sections 301-310 of the Trade Act of 1974*, Report of the Panel, 22 December 1999, WTO doc. WT/DS152/R, paras. 7.35-7.46.

[37] To use the synonym adopted by the International Court in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

inviolability. The justification in each case concerns not so much the substantive (peremptory or non-derogable) character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in subparagraph (2) (a), applies to "any applicable dispute settlement mechanism in force" between the injured State and the responsible State. The phrase "any applicable dispute settlement procedure" refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty or other agreement which is at the heart of the dispute and the continued validity or effect of which is challenged. As the International Court said in *Appeal Relating to the Jurisdiction of the ICAO Council*…

> "Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested."[38]

Similar reasoning underlies the principle that dispute settlement provisions in force between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the International Court in the *Diplomatic and Consular Staff* case:

> "In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes."[39]

(14) The second exception in subparagraph 2 (b) limits the extent to which an injured State may resort by way of countermeasures to conduct inconsistent with its obligations in the field of

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[38] *I.C.J. Reports 1972*, p. 46, at p. 54. See also S.M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13-59.

[39] United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 3, at p. 28, para. 53.

diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors - such acts are specifically permitted and do not amount to countermeasures. At a second level, measures may be taken affecting diplomatic rights or privileges, not prejudicing the inviolability of diplomatic or consular agents or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this Chapter are met. On the other hand, the scope of prohibited countermeasures under article 50 (2) (b) is limited to those obligations which are designed to guarantee the physical safety and inviolability of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.[40]

(15) In the *Diplomatic and Consular Staff* case, the International Court stressed that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic and consular missions",[41] and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

> "The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the missions and specifies the means at the disposal of the receiving State to counter any such abuse."[42]

It is precisely when the relations between States are strained as a result of some dispute over responsibility that diplomatic channels need to be kept open. Moreover if diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various

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[40] See, e.g. Vienna Convention on Diplomatic Relations, 18 April 1961, U.N.T.S., vol. 500, p. 95, arts. 22, 24, 29, 44, 45.

[41] I.C.J. Reports 1980, p. 3, at p. 38, para. 83.

[42] Ibid., at p. 40, para. 86. Cf. Vienna Convention on Diplomatic Relations, art. 45 (a); Vienna Convention on Consular Relations, 24 April 1963, U.N.T.S., vol. 596, p. 261, art. 27 (1) (a)" (premises, property and archives of the mission to be protected "even in case of armed conflict").

avenues for redress available to the receiving State under the terms of the Vienna Conventions of 1961 and 1963[43]. On the other hand no reference need be made in article 50 (2) (b) to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) Article 51 establishes a limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. Proportionality is a core element in determining the lawfulness of a countermeasure. It is relevant in determining what countermeasures may be applied and their degree of intensity. The principle of proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) The principle of proportionality is a well-established part of the law relating to countermeasures, being widely recognized as a general requirement for the legitimacy of countermeasures in State practice, doctrine and jurisprudence. According to the award in the *"Naulilaa"* case…

> "même si l'on admettait que le droit des gens n'exige pas que la représaille se mesure approximativement à l'offense, on devrait certainement considérer comme excessives et partant illicites, des représailles hors de toute proportion avec l'acte qui les a motivés".[44]

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[43] See Vienna Convention on Diplomatic Relations, arts. 9, 11, 26, 36 (2), 43 (b), 47 (2) (a); Vienna Convention on Consular Relations, arts. 10 (2), 12, 23, 25 (b), (c), 35 (3).

[44] "Naulilaa" (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa), R.I.A.A., vol. II, p. 1013 (1928), at p. 1028.

(3) In the *Air Services* arbitration,[45] the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France's refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States' countermeasure which suspended Air France flights to Los Angeles altogether. The Tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France".[46] In particular the majority said:

> "It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule… It has been observed, generally, that judging the 'proportionality' of countermeasures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited change of gauge in third countries. If the importance of the issue is reviewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the

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[45] Air Services Agreement of 27 March 1946 (United States v. France), R.I.A.A., vol. XVIII, p. 417 (1978).

