

Document:-

**A/CN.4/440 and Add.1**

**Third report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur**

Topic:

**State responsibility**

Extract from the Yearbook of the International Law Commission:-

**1991, vol. II(1)**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

Copyright © United Nations

# STATE RESPONSIBILITY

[Agenda item 2]

## DOCUMENT A/CN.4/440 and Add.1

### Third report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

[Original: English]

[19 July 1991]

## CONTENTS

	<i>Page</i>
<i>Note</i> .....	3
Works cited .....	3
	<i>Paragraphs</i>
INTRODUCTION .....	1-122 13
<i>Chapter</i>	
I. KINDS OF MEASURES TO BE CONSIDERED .....	8-36 15
A. Self-defence .....	9-12 15
B. Sanctions .....	13-15 17
C. Retortion .....	16-19 19
D. Reprisals .....	20-25 20
E. Countermeasures .....	26-27 21
F. Reciprocal measures .....	28-32 22
G. <i>Inadimplenti non est adimplendum</i> . Suspension and termination of treaties .....	33-35 24
H. Subject-matter of the following chapters .....	36 25
II. AN INTERNATIONALLY WRONGFUL ACT AS A PRECONDITION .....	37-38 26
III. FUNCTIONS AND PURPOSES OF MEASURES .....	39-45 27
IV. THE ISSUE OF A PRIOR CLAIM FOR REPARATION .....	46-51 30
V. THE IMPACT OF DISPUTE SETTLEMENT OBLIGATIONS .....	52-62 32
VI. THE PROBLEM OF PROPORTIONALITY .....	63-68 37
VII. THE REGIME OF SUSPENSION AND TERMINATION OF TREATIES AS COUNTERMEASURES .....	69-83 41
VIII. THE ISSUE OF SO-CALLED SELF-CONTAINED REGIMES .....	84-88 46
IX. THE PROBLEM OF DIFFERENTLY INJURED STATES .....	89-95 48
X. SUBSTANTIVE LIMITATIONS ISSUES .....	96-122 52
A. The prohibition of the use of force .....	97-102 52
B. Respect for human rights and other humanitarian values .....	103-113 58
C. Inviolability of specially protected persons .....	114-117 62
D. The relevance of <i>jus cogens</i> and <i>erga omnes</i> obligations .....	118-122 102

## NOTE

### *Multilateral conventions cited in the present report*

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)  
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)  
International Covenant on Civil and Political Rights (New York, 16 December 1966)  
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)

### Source

United Nations, *Treaty Series*, vol. 75, p. 31.  
Ibid., vol. 993, p. 3.  
Ibid., vol. 999, p. 171.  
Ibid., vol. 1155, p. 331.

## WORKS CITED

### A

AGO, R.  
“Le délit international”, *Recueil des cours de l’Académie de droit international de La Haye, 1939-11*, Paris, Sirey, 1947, vol. 68.  
AKEHURST, M.  
“Reprisals by third States”, *British Year Book of International Law, 1970* (London), vol. 44.  
*A Modern Introduction to International Law*, London, Allen and Unwin, 4th ed., 1982.  
ALLAND, D.  
“International responsibility and sanctions: self-defence and counter-measures in the ILC codification of rules governing international responsibility”, *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma, eds., New York, Oceana Publications, 1987.  
ANZILOTTI, D.  
*Teoria generale della responsabilità dello Stato nel diritto internazionale*, Florence, Lumachi, 1902, part 1.  
*Corso di diritto internazionale*, Rome, Athenaeum, 1915 and 3rd ed., 1928.  
ARANGIO-RUIZ, G.  
“The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations”, *Collected Courses of The Hague Academy of International Law, 1972-III*, Leiden, Sijthoff, 1974, vol. 137.  
“Human rights and non-intervention in the Helsinki Final Act”, *Collected Courses of The Hague Academy of International Law, 1977-IV*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1980, vol. 157.

### B

BARSOTTI, R.  
“Armed reprisals”, *The Current Legal Regulation of the Use of Force*, Dordrecht, Nijhoff, 1986.  
BEIRLAEN, A.

“Economic coercion and justifying circumstances”, *Belgian Review of International Law* (Brussels), vol. XVIII, 1984-1985.

BLUM, Y.

“Economic boycotts in international law”, *Conference on Transnational Economic Boycotts and Coercion, 19-20 February*

1976, *University of Texas Law School*, R. M. Mersky, ed., Dobbs Ferry (N.Y.), Oceana Publications, 1978, vol. I.

BOISSON DE CHAZOURNES, L.

*Les contre-mesures dans les relations internationales économiques* (thesis presented to Geneva University in 1990, subsequently published by Pedone, Paris in 1993).

BORCHARD, E.

“Reprisals on private property”, *American Journal of International Law*, Washington (D.C.), vol. 30, 1936.

BOURQUIN, M.

“Règles générales du droit de la paix”, *Recueil des cours de l'Académie de droit international de La Haye, 1931-1*, Paris, Sirey, 1932, vol. 35.

BOWETT, D. W.

*Self-defence in International Law*, Manchester, Manchester University Press, 1958.

“Reprisals involving recourse to armed force”, *American Journal of International Law*, Washington (D.C.), vol. 66, No. 1, January 1972.

“Economic coercion and reprisals by States”, *Virginia Journal of International Law*, Charlottesville (Va.), vol. 13, No. 1, 1972.

“International law and economic coercion”, *Virginia Journal of International Law*, Charlottesville (Va.), vol. 16, No. 2, 1976.

“The use of force for the protection of nationals abroad”, *The Current Legal Regulation of the Use of Force*, A. Cassese, ed., Dordrecht, Nijhoff, 1986.

“Treaties and State responsibility”, *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*, Paris, Pedone, 1991.

BROWNLIE, I.

*International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963.

*System of the Law of Nations: State Responsibility*. Oxford, Clarendon Press, 1983, part I.

## C

CAHIER, P.

*Le droit diplomatique contemporain*, Geneva, Droz, 1962.

CAPOTORTI, F.

“L’extinction et la suspension des traités”, *Collected Courses of The Hague Academy of International Law, 1971-111*, Leiden, Sijthoff, 1972, vol. 134.

CASSESE, A.

*Il diritto internazionale nel mondo contemporaneo*, Bologna, Mulino, 1984.

Commentaire relatif à l’Article 51 de la Charte, *La Charte des Nations Unies*, 2nd ed. rev. and enl., J. P. Cot and A. Pellet, eds., Paris, Economica, 1990.

CAVAGLIERI, A.

“Règles générales du droit de la paix”, *Recueil des cours de l'Académie de droit international de La Haye, 1929-1*, Paris, Hachette, 1930, vol. 26.

ČEPELKA, C.

*Les conséquences juridiques du délit en droit international contemporain*, Prague, Karlova University, 1965.

COLBERT, E. S.

*Retaliation in International Law*, New York, King's Crown Press, 1948.

COMBACAU, J.

“The exception of self-defence in United Nations practice”, *The Current Legal Regulation of the Use of Force*, A. Cassese, ed., Dordrecht, Nijhoff, 1986.

“Sanctions”, *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1986, vol. 9.

CONFORTI, B.

*Diritto internazionale*, 3rd ed., Naples, Editoriale Scientifica, 1987.

## D

DE GUTTRY, A.

*Le rappresaglie non comportanti la coercizione militare nel diritto internazionale*, Milan, Giuffrè, 1985.

DELIVANIS, J.

*La lègitime défense en droit international public moderne: Le droit international face à ses limites*, Paris, Librairie générale de droit et de jurisprudence, 1971.

DINSTEIN, Y.

*War, Aggression and Self-defence*, Cambridge, Grotius, 1988.

DOMINICÉ, C.

“Représailles et droit diplomatique”, *Recht als Prozess und Gefüge, Festschrift für Hans Huber*, Bern, 1981.

“Observations sur les droits de l'État victime d'un fait internationalement illicite”, *Droit international 2*, Paris, Pedone, 1982.

DUMBAULD, E.

*Interim Measures of Protection in International Controversies*, The Hague, Nijhoff, 1932.

DUPUY, P. M.

“Action publique et crime international de l'État: À propos de l'article 19 du projet de la Commission du droit international sur la responsabilité des États”, *Annuaire français de droit international*, 1979 (Paris), vol. 25, 1979.

“Observations sur la pratique récente des ‘sanctions’ de l'illicite”, *Revue générale de droit international public* (Paris), vol. 87, No. 3, 1983.

“Le fait générateur de la responsabilité internationale des “États”, *Collected Courses of The Hague Academy of International Law, 1984-V*, Dordrecht, Nijhoff, 1986, vol. 188.

## E

ELAGAB, O. Y.

*The Legality of Non-forcible Counter-Measures in International Law*, Oxford, Clarendon Press, 1988.

## F

FALK, R. A.

“The Beirut raid and the international law of retaliation”, *American Journal of International Law* (Washington, D.C.), vol. 63, No. 3, July 1969.

FAUCHILLE, P.

*Traité de droit international public*, Paris, Rousseau, 1926, vol. I, part 3.

FENWICK, C. G.

*International Law*, 4th ed., New York, Appleton-Century-Crofts, 1965.

FISLER DAMROSCH, L.

“Retaliation or arbitration or both? The 1978 United States-France aviation dispute”,  
*American Journal of International Law* (Washington, D.C.), vol. 74, No. 4,  
October 1980.

FORLATI PICCHIO, M. L.

*La sanzione nel diritto internazionale*, Padua, CEDAM, 1974.

## G

GAJA, G.

“*Jus cogens* beyond the Vienna Convention”, *Collected Courses of The Hague Academy of International Law, 1981-111*, The Hague, Nijhoff, 1982, vol. 172.

GIANELLI, A.