[46] Ibid., at p. 443, para. 83.

existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation."[47]

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Slovakia in the *Gabčíkovo-Nagymaros Project* case.[48] The International Court, having accepted that Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the 1977 Agreement went on to say:

"In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question. In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

'[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others'...

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well…

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz - failed to respect the proportionality which is required by international law… The Court thus considers that the

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[47] Ibid. M. Reuter, dissenting, accepted the Tribunal's legal analysis of proportionality but suggested that there were "serious doubts on the proportionality of the counter-measures taken by the United States, which the Tribunal has been unable to assess definitively." Ibid., at p. 448.

[48] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, p.7.

> diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate."[49]

Thus the Court took into account the quality or character of the rights in question as a matter of principle and (like the Tribunal in the *Air Services* case) did not assess the question of proportionality only in quantitative terms. Its statement that countermeasures must be "commensurate with the injury suffered, taking account of the rights in question" helpfully captures the test of proportionality.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely. The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

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[49] Ibid., at p. 56, paras. 85, 87, citing Territorial Jurisdiction of the International Commission of the River Oder, 1929, P.C.I.J., Series A, No. 23, p. 27.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased, and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part 2. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be

available, immediately or at all.[50] At the same time it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, an acknowledgement of the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that one party is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the Tribunal in the *Air Services* arbitration.[51] The first requirement, set out in paragraph (1) (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as "*sommation*") was stressed both by the Tribunal in the *Air Services* arbitration[52] and by the International Court in the *Gabčíkovo-Nagymaros Project* case.[53] It also appears to reflect a general practice.

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response, even though the time span between the giving of notice and taking countermeasures may be short. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with paragraph 1 (a).

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[50] See above, introduction to this Chapter, para. (6).

[51] *Air Services Agreement of 27 March 1946 (United States v. France)*, *R.I.A.A.*, vol. XVIII, p. 417 (1978), at pp. 445-446, paras. 91, 94-96.

[52] Ibid., at p. 444, paras. 85-7.

[53] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997,* p.7, at p. 56, para. 84.

(5) Paragraph 1 (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs 1 (a) and 1 (b) is not strict. Notifications could be made close to each other or even at the same time.

(6) Under paragraph 2, however, the injured State may take "such urgent countermeasures as are necessary to preserve its rights" even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefor may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by subparagraph (1) (b) might frustrate its own purpose. Hence paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject-matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) Paragraph 3 deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met the injured State may not take countermeasures; if already taken, they must be suspended "without undue delay". The phrase "without undue delay" allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not "pending before a court or tribunal" for the purposes of subparagraph 3 (b) unless the court or tribunal is actually constituted. With a standing court or tribunal this will be the case immediately, irrespective of whether jurisdiction is accepted by both parties or is in dispute. For example a contentious case is pending before the International Court of Justice from the moment when an application or special agreement is notified to the Court by a State or States entitled to appear before it.[54] On the other hand, for these purposes a dispute is

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[54] Statute of the International Court of Justice, art. 40.

not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which may take some time even if both parties are cooperating in the appointment of the members of the tribunal.[55]

(9) The rationale behind paragraph 3 is that once the parties submit their dispute to a court or tribunal for resolution, the injured State may request such a court or tribunal to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will make countermeasures unnecessary pending the decision of the tribunal. The paragraph is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international tribunals.[56] The reference in paragraph 3 to a "court or tribunal" is intended to refer to any third party dispute settlement procedure, whatever its designation, which is established and operating and which has the competence to make decisions binding on the parties, including decisions regarding provisional measures.[57] It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be

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[55] Hence art. 290 (5) of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, *U.N.T.S.,* vol. 1833, p. 396) provides for the International Tribunal on the Law of the Sea to deal with provisional measures requests "[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted".

[56] See, e.g., Statute of the International Court of Justice, art. 41; United Nations Convention on the Law of the Sea, 1982, art. 290.

[57] The binding effect of provisional measures orders under Part XI of the 1982 Convention is assured by art. 290 (6). For the binding effect of provisional measures orders under art. 41 of the Statute of the International Court of Justice see the decision in *LaGrand (Germany v. United States of America), Merits*, judgment of 27 June 2001, paras. 99-104.

relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.[58]

(10) Paragraph 4 of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Commentary

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this Chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 47.

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[58] Under the Washington Convention of 1965, the State of nationality may not bring an international claim of behalf of a claimant individual or company "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such a dispute": Convention on the settlement of investment disputes between States and nationals of other States, Washington, 18 March 1965, *U.N.T.S.,* vol. 575, p. 159., art. 27 (1); C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) pp. 397-414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See commentary to article 42, para. (2).

Article 54

Measures taken by States other than an injured State

This Chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interests of the injured State or of the beneficiaries of the obligation breached.

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, "injured" States, as defined in article 42 are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under Chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interests of the group. By virtue of article 48 (2), such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus with respect to the obligations referred to in article 48, such States are recognised as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.[59]

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organisations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the United Nations Charter, is not covered by the Articles.[60] More generally

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[59] See e.g., L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, LDGJ, 1990), pp. 110-175; M. Akehurst, "Reprisals by Third States", *B.Y.I.L.*, vol. 44 (1970), p. 1; J.I. Charney, "Third State Remedies in International Law", *Michigan Journal of International Law*, vol. 10 (1988), p. 57; J.A. Frowein, "Reactions by Not Directly Affected States to Breaches of Public International Law", *Recueil des cours*, vol. 248 (1994–IV), p. 345; D.N. Hutchinson, "Solidarity and Breaches of Multilateral Treaties", *B.Y.I.L.*, vol. 59 (1988), p. 151; B. Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours*, , vol. 250 (1994-VI), p. 217.

[60] See article 59 and commentary.

the Articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.[61]

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

- *USA - Uganda (1978).* In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[62] The legislation recited that "[t]he Government of Uganda… has committed genocide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide".[63]
- *Certain western countries - Poland and Soviet Union (1981).* On 13 December 1981, the Polish government imposed martial law and subsequently suppressed demonstrations and interned many dissidents.[64] The United States and other western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.[65] The suspension procedures provided for in the respective treaties were disregarded.[66]
- *Collective measures against Argentina (1982).* In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an

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[61] See article 57 and commentary.

[62] Uganda Embargo Act, 22 USC s. 2151 (1978).

[63] Ibid., §§ 5c, 5d.

[64] *R.G.D.I.P.*, vol. 86 (1982), pp. 603-604.

[65] Ibid., p. 607.

[66] See e.g. art. XV of the US-Polish agreement of 1972, 23 U.S.T. 4269; art. XVII of the US-Soviet agreement of 1967, *I.L.M.,* vol. 6, (1967), p. 82; *I.L.M.,* vol. 7 (1968), p. 571.

immediate withdrawal.[67] Following a request by the United Kingdom, E.C. members, Australia, New Zealand and Canada adopted trade sanctions. These included a temporary prohibition on all imports of Argentinean products, which ran contrary to article XI:1 and possibly article III of the GATT. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the GATT.[68] The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[69] for which security exceptions of GATT did not apply.

- *USA - South Africa (1986).* When in 1985, the South African government declared a state of emergency in large parts of the country, the UN Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[70] Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on US territory.[71] This immediate suspension was contrary to the terms of the 1947 US-South African Aviation Agreement[72] and was justified as a measure which should encourage the South African government "to adopt measures leading towards the establishment of a non-racial democracy".[73]

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[67] SC res. 502 (1982), 3 April 1982.

[68] Western States' reliance on this provision was disputed by other GATT members, cf. Communiqué of western countries, GATT doc. L. 5319/Rev.1 and the statements by Spain and Brasil, GATT doc. C/M/157, pp. 5-6. For an analysis see H. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Berlin, Springer, 1996), pp. 328-34.