*Adempimenti preventivi al ricorso a misure di reazione all'illecito internazionale*,  
Rome University, 1990.

GIULIANO, M.

*Diritto internazionale*, vol. I, *La società internazionale e il diritto*, 2nd ed. with T.  
Scovazzi and T. Treves, Milan, Giuffrè, 1983.

GRAEFRATH, B.

“Responsibility and damages caused: relationship between responsibility and  
damages”, *Collected Courses of The Hague Academy of International Law,*  
*1984-11*, The Hague, Nijhoff, 1985, vol. 185.

GRAEFRATH, B. and P. A. STEINIGER

“Kodifikation der völkerrechtlichen Verantwortlichkeit”, *Neue Justiz*, Berlin, No. 8,  
1973.

GROTIUS, H.

*De jure belli ac pacis, libri tres* [1646], *The Classics of International Law*, vol. I,  
Oxford, Clarendon Press, 1913.

GUGGENHEIM, P.

*Traité de droit international public*, Geneva, Georg, 1954. vol. II, and 2nd ed. rev.  
and enl., Geneva, Georg, 1967, vol. I.

## H

HALL, W. E.

*A Treatise on International Law*, 8th ed., Oxford, Clarendon Press. 1924.

HEILBORN, P.

*Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen*, Berlin,  
Springer, 1896.

HIGGINS, R.

“The taking of property by the State: recent developments in international law”,  
*Collected Courses of The Hague Academy of International Law, 1982-111*,  
The Hague, Nijhoff, 1983, vol. 176.

HUTCHINSON, D. N.

“Solidarity and breaches of multilateral treaties”, *British Year Book of International Law, 1988* (Oxford), vol. 59.

## J

JIMÉNEZ DE ARÉCHAGA, E.

“International law in the past third of a century”, *Collected Courses of The Hague Academy of International Law, 1978-1*, Alphen aan den Rijn, Sitjhoff & Nordhoff, 1979, vol. 159.

## K

KALSHOVEN, F.

*Belligerent Reprisals*, Leiden, Sijthoff, 1971.

KAPOOR, S. K.

*A Textbook of International Law*, Allahabad, 1985.

KELSEN, H.

“Unrecht und Unrechtsfolge im Völkerrecht”, *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4, October 1932.

*Principles of International Law*, 2nd ed. rev. and ed. by R. W. Tucker, New York, Holt, Rinehart and Winston, 1966.

KUNZ, J.

“Sanctions in international law”, *American Journal of International Law* (Washington, D.C.), vol. 54, No. 2, April 1960.

## L

LA BRIÈRE, Y. DE

“Évolution de la doctrine et de la pratique en matière de représailles”, *Recueil des cours de l'Académie de droit international de La Haye, 1928-11*, Paris, Hachette, 1929, vol. 22.

LAMBERTI ZANARDI, P.

*La legittima difesa nel diritto internazionale*, Milan, Giuffrè, 1972.

LATTANZI, F.

*Garanzie dei diritti dell'uomo nel diritto internazionale generale*, Milan, Giuffrè, 1983.

“Sanzioni internazionali”, *Enciclopedia del diritto*, Milan, 1989, vol. XLIII.

LAUTERPACHT, H.

*Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, London, Longmans, Green, 1927.

LEBEN, C.

“Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale”, *Annuaire français de droit international*, 1982 (Paris), vol. XXVIII.

LEVENFELD, B.

“Israeli counter-*fedayeen* tactics in Lebanon: self-defence and reprisal under modern international law”, *Columbia Journal of Transnational Law* (New York), vol. 21, No. 1, 1982.

LILLICH, R. B.

“The status of economic coercion under international law: United Nations norms”, *Conference on Transnational Economic Boycotts and Coercion, 19-20 February 1976, University of Texas Law School*, R. M. Mersky, ed., Dobbs Ferry (N.Y.), Oceana Publications, 1978, vol. 1.

“Forcible self-help under international law”, *United States Naval War College—International Law Studies*, vol. 62, *Readings in International Law from the Naval War College Review 1947-1977*, vol. II: *The Use of Force, Human Rights and General International Legal Issues*, R. B. Lillich and J. N. Moore, eds., Newport (R.I.), Naval War College Press, 1980.

## M

MALANCZUK, P.

“Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg), vol. 45, 1985.

“Countermeasures and self-defence as circumstances precluding wrongfulness in the International Law Commission’s draft articles on State responsibility”, *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma, eds., New York, Oceana Publications, 1987.

MCDUGAL, M. S. and F. P. FELICIANO

“Legal regulation of resort to international coercion: aggression and self-defense in policy perspective”, *The Yale Law Journal* (New Haven, Conn.), vol. 68, No. 6, May 1959.

*Law and Minimum World Public Order: The Legal Regulation of International Coercion*, New Haven and London, Yale University Press, 1961.

MCNAIR, A. D.

*The Law of Treaties*, 2nd ed., Oxford, Clarendon Press, 1961.

MERON, T.

*Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989.

MORELLI, G.

*Nozioni di diritto internazionale*, 7th ed., Padua, CEDAM, 1967.

MORGENTHAU, H.

“Théorie des sanctions internationales”, *Revue de droit international et de législation comparée* (The Hague and Paris), 3rd series, vol. XVI, 1935.

## O

OBRADOVIC, M.

“Prohibition of the threat or use of force”, *Principles of International Law Concerning Friendly Relations and Co-operation*, M. Sahovic, ed., Belgrade, Institute of International Politics and Economics and Dobbs Ferry (N.Y.), Oceana Publications, 1972.

OPPENHEIM, L.

*International Law: A Treatise*, 7th ed., H. Lauterpacht, ed., vol. II, and 8th ed., vol. I, London, Longmans, Green, 1955.

## P

PALMISANO, G.

“Sulla decisione arbitrale relativa alla seconda fase del caso ‘Rainbow Warrior’”, *Rivista di diritto internazionale* (Milan), vol. 73, No. 4, 1990.

PANIAGUA REDONDO, R.

“Las represalias en el derecho internacional: Perspectiva histórica”, *Revista Jurídica de Catalunya, 1984* (Barcelona), vol. 1.

PARTSCH, K. J.

“Self-preservation”, *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1982, vol. 4.

“Reprisals” and “Retorsion”, *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1986, vol. 9.



- PAUST, J. J. and A. P. BLAUSTEIN  
 “The Arab oil weapon—a threat to international peace”, *American Journal of International Law* (Washington, D.C.), vol. 68, No. 3, July 1974.
- PHILLIMORE, R.  
*Commentaries upon International Law*, vol. III, 3rd ed., London, Butterworths, 1885.
- PISILLO MAZZESCHI, R.  
*Risoluzione e sospensione dei trattati per inadempimento*, Milan, Giuffrè, 1984.  
 “Termination and suspension of treaties for breach in the ILC works on State responsibility”, *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma, eds., New York, Oceana Publications, 1987.
- POLITIS, N.  
 “Le régime des représailles en temps de paix”, *Annuaire de l’Institut de droit international*, 1934 (Paris).
- PUEYO LOSA, J.  
 “El derecho a las represalias en tiempo de paz: condiciones de ejercicio”, *Revista Española de Derecho Internacional* (Madrid), vol. XL, No. 1, January-June 1988.

## R

- REISMAN, W. M.  
*Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, New Haven and London, Yale University Press, 1971.
- REITZER, L.  
*La réparation comme conséquence de l’acte illicite en droit international*, Paris, Sirey, 1938.
- REUTER, P. and J. COMBACAU  
*Institutions et relations Internationales*, Paris, Presses universitaires de France, 1980.
- REUTER, P.  
*Droit international public*, 6th ed., Paris, Presses universitaires de France, 1983.
- RÖLING, B. V. A.  
 “Aspects of the case concerning United States diplomats and consular staff in Tehran”, *Netherlands Yearbook of International Law* (Alphen aan den Rijn), vol. XI, 1980.
- RONZITTI, N.  
*Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, Nijhoff, 1985.
- ROSENNE, S.  
 “Vienna Convention on the Law of Treaties”, *Encyclopedia of Public-International Law*, Amsterdam, North-Holland, 1984, vol. 7.  
*Breach of Treaty*, Cambridge, Grotius, 1985.
- ROUGIER, A.  
 “La théorie de l’intervention d’humanité”, *Revue générale de droit international public* (Paris), vol. XVII, 1910.

## S

- SACHARIEW, K.  
 “State responsibility for multilateral treaty violations: identifying the ‘injured State’ and its legal status”, *Netherlands International Law Review* (Dordrecht), vol. XXXV, No. 3, 1988.

- SALMON, J.  
 “Les circonstances excluant l’illicéité”, *Responsabilité internationale*, Paris, Pedone, 1987-1988.
- SCHACHTER, O.  
 “Enforcement of international judicial and arbitral decisions”, *American Journal of International Law* (Washington, D.C.), vol. 54, No. 1, January 1960.  
 “Self-help in international law: U.S. action in the Iranian hostages crisis”, *Journal of International Affairs* (New York), vol. 37, No. 2, 1983-1984.  
 “International law in theory and practice—General course in public international law”, *Collected Courses of The Hague Academy of International Law, 1982-V*, Dordrecht, Nijhoff, 1985, vol. 178.
- SCHINDLER, D.  
 Le principe de non-intervention dans les guerres civiles”, *Annuaire de l’Institut de droit international, 1973* (Basel), vol. 55.
- SCHOEN, P.  
 “Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen”, *Zeitschrift für Völkerrecht* (Breslau), Supplement No. 2 to vol. X, 1917.
- SCHWEBEL, S. M.  
 “Aggression, intervention and self-defence in modern international law”, *Collected Courses of The Hague Academy of International Law, 1972-11*, Leiden, Sijthoff, 1973, vol. 136.
- SEIDL-HOHENVELDERN, I.  
 “Reprisals and the taking of private property”, *Netherlands International Law Review, De Conflictu Legum, Essays presented to Roeland Duco Kollewyn and Johannes Offerhaus* (Leiden), vol. IX, No. 4 (Special issue), October 1962.  
 “The United Nations and economic coercion”, *Belgian Review of International Law* (Brussels), vol. XVIII, 1984-1985.  
 “International economic law”, *Collected Courses of The Hague Academy of International Law, 1986-III*, Dordrecht, Nijhoff, 1987, vol. 198.
- SERENI, A. P.  
*Diritto internazionale*, vol. III, *Relatione internazionale*, Milan, Giuffrè, 1962.
- SICILIANOS, L.-A.  
*Les réactions décentralisées à l’illicite: Des contre-mesures à la légitime défense*, Paris, Librairie générale de droit et de jurisprudence, 1990.
- SIMMA, B.  
 “Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general international law”, *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. 20, 1970.  
 “Reciprocity”, *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1984, vol. 7.  
 “Self-contained regimes”, *Netherlands Yearbook of International Law* (The Hague), vol. XVI, 1985.
- SINHA, B. P.  
*Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*, The Hague, Nijhoff, 1966.
- SKUBISZEWSKI, K.  
 “Use of force by States. Collective security. Law of war and neutrality”, *Manual of Public International Law*, M. Sørensen, ed., London, Macmillan, 1968.

SØRENSEN, M.

“Eigene Rechtsordnungen—Skizze zu einigen systemanalytischen Betrachtungen über ein Problem der internationalen Organisation”, *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, Festschrift zum 70. Geburtstag von Hans Kutscher*, Baden-Baden, Nomos, 1981.

SPINEDI, M.

“International crimes of State: The legislative history”, *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, J. Weiler, A. Cassese and M. Spinedi, eds., Berlin-New York, de Gruyter, 1989.

STONE, J.

*Aggression and World Order: A Critique of United Nations Theories of Aggression*, London, Stevens, 1958.

STRUPP, K.

“Das völkerrechtliche Delikt”, *Handbuch des Völkerrechts*, comp. by F. Stier-Somlo, Stuttgart, Kohlhammer, 1920, vol. III, part I.

SUR, S.

“L’application du droit international”, *Droit international public*, Paris, Montchrestien, 1975.

## T

TAOKA, R.

*The Right of Self-defence in International Law*, Osaka, Osaka University of Economics and Law, 1978.

TAULBEE, J. L. and J. ANDERSON

“Reprisal *redux*”, *Case Western Reserve Journal of International Law* (Cleveland, Ohio), vol. 16, No. 3, 1984.

THIERRY, H. and others

*Droit international public*, Paris, Montchrestien, 1986.

TOMUSCHAT, C.

“Repressalie und Retorsion: Zu einigen Aspekten ihrer innerstaatlichen Durchführung”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 33, No. 1, March 1973.

TUCKER, R. W.

“Reprisals and self-defence: the customary law”, *American Journal of International Law* (Washington, D.C.), vol. 66, No. 3, July 1972.

TUNKIN, G.

*Droit international public: Problèmes théoriques*, Paris, Pedone, 1965.

TWISS, T.

*The Law of Nations (considered as Independent Political Communities)*, rev. ed., Oxford, Clarendon Press, 1884.

## V

VATTEL, E. DE

*The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, London, 1797, English translation.

VENEZIA, J.-C.

“La notion de représailles en droit international public”, *Revue générale de droit international public* (Paris), vol. 64, No. 3, July-September 1960.

VERDROSS, A.

*Völkerrecht*, 5th ed., Vienna, Springer, 1964.

VIRALLY, M.

“Le principe de réciprocité dans le droit international contemporain”, *Recueil des cours de l’Académie de droit international de La Haye, 1967-III* (Leiden), vol. 122.

Commentaire du paragraphe 4 de l’Article 2 de la Charte, *La Charte des Nations Unies*, 2nd ed. rev. and enl., J. P. Cot and A. Pellet, eds., Paris, Economica, 1990.

## W

WALDOCK, C. H.

“The regulation of the use of force by individual States in international law”, *Recueil des cours de l’Académie de droit international de La Haye. 1952-II*, Paris, Sirey, 1953, vol. 81.

WEBER, H.

“Unfriendly act”, *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1982, vol. 4.

WENGLER, W.

*Völkerrecht*, Berlin, Springer, 1964, vol. I.

“Public international law: paradoxes of a legal order”, *Collected Courses of The Hague Academy of International Law, 1977-V*, The Hague, Nijhoff, 1982, vol. 158.

## Z

ZEMANEK, K.

“Responsibility of States: General principles”, *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1987, vol. 10.

“The unilateral enforcement of international obligations”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol.47, 1987.

“La responsabilité des États pour faits internationalement illicites, ainsi que pour faits internationalement licites”, *Responsabilité internationale*, Paris, Pedone, 1987-1988.

ZOLLER, E.

*Peacetime Unilateral Remedies: An Analysis of Countermeasures*, New York, Transnational Publishers, 1984.

“Quelques réflexions sur les contre-mesures en droit international public”, *Droit et libertés à la fin du XX<sup>e</sup> siècle: Études offertes à Claude-Albert Colliard*, Paris, Pedone, 1984.

ŽOUREK, J.

“La notion de légitime défense en droit international”, *Annuaire de l’Institut de droit international, 1975* (Basel), vol. 56.

“La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée?”. *Mélanges offerts à Henri Rolin*, Paris, Pedone, 1964.

## Introduction

1. The preliminary and second reports of the Special Rapporteur on State responsibility submitted in 1988<sup>1</sup> and 1989<sup>2</sup> respectively, dealt with the substantive consequences of an internationally wrongful act, namely cessation (art. 6), restitution in kind (art. 7), reparation by equivalent (arts. 8 and 9), and satisfaction and guarantees of non-repetition (art. 10). The present report deals with what are referred to as the “instrumental” consequences of an internationally wrongful act. Whatever the merits of that distinction, which had been adopted solely for the purposes of a more orderly discussion, the present report addresses itself to the legal issues arising in connection with the measures that may be taken by the injured State or States against a wrongdoing State. Like the two previous reports, this report will deal, in principle, with the measures in question as applied or applicable in the case of delicts, namely of ordinary wrongful acts. It may be necessary to refer, of course, to issues which are more or less analogous and arise in connection with international crimes of States. However, in conformity with the outline submitted in the preliminary report,<sup>3</sup> discussion of these issues is to be kept for the appropriate, next stage.

2. The task facing the Commission with regard to this part of the topic differs quite considerably, however, from the one it has undertaken so far with regard to the substantive consequences of an internationally wrongful act, as it has defined them. Two main features characterize, *de lege lata* and *de lege ferenda*, the regime of instrumental consequences (countermeasures). The first is a drastic reduction, if not a total absence, of any similarities with the regime of responsibility within national legal systems which would make it relatively easy to transplant into international law, in the area of substantive consequences, what an eminent authority, more than half a century ago, called private law sources and analogies.<sup>4</sup> With regard to the major substantive consequences (with the only exception, to some extent, of satisfaction) the international “legislator” faces legal problems so similar to those that have basically been settled for centuries in national law, that it is possible to envisage the essence of the legal relationship between the injured and the wrongdoing State in terms not dissimilar from those of homologous institutions of national systems. Thanks to such obvious analogies, the Commission had little difficulty making basic choices with a high degree of confidence that they were ultimately sound, however numerous the issues which lend themselves to alternative solutions. In contrast, when it comes to the regime of the instrumental consequences, a comparative study of “corresponding” problems of national law—namely of the rules governing the ways and means to ensure the cessation of wrongful conduct and the making good of the physical and moral injuries caused thereby—leads to the very opposite conclusion. Whether in the practice of international law or in legal writings in this area, hardly any similarities can be found.

3. The second main feature is that in no other area in the “society of States” is the lack of an adequate institutional framework for present or conceivable future regulation of State conduct so keenly felt. Two aspects in particular of the sovereign

<sup>1</sup> *Yearbook ... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1.

<sup>2</sup> *Yearbook ... 1989*, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1.

<sup>3</sup> *Yearbook ... 1988*, vol. II (Part One) (see footnote 1 above), paras. 6-20.

<sup>4</sup> Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*.

equality of States—to the principle of which all are committed by the Charter of the United Nations—come to mind. These are the propensity of States, large, medium or small, to refuse to accept any higher authority, and the contrast between the equality of States in law and their inequality in fact, which tempts stronger States to impose their economic, if not military, power despite the principle of equality. It follows that, except in rare and circumscribed cases, the model offered by the remedies to wrongdoing available in national societies is of little avail to the international “legislator”. To put it bluntly, using a very old image, at no time is the Emperor’s nakedness so apparent as when we move from what are rather satisfactory rules on the substantive consequences of State responsibility to the study of the available ways and means of redress. The fact that this is obvious to the point of appearing trite does not diminish in any measure the difficulties to be faced at this juncture.