[69] The treaties are reproduced in *O.J.E.C.* 1979 L 298, p.2; *O.J.E.C.*, 1980 L 275, p. 14.

[70] SC res. 569 (1985), 26 July 1985. For further references see L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, L.D.G.J., 1990), p. 165.

[71] For the text of this provision see *I.L.M.*, vol. 26 (1987), p. 79, (s. 306).

[72] *U.N.T.S.*, vol. 66, p. 233, art. VI.

[73] For the implementation order, see *I.L.M.*, vol. 26 (1987), p. 105.

- *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The UN Security Council immediately condemned the invasion. E.C. member States and the United States adopted trade embargos and decided to freeze Iraqi assets.[74] This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.
- C*ollective measures against Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[75] For a number of countries, such as Germany, France and the United Kingdom, the latter measure implied the breach of bilateral aviation agreements.[76] Because of doubts about the legitimacy of the action, the British government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist on the 12 months notice which would normally apply."[77] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[78]

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

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[74] See e.g. President Bush's Executive Orders of 2 August 1990, reproduced in *A.J.I.L.*, vol. 84 (1990), p. 903.

[75] Common positions of 7 May & 29 June 1998, *O.J.E.C.* 1998, L 143 (p. 1) and L 190 (p. 3); implemented through EC Regulations 1295/98 (L 178, p. 33) & 1901/98 (L 248, p. 1).

[76] See e.g. U.K.T.S. 1960, No. 10; R.T.A.F. 1967, No. 69.

[77] See *B.Y.I.L.*, vol. 69 (1998), pp. 580-1; *B.Y.I.L.*, vol. 70 (1999), pp. 555-6.

[78] Statement of the Government of the Federal Republic of Yugoslavia on the Suspension of Flights of Yugoslav Airlines, 10 October 1999: S/1999/216.

- *Netherlands - Surinam (1982).* In 1980, a military government seized power in Surinam. In response to a crackdown by the new government on opposition movements in December 1982, the Dutch government suspended a bilateral treaty on development assistance under which Surinam was entitled to financial subsidies.[79] While the treaty itself did not contain any suspension or termination clauses, the Dutch government stated that the human rights violations in Surinam constituted a fundamental change of circumstances which gave rise to a right of suspension.[80]
- *E.C. Member States - Yugoslavia (1991).* In the autumn of 1991, in response to resumption of fighting within Yugoslavia, EC members suspended and later denounced the 1983 Co-operation Agreement with Yugoslavia.[81] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in Resolution 713 of 25 September 1991. The reaction was incompatible with the terms of the Co-operation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, EC member States explicitly mentioned the threat to peace and security in the region. But as in the case of Surinam, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[82]

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered "injured States" in the sense of article 42. It should be noted that in those cases

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[79] *Tractatenblad* 1975, No. 140. See Lindemann, "Die Auswirkungen der Menschenrechtsverletzungen auf die Vertragsbeziehungen zwischen den Niederlanden und Surinam", *Z.a.ö.R.V.*, vol. 44 (1984), at pp. 68-69.

[80] P. Siekmann, "Netherlands State Practice for the Parliamentary Year 1982-1983", *Netherlands Yearbook of International Law*, vol. 15 (1984), p. 321.

[81] *O.J.E.C.* 1983 L 41, p. 1. See *O.J.E.C.* 1991 L 315, p. 1, for the suspension, and L 325, p. 23, for the denunciation.

[82] See also the decision of the European Court of Justice: Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] E.C.R. I-3655, at pp. 3706–3708, paras. 53-59.

where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.[83]

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognised entitlement of States referred to in article 48 to take countermeasures in the collective interest; such practice as exists is unclear, and may be explained in other ways. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead Chapter II includes a savings clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the Chapter on countermeasures does not prejudice the right of any State, entitled under article 48(1) to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interests of the beneficiaries. The Article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position on the lawfulness or otherwise of measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

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[83] Cf. *Military and Paramilitary Activities* where the International Court noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, *I.C.J. Reports 1986*, p. 14, at p. 105, para. 199.