4. Indeed, practice in the matter is abundant but increasingly varied in quality and often very hard to assess. Alongside the bulk of cases of classic reprisals taken within a strictly bilateral framework, the conformity of which with what is presumed to be the best interpretation of the old norms and the rules of the Charter of the United Nations is often dubious, two major developments are to be found. On the one hand, there is the timid and not very successful attempt at institutionalization of impartial ways and means at the worldwide or regional levels. On the other hand, there are cases where measures are taken on a partially collective basis by groups of States coming together for the occasion to take concerted action against the “wrongdoer” of the day, for the most part outside of any worldwide institutional framework. Such practices, while following in some sense the classic bilateral “injured State—author State” pattern, do not seem to offer the essential guarantees of regularity and objectivity, whatever the merits of each particular case. At times, it is difficult to identify the precise content of some of the general rules involved in certain of these unilateral practices. Uncertainty is manifest in the doctrine of the so-called self-contained regimes, and it is hard to identify future trends in the development of the law, as well as the avenues the Commission could prudently explore in seeking to improve it and make proposals thereon to the General Assembly, and ultimately to States. One of the crucial aspects of the Commission’s task appears to be to devise ways and means which, by emphasizing the best of *lex lata* or careful progressive development, could reduce the impact of the great inequality revealed among States in the exercise of their *faculté* (and possibly obligation) to apply countermeasures, which is such a major cause of concern. It was argued in the second report<sup>5</sup>—though not without challenge—that the secondary rules on cessation and reparation are in a sense relatively more “objective” than many primary rules. In fact, they operate equally to the advantage or disadvantage of all States, because any State, weak or strong, rich or poor, can find itself in the position of injured State or of wrongdoer. While that may apply to substantive consequences however, it could certainly not be said of countermeasures. In the absence of adequate third-party settlement commitments, the powerful or rich countries can the more easily have the advantage over the weak or needy when it comes to exercising the means of redress in question.

5. Whether the Commission will be able to do more in that respect in the future remains to be seen. The elimination of the main source of ideological conflict and division is certainly a positive factor: though thoroughly novel, it is not free of effects which give cause for concern. At the same time, other signs have recently come to the

---

<sup>5</sup> *Yearbook ... 1989*. vol. II (Part One) (see footnote 2 above), para. 33.

forefront which are still rather difficult to interpret. One of the most recent is the evocation of the hazy and ambiguous concept of a “new international order”.<sup>6</sup>

6. The present report has been prepared in the light of the peculiarities of the subject-matter and of the perplexities and preoccupations which they evoke, mainly in the area of crimes. But is there such a clear and firm demarcation line between crimes and the most serious delicts? The main purpose of the present report is to identify problems, opinions and alternatives, and to elicit comment and criticism within the Commission and elsewhere on the basis of which more considered suggestions and proposals could be submitted.

7. In view of the wide variety of terms used to describe the measures discussed in the present report and the problems they pose, the substantive chapters have been prefaced by a preliminary chapter on terminology. This will reduce the ambiguities that would arise from the variety of meanings attached to those terms in the literature as well as in practice.

## CHAPTER I

### I. KINDS OF MEASURES TO BE CONSIDERED

8. International practice indicates a variety of measures to which States resort in order to secure fulfilment of the obligations deriving from, or otherwise react to, the commission of an internationally wrongful act. Practice and legal writings classify such measures in separate categories according to factual and juridical affinities. Thus, a variety of terms are to be found, some referring to one and the same concept, while others overlap in many ways and are differently understood according to the stage of historical development and scholarship. The most widely used are self-defence (distinguished to a greater or lesser degree from the wider concept of self-help), sanctions, retortion, reprisals, reciprocity, counter-measures, termination and suspension of treaties, *inadimplenti non est adimplendum*. In English one also speaks generally of unilateral remedies; in French of *réactions décentralisées* as opposed, presumably, to *réactions centralisées*.

#### A. Self-defence

9. Self-defence is perhaps one of the terms most frequently used in practice and analysed in most detail in the literature,<sup>7</sup> mainly in the light of the official positions

---

<sup>6</sup> The grave crisis in connection with which the concept of a “new international order” was evoked has also brought about some interesting developments which have a bearing on State responsibility. See the report submitted by the Secretary-General of the United Nations pursuant to paragraph 19 of Security Council resolution 687 (1991) of 3 April 1991 (document S/22559).

<sup>7</sup> See, *inter alia*. Waldock, “The regulation of the use of force by individual States in international law”, *Recueil des cours...*, 1952-11, pp. 455-515; McDougal and Feliciano, “Legal regulation of resort to international coercion: Aggression and self-defence in policy perspective”, *Yale Law Journal* (May 1959), pp. 1057-1165; Brownlie, *International Law and the Use of Force by States*, pp. 214-308; Delivanis. *La légitime défense en droit international public: moderne: Le droit international face à ses limites*; Schwebel, “Aggression, intervention and self-defence in modern international law”. *Collected Courses...*, 1972-11, pp. 411-498; Lamberti Zanardi, *La legittima difesa nel diritto internazionale*; Žourek, “La notion de légitime défense en droit international”, *Annuaire de l’Institut de droit international*, 1975, pp. 1-69; Taoka, *The Right of Self-Defence in International Law*; Ago, Addendum to the eighth report on State responsibility, *Yearbook ... 1980*, vol. II (Part One), p. 13, document A/CN.4/318/Add.5-7, paras. 82-124; Cassese, commentary on Article 51 of the Charter, in

taken by States and of the *dicta* of international bodies. However, for the purposes of the instrumental consequences of international delicts, it does not seem necessary to deal in detail with all the complex legal problems involved in the notion of self-defence. Indeed, the Commission has taken a position on self-defence within the framework of article 34 of part 1 of the draft articles.<sup>8</sup> Whatever the present writer's personal view on the choices then made regarding self-defence as a circumstance precluding wrongfulness, it is considered preferable, at least for the time being, not to abandon the meaning adopted at that time.

10. From the commentary to article 34 it appears that self-defence has to be understood as “a reaction to... a specific kind of internationally wrongful act”,<sup>9</sup> namely as a unilateral armed reaction against an armed attack. Such a reaction would consist of a “form of armed self-help or self-protection”,<sup>10</sup> exceptionally permitted by the “international legal order” which nowadays “contemplate[s] a genuine and complete ban on the use of force” as “a defence against an armed attack by another subject in breach of the prohibition”.<sup>11</sup> In particular, the Commission, considering “that no codification taking place within the framework and under the auspices of the United Nations should be based on criteria which, from any standpoint whatsoever, do not fully accord with those underlying the Charter, especially when, as in the present case, the subject-matter concerns so sensitive a domain as the maintenance of international peace and security”,<sup>12</sup> concluded that the typical legal meaning of such a notion, for the purposes of the draft articles on State responsibility, can only be “to suspend or negate altogether, in the particular instance concerned, the duty to observe ... the general obligation to refrain from the use or threat of force in international relations”.<sup>13</sup> In this way the “Commission intends ... to remain faithful to the content and scope of the pertinent rules of the United Nations Charter and to take them as a basis in formulating” draft article 34.<sup>14</sup>

11. Even if the Commission did not want to take a stand “on the question of any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence”,<sup>15</sup> it is very likely that such an identity exists, as has been asserted by ICJ in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.<sup>16</sup> Just as general (customary) international law included a

---

*La Charte des Nations Unies*, pp. 771-794; Combacau, “The exception of self-defence in United Nations practice”, in *The Current Legal Regulation of the Use of Force*, pp. 9-38; Dinstein, *War, Aggression and Self-defence*; and Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, pp. 291-335.

<sup>8</sup> See the commentary to article 34 in *Yearbook ... 1980*, vol. II (Part Two), pp. 52-61. For the views of legal writers on the choices made by the Commission regarding self-defence, see Alland, “International responsibility and sanctions: Self-defence and countermeasures in the ILC codification of rules governing international responsibility”, *United Nations Codification of State Responsibility*, pp. 143 *et seq.*; and Malanczuk, “Countermeasures and self-defence as circumstances precluding wrongfulness in the International Law Commission's draft articles on State responsibility”, *ibid.*, pp. 197 *et seq.*

<sup>9</sup> See *Yearbook ... 1980*, vol. II (Part Two) (footnote 8 above), p. 53, para. (5).

<sup>10</sup> *Ibid.*, p. 54, para. (7).

<sup>11</sup> *Ibid.*, p. 55, para. (9).

<sup>12</sup> *Ibid.*, p. 59, para. (20).

<sup>13</sup> *Ibid.*, p. 60, para. (24).

<sup>14</sup> *Ibid.*, p. 59, para. (20).

<sup>15</sup> *Ibid.*

<sup>16</sup> *I.C.J. Reports 1986*, p. 14; see also pp. 102-106, paras. 193-201.



prohibition of force as broad as that embodied in Article 2, paragraph 4, of the Charter, so it also developed a regime of self-defence identical to the regime set forth in Article 51. As a consequence, there would probably be no room for any of those broader concepts of self-defence which are assumed to have survived the Charter (as inherent customary rights) on the basis of general international law, according to some scholars and to judge from some State practice.<sup>17</sup> Although, as will be demonstrated later, scholarship and practice based upon such a notion are certainly far from negligible, except for the few general remarks in paragraphs 98 and 99 below, their legal merits will be discussed only in connection with the consequences of international crimes, which will be dealt with at a later stage.

12. The more general concept of self-help—avoided so far by the Commission—would not be useful for the purposes of the present report. It could even be misleading. Of course, in a predominantly inorganic society, in which individual States and groups of States must place so much reliance on the unilateral protection of their rights, the concept of self-help ultimately characterizes the whole range of inter-State relations.<sup>18</sup> But the codification of State responsibility requires a more precise and discriminating terminology in order to stress the differences in legal regime among the various forms of reaction to a wrongful act and to distinguish clearly between the lawful and unlawful forms of such reactions, and their specific features.

## B. Sanctions

13. The concept of sanctions, already problematic in the general theory of law, is notoriously even more problematic in the literature and practice of international responsibility. Only one thing is clear, namely that it deals with an essentially relative notion which may be defined in a variety of ways. It is proposed, however, to leave aside the broader definitions according to which any one of the consequences of an internationally wrongful act, including not only the measures by which States may secure cessation or reparation but also the substantive right to obtain cessation and/or reparation, could be labelled as a sanction.

14. A relatively recent authoritative work identifies international sanctions with the “consequences of an [internationally] wrongful act, unfavourable to the offender, provided for or admitted under international law”. Within such a framework a “sanctioning action” would be “any conduct detrimental to the interests of the offending State designed to pursue reparatory, punitive, or possibly preventive purposes, which is either provided for or simply not prohibited by international law”.<sup>19</sup> Understood this way, sanctions would seem to encompass not only such measures as retortion and reprisals—including so-called reciprocal measures (see paras. 28-32 below)—but also self-defence. Other scholars, in recent analyses, submit

---

<sup>17</sup> On this point, see para. 100 below.

<sup>18</sup> On self-help, see Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen*. pp. 325, 334 and 371; Anzilotti, *Corso di diritto Internazionale*, vol. III. pp. 155 *et seq.*; Bowett, *Self-Defence in International Law*, p. 11; Verdross, *Völkerrecht*, p. 428; Forlati Picchio, *La sanzione nel diritto internazionale*, pp. 11 and 83 *et seq.* (and *passim*); Lamberti Zanardi, *op. cit.*, p. 15; Ago, Addendum to the eighth report... (see footnote 7 above), para. 95; and Partsch, “Self-preservation”. *Encyclopedia of Public International Law* (1982). pp. 217-220.

<sup>19</sup> Paraphrased from the original Italian. Forlati Picchio. *op. cit.*, p. 40. This work has been reviewed in French by Rousseau in RGDIP (Paris. 1978). pp. 557-558, in English by Ferrari Bravo in *Italian Yearbook of International Law*. vol. 1 (1975). pp. 377-379. and in German by Verdross in *Österreichische Zeitschrift für öffentliches Recht*, vol. 28(1977), pp. 374-375.

that the above definition is acceptable in so far as it does not extend the concept to actions taken in self-defence. Such actions would not really be sanctions for the same reasons that distinguish them from reprisals.<sup>20</sup>

15. A more specific, circumscribed meaning of sanctions seems, however, to prevail in contemporary legal scholarship<sup>21</sup> and to find some support in the work of the Commission itself. In particular, by using in draft article 30 of part 1<sup>22</sup> the terms “measures” and “counter-measures”, instead of the term “sanction” proposed by Ago, to describe the so-called “unilateral”, “horizontal” (State-to-State) forms of reaction to an unlawful act, the Commission reserves the term “sanction” for measures adopted by an international body. It referred notably to international measures adopted by such a body following a wrongful act “having serious consequences for the international community as a whole, in particular ... to the ... measures [adopted by the United Nations] under the system established by the Charter with a view to the maintenance of international peace and security”.<sup>23</sup> It is opined in this report that the rather low degree of “verticality” of the measures taken by international bodies might not really justify the abandonment of a concept which could still serve a useful purpose to describe the function of those strictly unilateral or “horizontal” State measures upon which the effectiveness of international law still so largely depends. Considering the very close relationship between the function of sanctions and the “effectiveness or even the existence of international law” and considering further the essentially inorganic structure of international society and the difficulty of distinguishing between “civil” and “penal” aspects of State responsibility, this concept, like that of reprisals, is still indispensable for the analytical study of international responsibility.<sup>24</sup> However, in line with the choice made by the Commission, it would be better to confine the term “sanctions” to the designation of measures taken by international bodies, except that when it comes to discussing the consequences of crimes, it might be worthwhile to see whether the term “sanctions” could be extended to measures which, although emanating from States collectively, would not qualify as measures taken by an international body.

### C. Retortion

16. According to most scholars, the term “retortion” would cover those reactions of a State to an unlawful, hostile act, which while they may be hostile *per se* are not

---

<sup>20</sup> Lattanzi, “Sanzioni internazionali”, in *Enciclopedia del diritto*, para. 2.

<sup>21</sup> De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale*, p. 36; Leben, “Les contre-mesures inter-étatiques et les réactions à l’illicite dans la société internationale”, *Annuaire français de droit international*, 1982, p. 19. Dupuy takes essentially the same line in “Observations sur la pratique récente des ‘sanctions’ de l’illicite”, RGDIP (1983), p. 517. By using this term to indicate measures adopted by a number of States, presumably in response to *erga omnes* violations. Dupuy seems to differentiate such measures from ordinary “horizontal” reprisals and to place them closer to the “vertical” measures (“sanctions”) provided for by international institutions. A similar approach is taken by Dominicé in his “Observations sur les droits de l’État victime d’un fait internationalement illicite”. *Droit international* 2, p. 33; and by the Commission in its debate on article 30 of part 1 of the draft articles (*Yearbook ... 1979*, vol. I, 1544th and 1545th meetings).

<sup>22</sup> See *Yearbook ... 1980*, vol. II (Part Two), p. 33.

<sup>23</sup> See *Yearbook ... 1979*, vol. II (Part Two), p. 121, para. (21); and Malanczuk, loc. cit., p. 206.

<sup>24</sup> See Combacau, “Sanctions”, in *Encyclopedia of Public International Law* (1986), pp. 337-341; and Partsch, “Reprisals” and “Retorsion”, *ibid.*, pp. 330-337.

unlawful.<sup>25</sup> The term is used in a slightly different sense by Politis,<sup>26</sup> Oppenheim,<sup>27</sup> Morelli,<sup>28</sup> Skubiszewski<sup>29</sup> and Paniagua Redondo,<sup>30</sup> who confine the term to unfriendly measures taken in response to equally unfriendly acts, thus excluding unfriendly measures taken in response to unlawful acts. The concept would thus exclude (and possibly make it difficult to classify systematically) any unfriendly measures taken by way of reaction to an unlawful act. For the purposes of the present study it is most practical to use the term “retortion” or “retaliation” to indicate hostile but lawful action in response to a prior internationally wrongful act.

17. In describing retortion some writers like to refer to the sphere of discretionary action of each State.<sup>31</sup> Others prefer to speak either of a sphere of non-regulated conduct of States or of international *comitas* of nations.<sup>32</sup> Yet others stress the existence in the habitual behaviour of States of a margin favourable to another State or its nationals.<sup>33</sup> Such a margin would encompass measures of retortion, that is, acts which deprive the allegedly responsible State of an advantage to which it had no proper right prior to the wrongful act.<sup>34</sup> In line with the prevailing legal scholarship, the former Special Rapporteur, Mr. Riphagen, includes the suspension of diplomatic relations among retortory measures. Since, in his opinion, no *de lege lata* obligation exists in this respect, the suspension of diplomatic relations is neither an unlawful act nor a reprisal. The taking of such a measure is always possible in response to an internationally wrongful act.<sup>35</sup>

18. Although acts of retortion belong *per se* to the sphere of permissible, lawful conduct, some authors wonder whether resort thereto is not subject to legal limitations. For instance, Schachter refers to the hypothesis where “an otherwise permissible action is taken for an illegal objective”.<sup>36</sup> De Guttry mentions the possible contradiction between acts of retortion which may endanger “international peace and security, and justice” and the obligation to settle disputes by peaceful means as provided for in Article 2, paragraph 3, of the Charter.<sup>37</sup>

---

<sup>25</sup> Akehurst, *A Modern Introduction to International Law*, p. 6; Sur, “L’application du droit international”. *Droit international public*, 1975, p. 192; Zemanek, “Responsibility of States: General principles”, *Encyclopedia of Public International Law* (1987), p. 370; and Partsch, “Retorsion”, loc. cit., p. 335.

<sup>26</sup> “Le régime des représailles en temps de paix”, *Annuaire de l’Institut de droit international*, 1934, p. 10.

<sup>27</sup> *International Law: A Treatise*, vol. II, pp. 134-135.

<sup>28</sup> *Nozioni di diritto internazionale*, p. 361.

<sup>29</sup> “Use of force by States. Collective security. Law of war and neutrality”. *Manual of Public International Law*, p. 753.

<sup>30</sup> “Las represalias en el derecho internacional: Perspectiva histórica”, *Revista Jurídica de Catalunya*, 1984, pp. 160 *et seq.*

<sup>31</sup> Leben, loc. cit., p. 14.

<sup>32</sup> Zoller, *Peacetime Unilateral Remedies: An Analysis of Counter-measures*, pp. 5 *et seq.* On the restriction of discretionary use of retortion resulting from the concentration of international regulation of trade relations, see Partsch, loc. cit., p. 336; and Gianelli, *Adempimenti preventivi al ricorso a misure di reazione all’illecito internazionale*, p. 22.

<sup>33</sup> Reuter, *Droit international public* (1983), p. 463.

<sup>34</sup> Zoller, “Quelques réflexions sur les contre-mesures en droit international public”, in *Droit et libertés à la fin du XXe siècle: Études offertes à Claude-Albert Colliard* (1984), p. 361.

<sup>35</sup> *Yearbook ... 1983*, vol. II (Part One), p. 21. document A/CN.4/366 and Add.1, para. 110.

<sup>36</sup> “International law in theory and practice: General course in public international law”, *Collected Courses...*, 1982-V, p. 185.

<sup>37</sup> See De Guttry, op. cit., pp. 25-26; and Weber, “Unfriendly act”, in *Encyclopedia of Public International Law* (1982), p. 253.

19. If one accepts the notion of retortion as covering acts not unlawful *per se* (albeit less than friendly), such a concept should not find a place within the framework of a codification of State responsibility. Although retaliatory measures are and may be resorted to by way of reaction to an internationally wrongful act, they do not give rise to the legal problems typifying the other forms of reaction to be considered for the purposes of the draft articles on State responsibility. Acts of retortion may nevertheless call for some attention in view of the fact that international practice does not always distinguish clearly between measures constituting violations of international obligations and those which do not cross the threshold of unlawfulness.

#### D. Reprisals

20. Once self-defence, sanctions and retortion are set aside, a further traditional concept to be considered—the oldest and the most important one—is that of reprisals.

21. It may be useful to recall that the notion of reprisal originally indicated, in systems involving individuals, the measures taken directly by the aggrieved party for the purpose of securing direct reparation. During the Middle Ages a person who had suffered an injustice in a foreign country and was formally denied satisfaction by that country's sovereign, could turn to his own sovereign and request *lettres de marque*. These *lettres de marque* contained an official authorization on the part of the sovereign for the injured party to resort to reprisals against the property of the nationals of the foreign State present in his own country, or at sea.<sup>38</sup> “Private reprisals” were later replaced by “public” or “general reprisals”, with only “nations” being entitled to resort to them.<sup>39</sup> Vattel described reprisals as follows:

Reprisals are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another—if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it—the latter may seize something belonging to the former, and apply it to her own advantage till she obtains payment of what is due to her, together with interest and damages—or keep it as a pledge till she has received ample satisfaction.<sup>40</sup>

22. Most modern authors see a reprisal as conduct which, “*per se* unlawful, inasmuch as it would entail the violation of the right of another subject, loses its unlawful character by virtue of being a reaction to a wrongful act committed by that other subject”.<sup>41</sup> Anzilotti defined reprisals as *actes objectivement illicites par lesquels un État réagit contre le tort à lui fait par un autre État*.<sup>42</sup> A less concise definition was adopted in 1934 by the International Law Institute, whereby reprisals are *des mesures de contrainte dérogoatoires aux règles ordinaires du droit des gens, prises par un État à la suite d'acte illicite commis à son préjudice par un autre État et ayant pour but d'imposer à celui-ci, au moyen d'un dommage, le respect du droit*.<sup>43</sup>

<sup>38</sup> La Brière, “Evolution de la doctrine et de la pratique en matière de représailles”, *Recueil des cours...*, 1928-11, p. 255.

<sup>39</sup> Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, p. 285, para. 347.

<sup>40</sup> *Ibid.*, pp. 283-284, para. 342. Similar descriptions had already been given by Grotius, *De Jure Belli ac Pacis, Libri Tres*. English translation in *The Classics of International Law*, p. 629, and by Phillimore, *Commentaries upon International Law*, vol. III, p. 32.

<sup>41</sup> Morelli, *op. cit.*, p. 361.

<sup>42</sup> *Cours de droit international*, French translation (1929), p. 515.

<sup>43</sup> *Annuaire de l'Institut de droit international, 1934* (Paris), vol. 38, p. 708.

23. In the contemporary literature a narrow concept of reprisal is proposed by some authors, which would exclude reciprocal measures. The term “reprisal” would thus only cover such reactions to a wrongful act as violate a different norm to that violated by the wrongful act itself: “While reciprocity gives rise to non-performance of an obligation similar (by identity or by equivalence) to the violated obligation, reprisals consist in the nonperformance of a different rule”.<sup>44</sup> The subject of reciprocity will be taken up again later in this report.<sup>45</sup>

24. According to a widely shared view the term “reprisal” would apply preferably to the measures adopted by way of reaction to an internationally wrongful act by an injured party against the offending State (“horizontal” measures), whereas the term “sanction” would more properly apply, as recalled earlier, to the measures taken against the wrongdoing State by an international body (“vertical” measures).

25. Given that the connotation the term “reprisal” has acquired in the practice and doctrine of unilateral State reactions to internationally wrongful acts is fairly clear, most such reactions—in so far as they do not qualify as retortion or self-defence—are properly covered, in principle, by that classic term. The reasons which may make other terms preferable are either their greater generality (this is particularly the case of “measures” or “counter-measures”) or the frequent association of acts of reprisal with the notion of measures involving the use of force.<sup>46</sup>

## E. Countermeasures

26. As noted in the preliminary report,<sup>47</sup> the term “countermeasures” is a newcomer in the terminology of the consequences of an internationally wrongful act.<sup>48</sup> Significant examples of its use are to be found in the *Air Service*,<sup>49</sup> *United States Diplomatic and Consular Staff in Tehran*<sup>50</sup> and *Military and Paramilitary Activities in and Against Nicaragua*<sup>51</sup> decisions. Article 30 of part 1 of the draft articles, as adopted on first reading, uses the term “measure” in the text and “countermeasures” in the title.<sup>52</sup>

27. Although divergent views are expressed in the literature with regard to both the degree of propriety of the term “countermeasures” and the kinds of measures it covers,<sup>53</sup> writers seem generally inclined to consider this concept as best embracing

---

<sup>44</sup> Zoller, *op. cit.*, p. 43.

<sup>45</sup> See section F below (paras. 28-32).

<sup>46</sup> On this last aspect, see Dominicé, *loc. cit.*, p. 33.

<sup>47</sup> See footnote 1 above.

<sup>48</sup> *Ibid.*, para. 14, footnote 12.

<sup>49</sup> *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, United Nations, Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 443 *et seq.*

<sup>50</sup> *I.C.J. Reports 1980*, p. 3.

<sup>51</sup> See footnote 16 above.

<sup>52</sup> See footnote 22 above.

<sup>53</sup> Elagab seems to exclude “forcible” reprisals (*The Legality of Non-Forcible Countermeasures in International Law*, p. 4); Zoller seems to consider the term to cover all non-armed measures and suspension of treaties, leaving out reciprocity and treaty termination. In her view, an essential feature of countermeasures would be their coercive purpose: such a purpose being present only where the reaction goes beyond the limit of “identity/equivalence” (reciprocity) and excluded in case of adoption of such a definitive measure as termination of the treaty (*op. cit.*, p. 75). The *Restatement of the Law Third* uses the term countermeasures in section 905 (Unilateral Remedies).

the generality of the measures that may be resorted to in order to seek cessation or redress.<sup>54</sup> A number of authors note that the Commission itself understood the term in question, as used in article 30 of part 1 of the draft, as including the measures traditionally classified as reprisals as well as the “sanctions” decided upon or applied by international bodies.<sup>55</sup> Although there is no obstacle to such a broad interpretation of the term as used in that draft article, it will be used here (and in further developments on the consequences of delicts) to indicate essentially the so-called unilateral or “horizontal” reactions of one or more States to an internationally wrongful act, to the exclusion of self-defence and retortion. Leaving aside for the time being the choice of the term or terms for the draft articles which will most suitably cover the relevant aspects of the instrumental consequences of internationally wrongful acts, the term “countermeasures” seems (despite our initial reservations) to be the most neutral, and as such the most comprehensive, to describe the various kinds of measures injured States may be lawfully entitled to take severally or jointly against the author State or States. This is without prejudice, for the time being, to any subcategories which the present writer or, principally, the Commission may find to be appropriate.

## F. Reciprocal measures

28. The main issue here is whether it is justifiable or of practical use to make a distinction between reprisals (or the countermeasures so qualified), on the one hand, and the measures taken by way of mere reciprocity, so to speak, on the other.

29. It is well-known that the concept (as well as “principle”) of reciprocity applies in various areas of international law and relations.

La réciprocité exprime l'idée d'un retour, d'un lien entre ce qui est donné de part et d'autre. De ce lien peuvent être tirées un certain nombre de conséquences juridiques, en ce qui concerne notamment l'exigibilité des engagements échangés. En comprenant plus largement encore cette idée de retour, pour justifier toute symétrie des attitudes, on trouve la réciprocité à la base de la rétorsion et des représailles.<sup>56</sup>

Moving from such a very broad meaning, a number of authors use the term “reciprocity” to indicate a certain kind of unilateral reaction to an internationally wrongful act. According to the former Special Rapporteur, for example, “[r]eciprocity meant action consisting of nonperformance by the injured State of obligations under the same rule as that breached by the internationally wrongful act, or a rule directly connected therewith”.<sup>57</sup>

30. More articulately other writers identify two possible kinds of reciprocity. One is reciprocity “by identity” (*par identité*) in the case where a reaction takes place under “conditions which are exactly the same for both parties”. The other is

---

According to the “Comment”, countermeasures are measures that would be unlawful were they not in response to a violation and include suspension or termination of treaty relations generally or of a particular international agreement or provision; freezing of assets of the offending State; and imposition of other economic sanctions (*Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987), pp. 380-381).

<sup>54</sup> See. *inter alia*, Reuter, op. cit., p. 465, and Dupuy, loc. cit., p. 527.

<sup>55</sup> Malanczuk, loc. cit., pp. 203 *et seq.*; Leben, op. cit., pp. 15-17; Dominicé, loc. cit., p. 33; and Dupuy, loc. cit., p. 528.

<sup>56</sup> Virally, “Le principe de réciprocité dans le droit international contemporain”, *Recueil des cours...* 1967-III, p. 100. In the same vein, cf. Simma, “Reciprocity” in *Encyclopedia of Public International Law*, 1984, pp. 402-404. The differing opinion that the basis for reprisals is distinct from that of reciprocity is expressed by Kalshoven, *Belligerent Reprisals*, pp. 24-25.

<sup>57</sup> See *Yearbook ... 1984*, vol. 1, 1867th meeting, para. 33.

reciprocity “by equivalent” (*par équivalent*) in the case where “identity of conditions cannot be ensured”, that is to say, when the States “are not bound by the same obligations”.<sup>58</sup> In the latter case, reciprocity will take the form of non-performance of the counterpart’s *quid pro quo* obligation (namely, of what Forlati Picchio calls *prestazione corrispettiva*) or of the non-performance of an obligation of “equal value or equal meaning” (as Zoller calls it) of the infringed reciprocal obligation.

31. While most writers do not believe that “reciprocity by equivalent” corresponds to types of measures distinct from reprisals—or, more generally, to countermeasures—a few authors seem to maintain that reciprocal measures are distinct and as such should be subject to a different legal regime.<sup>59</sup> The former Special Rapporteur, for his part, while dealing with measures of reciprocity within the general framework of countermeasures does make them the object of a provision separate from the draft article dealing with reprisals. The distinction would be necessary, in his view, because measures by way of reciprocity would be intended to restore the balance between the position of the offending State and that of the injured party, while reprisals would instead be intended to “put pressure” on the offending State in order to secure compliance with the new obligation arising from the wrongful act. As for the conceptual basis of reciprocity, the former Special Rapporteur finds it in the existence of the synallagmatic relationship or *échange de prestations* which is the object and *raison d’être* of the norm infringed. Reciprocity would thus be achieved through the suspension, on the part of the injured State, of compliance with the obligations corresponding to those violated by the offending State. Reprisals, on the contrary, would presuppose that no legal link existed between the infringed obligation and the obligations the performance of which is suspended by the injured State.<sup>60</sup>

32. The question should be settled by a careful study of practice. In particular, the practice of States should indicate whether the reactions qualified as “reciprocal measures” are or should be subject to conditions, limitations or other requirements different from those obtaining for reprisals or countermeasures in general or whether any special features presented by reciprocal measures are simply justified by a more articulate application of the very same principles governing reprisals or countermeasures in general.

### **G. *Inadimplenti non est adimplendum.* Suspension and termination of treaties**

33. An analogous question arises with regard to the measures commonly referred to by the maxim *inadimplenti non est adimplendum* and for the suspension and termination of treaties. It is well known that although the tenet *inadimplenti non est adimplendum* would seem literally to be applicable to non-compliance with any

---

<sup>58</sup> Zoller, *op. cit.*, pp. 19-20; Virally, *loc. cit.*, pp. 22 *et seq.*; and Forlati Picchio, who speaks of *sospensione della prestazione reciproca* with regard to *réciprocité par identité* and *sospensione della prestazione corrispettiva* with regard to *réciprocité par équivalent*. *op. cit.*, p. 93, footnote 116.

<sup>59</sup> Zoller, *loc. cit.*, p. 364.

<sup>60</sup> Cf. *Yearbook ... 1985*, vol. II (Part One), p. 3, document A/CN.4/389, commentary on article 8 at pp. 10-11. The distinction proposed by Riphagen is explicitly criticized by Pisillo Mazzeschi, “Termination and suspension of treaties for breach in the ILC works on State responsibility” (*United Nations Codification of State Responsibility* (1987), p. 794). He shares the prevailing concept of reciprocity as a specific form of reprisal. Malanczuk is equally critical in “Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1985), p. 315.

international obligation, irrespective of its conventional or customary origin, it is traditionally used to indicate so-called reciprocity within a treaty context.<sup>61</sup>

34. The regime of suspension and termination of treaties of course refers instead to the particular consequences of non-compliance with treaty obligations codified in article 60 of the Vienna Convention on the Law of Treaties. Some scholars consider both these consequences as *inadimplenti non est adimplendum* corollaries. They hold that reciprocity manifests itself when unlawful action and reaction both find a place within the context of the treaty, non-compliance with which would (in given circumstances) justify it. As noted above (paras. 31-32) with regard to the relationship between reprisals and reciprocity, essentially we are dealing again here with just another species of reprisal<sup>62</sup>—except for minor, albeit by no means negligible, specific features. Other scholars, while acknowledging that suspension and termination of treaties are applications of the principle *inadimplenti non est adimplendum*, instead stress the autonomy of suspension and termination whether falling within the framework of article 60 of the Vienna Convention on the Law of Treaties or not.<sup>63</sup> The autonomy of suspension and termination from reprisals would

---

<sup>61</sup> In this respect, the statement contained in the United States Memorial (pp. 37-41) presented to the arbitral tribunal in the *Air Service* case (see footnote 49 above) is significant:

“...International law recognizes that a party to an agreement which is breached by the other party may reciprocally suspend proportional obligations under the agreement. Available countermeasures range from formal termination of an agreement in the event of a material breach, to an interim withdrawal of corresponding rights of the other party while other rights and obligations remain in effect. As the International Law Commission has stated, a violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take nonforcible reprisals, and these reprisals may properly relate to the defaulting party’s rights under the treaty.

“This generally recognized principle serves as one of the most important sanctions behind international law—namely reciprocity. No State can validly claim from other States, as a matter of binding obligation, conduct which it is not prepared to regard as binding upon itself.

“This right to take proportional countermeasures has been specifically affirmed in the context of bilateral international aviation agreements. In his comprehensive treatise, *The Law of International Air Transport* at 482, Bin Cheng focuses specifically on this question in the context of the Bermuda-type bilateral air transport agreements and the practice of the United Kingdom. He concludes that: “[W]hen in the opinion of one of the parties [to a Bermuda-type agreement] the other contracting party has committed a breach of an agreement [...], the principle *inadimplenti non est adimplendum* applies and the party aggrieved is entitled to take proportionate retaliatory measures.”

(*Digest of United States Practice in International Law 1978*, Department of State Publication 9162 (Washington, D.C.), pp. 769-770.)

Numerous writers use the expressions *inadimplenti non est adimplendum* and *exceptio inadimpleti contractus* indiscriminately. A different view seems to be held by Zoller, who refers to *exceptio inadimpleti contractus* only with respect to treaty obligations and sees the other maxim (*inadimplenti non est adimplendum*) as just another way of expressing the principle of reciprocity, regardless of the source (custom or treaty) of the obligations in question (op. cit., p. 15; and loc. cit., p. 364). See also Reuter, op. cit., p. 464; and Politis, loc. cit., p. 10, who believed that *exceptio inadimpleti contractus* indicated, within a treaty context, the refusal of a State to comply with an obligation by reason of the non-compliance with the correlative (synallagmatic) obligation of the other party: a refusal which would not have been a reprisal but a lawful way of terminating treaty obligations.

<sup>62</sup> In the same vein, see, *inter alia*, Morelli, op. cit., p. 327; Guggenheim, *Traité de droit international public*, vol. 1, p. 227; Akehurst, “Reprisals by third States”, *The British Year Book of International Law*, 1970, pp. 6-12 and 16; Lattanzi, *Garanzie dei diritti dell’uomo nel diritto internazionale generale*, p. 294; and Pisillo Mazzeschi, loc. cit., pp. 57-94.

<sup>63</sup> According to Zoller, who takes an original position, the fact that suspension and termination—as forms of reaction to a wrongful act—do not present such features as identity and equivalence, places them beyond the ambit of reciprocity proper. In her opinion, it is necessary to distinguish between measures resorted to by way of reaction to noncompliance with a treaty *inadimplenti non est adimplendum* (reciprocity), and suspension and termination. The first type of



be justified by differences relating, *inter alia*, to the purpose of the measures, directly aimed at securing reparation instead of merely coercing the wrongdoer to make provision for it; to the objective, which in the case of suspension or termination would be confined to responding to non-compliance with a treaty obligation; and to the regulation of procedural conditions, which is more detailed.

35. The problem here is to see whether practice justifies making a distinction between such “conventional” measures as treaty suspension and termination and countermeasures in general, not only for merely descriptive purposes but in view of the legal regime to be codified or otherwise adopted by way of progressive development. As well as the question of so-called reciprocity in general, the issues relating to these two “conventional” measures—issues connected with the relationship between the law of treaties and the law of State responsibility—will require further study before any draft articles are formulated.

#### **H. Subject-matter of the following chapters**

36. The following chapters are devoted to the identification, in the light of the most authoritative and recent literature, of the various problems of the legal regime of the countermeasures to which States may resort as a consequence of internationally wrongful acts (including reprisals, reciprocity, *inadimplenti non est adimplendum*, and suspension and termination of treaties). For each set of problems, the report will seek, with the help of the literature, to identify in what direction the codification and development of that regime could proceed, the aim being to elicit comment and advice from members of the Commission and possibly from representatives in the Sixth Committee.

---

reaction (reciprocity) would consist in mere non-compliance with an obligation deriving from the treaty. Suspension and termination, however, would consist in the obliteration—permanent or temporary—of the very legal existence of the treaty obligation involved (op. cit., p. 28). On this distinction, see also Simma, “Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general international law”, *Österreichische Zeitschrift für öffentliches Recht* (1970), pp. 5-83; Forlati Picchio, op. cit., pp. 76-81; and Politis, loc. cit., p. 60.

## CHAPTER II

### II. AN INTERNATIONALLY WRONGFUL ACT AS A PRECONDITION

37. While most writers believe, on the basis of well-known jurisprudential *dicta*, that lawful resort to countermeasures presupposes internationally unlawful conduct of an instant or continuing character,<sup>64</sup> a few scholars seem to believe that resort to measures could be justified even in the presence of a bona fide belief on the part of the injured State that an internationally wrongful act is being or has been committed against it.<sup>65</sup>

38. Faced with the alternatives of the need for a wrongful act to have been committed and a sufficient bona fide belief on the part of the injured State or the mere allegation that a wrongful act has been committed, the inclination is to opt for the first alternative as the prerequisite for lawful resort to countermeasures.<sup>66</sup> However, this problem is of no real relevance for the present purposes. While it is essential in determining whether a cause of exclusion of wrongfulness does come into play under article 30 of part 1 of the draft<sup>67</sup> as a justification for countermeasures, the prior determination that an internationally wrongful act has been committed is simply a necessary assumption from the viewpoint of the regulation of the content, forms and

---

<sup>64</sup> An exemplary definition of this requirement is to be found in the well-known *Portuguese Colonies* case (Naulilaa incident): “*La première condition—sine qua non—du droit d’exercer des représailles est un motif fourni par un acte préalable, contraire au droit des gens*” (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1027). The same tribunal in the “*Cysne*” case emphasized: “There is no legal justification for reprisals except when they have been provoked by an act contrary to international law”, *Annual Digest and Reports of Public International Law Cases, 1929-1930*, (London), vol. 5 (1935), p. 490, case No. 287. It is significant that on the occasion of the 1930 Hague Codification Conference the question “What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?” was met by all the answering States with the indication that a prior wrongful act was an indispensable prerequisite (League of Nations, *Conference for the Codification of International Law: Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, pp. 128 *et seq.*). On the same lines, see also, article 1 of the resolution adopted in 1934 by the International Law Institute (footnote 43 above), and article 30 of part 1 of the draft articles on State responsibility (footnote 22 above).

<sup>65</sup> This seems to be the opinion, for example, of the arbitral tribunal in the *Air Service* case (see footnote 49 above) where the arbitrators affirmed that it was quite obvious that the lawfulness of the action must be considered regardless of the answer to the question of substance concerning the alleged violation (*ibid.*, p. 441, para. 74). This understanding is confirmed by the fact that, in the same case, as noted approvingly by Fiesler Damrosch, “the tribunal consistently refers to the ‘*alleged\** breach’ or ‘*alleged\** violation’ as giving rise to the other party’s right to take responsive action” (“Retaliation or arbitration or both? The 1978 United States-France aviation dispute”, *AJIL* (1980), p. 796). A similar view is expressed by Dominicé, who deems it unrealistic to require certainty as to the existence of a prior violation and concludes that reprisals are measures intended to react *à un manquement, réel ou allégué* (*loc. cit.*, pp. 40-41). Fenwick too speaks of reprisals or measures in reaction to “alleged illegal acts” (*International Law*, 4th ed., p. 636).

<sup>66</sup> This opinion seems to be shared by Wengler, “Public international law: paradoxes of a legal order”, in *Collected Courses...*, 1977-V, p. 20; Zoller, *op. cit.*, pp. 95-96; Elagab. *op. cit.*, pp. 43-50; and Salmon, in “Les circonstances excluant l’illicéité” in *Responsabilité internationale*, p. 179.

<sup>67</sup> See footnote 22 above.

degree of responsibility. It is obvious, in other words, that the lawfulness of any one of the measures, the legal regime of which the Commission is to cover in part 2 of the draft, necessarily presupposes the existence of a prior unlawful act which is governed by part 1.

### CHAPTER III

#### III. FUNCTIONS AND PURPOSES OF MEASURES

39. The question of the functions and purposes of measures, albeit controversial, is not without relevance. In the literature, the variety of opinions on the subject is determined to a considerable extent by the general concepts of international responsibility that each scholar takes as a starting point.<sup>68</sup>

40. Scholars writing less recently who start from the concept of an internationally wrongful act as being predominantly “civil” in nature, so to speak, are inclined to see reprisals as instruments for the pursuit of an essentially restitutive/compensatory end.<sup>69</sup> Those who conceive internationally wrongful acts as delicts of a predominantly “penal” or criminal nature assign to reprisals an afflictive, punitive or retributive function.<sup>70</sup> Article 1 of the International Law Institute’s 1934 resolution states in this respect:

Les représailles sont des mesures de contrainte, dérogoires aux règles ordinaires du droit des gens, prises par un État, à la suite d’actes illicites commis à son préjudice par un autre État et ayant pour but *d’imposer\** à celui-ci, au moyen d’un *dommage\**, le *respect du droit\**.

In this definition two features are of significance from the present point of view. One is the verb *imposer*, indicating the coercive role the injured State performs—in either direction—within the essentially “horizontal” legal relationship which obviously characterizes international responsibility. The other feature is the use of the terms *dommage* and *respect du droit*, which seem to emphasize, along with the reparatory function implied in *respect du droit*, the idea of retribution, implicit both in *dommage* and *respect du droit*. The Institute would thus seem to have adopted an ambivalent stance. Oppenheim seems to support a concept of measures that is largely compensatory when he stresses the element of compulsion together with an essentially reparatory role of reprisals.<sup>71</sup>

41. In the post-Second World War literature the doctrinal debate is characterized by the position of those who see in reprisals a measure exclusively instrumental to cessation and reparation, on one side, and those who believe that reprisals are instrumental to both reparation and retribution (punishment), on the other side. The

<sup>68</sup> For a discussion of the whole question of the purposes of reprisals, see Sicilianos, op. cit., pp. 49-69.

<sup>69</sup> See, for example, Anzilotti, op. cit., pp. 165-167, to be read in the light of his well-known remarks in *Teoria generale della responsabilità dello Stato nel diritto internazionale*, pp. 95-96. In the same vein, see also, La Brière, loc. cit., p. 241; Bourquin, “Règles générales du droit de la paix”, *Recueil des cours...*, 1931-1, p. 222; and the pertinent remarks by Politis, loc. cit., pp. 28-29, in his report to the International Law Institute, in which the reparatory nature of reprisals is confirmed by his observation that the right to act in reprisal begins only after the wrongdoing State refuses reparation and ceases the moment such reparation is obtained.

<sup>70</sup> See, for example, Kelsen, “Unrecht und Unrechtsfolge im Völkerrecht”, *Zeitschrift für öffentliches Recht* (1932), pp. 571 et seq.

<sup>71</sup> Op. cit., pp. 136 et seq.

first trend is represented, *inter alia*, by Skubiszewski,<sup>72</sup> Venezia,<sup>73</sup> Lamberti Zanardi,<sup>74</sup> Žourek,<sup>75</sup> Brownlie,<sup>76</sup> Dupuy,<sup>77</sup> Paniagua Redondo,<sup>78</sup> Zemanek<sup>79</sup> and the American Law Institute's *Restatement of The Law Third*.<sup>80</sup>

42. The second trend is the eclectic or “dual” concept (with some emphasis upon the retributive role) which seems to be preferred by Forlati Picchio,<sup>81</sup> Lattanzi,<sup>82</sup> and perhaps in a more subtle form, by Morelli<sup>83</sup> and Ago. According to the position expressed by the latter:

The peculiarity of a sanction is that its object is essentially punitive or repressive; this punitive purpose may in its turn be exclusive and as such represent an objective *per se*, or else it may be accompanied by the intention to give a warning against a possible repetition of conduct like that which is being punished, or again it might constitute a means of exerting pressure in order to obtain compensation for a prejudice suffered.<sup>84</sup>

While remaining within this trend, Sereni, Cassese and Conforti do not seem to stress any one of the concurrent functions. Bowett, for his part, while recognizing the punitive function of reprisals, specifies that they serve “to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent State to abide by the law in the future”.<sup>85</sup>

43. Some recent works on reprisals have paid particular attention to the study of the function of measures (and the aims the injured State pursues or may pursue thereby). Some give marked predominance to coercion for restitutive/reparatory purposes.<sup>86</sup> Zoller, for example, believes that “peacetime unilateral remedies” serve

...three distinct “purposes”: “reparation”, “coercion”, “punishment”; and assigns to “countermeasures” exclusively the second of these purposes, namely “coercion”.<sup>87</sup>

---

<sup>72</sup> Loc. cit., p. 753.

<sup>73</sup> “La notion de représailles en droit international public”, RGDIP (1960), pp. 467-468.

<sup>74</sup> Op. cit., pp. 131 *et seq.*

<sup>75</sup> Loc. cit., p. 60.

<sup>76</sup> *System of the Law of Nations: State Responsibility*, part I.

<sup>77</sup> Loc. cit., p. 530.

<sup>78</sup> Loc. cit., p. 158.

<sup>79</sup> “The unilateral enforcement of international obligations”, *Zeitschrift für ausländisches öffentliches Recht* (1987), p. 37 and loc. cit., p. 370.

<sup>80</sup> According to the *Restatement* the emphasis would seem to be placed on cessation/reparation: “The principle of necessity ordinarily precludes measures designed only as retribution for a violation and not as an incentive to terminate a violation or to remedy it”. (Op. cit., p. 382.)

<sup>81</sup> Op. cit., pp. 63-65.

<sup>82</sup> Op. cit., pp. 242-243.

<sup>83</sup> Op. cit., p. 363.

<sup>84</sup> Addendum to the eighth report... (see footnote 7 above), para. 90.

<sup>85</sup> “Reprisals involving recourse to armed force”. AJIL (1972). p. 3.

<sup>86</sup> De Guttry, for example, defines reprisals as “a form of pressure” aimed at getting the offending State to “modify its conduct in order to comply with its international obligations” (op. cit., p. 12). Reprisals would thus not perform a directly executive but an “indirect self-help” function by applying a kind of instrumental coercion in order to induce the offending State to comply with its obligations—an aim which would include cessation as well as reparation (ibid., pp. 29 and 150). A coercive rather than “executive” function is identified by Kalshoven, op. cit., p. 26; Paniagua Redondo, loc. cit., p. 158; and Zemanek, “The unilateral enforcement...”, loc. cit., p. 35.

<sup>87</sup> Op. cit., pp. 46 *et seq.* Like the writers previously cited, Zoller (who addressed the suspension of treaties as well as reprisals) believes that countermeasures are neither punitive-repressive nor directly reparatory (compensatory) or executive but exclusively coercive-reparatory in a broad sense. This would necessarily imply measures of a temporary nature which should cease to operate

Elagab identifies the functions of reprisals in “self-protection”, “reciprocity”, and inducement to “an expeditious settlement of a dispute”. Unlike Zoller and others but like Lamberti Zanardi he does not seem to exclude an “executive” function, namely the use of reprisals by the injured State in order to secure reparation directly.<sup>88</sup>

44. While recognizing the diversity of purposes pursued by reprisals, Dominicé<sup>89</sup> notes that

... la doctrine des représailles a été marquée par l'idée qu'il s'agit d'un acte de vengeance, d'un châtement, ce qu'elles furent sans doute autrefois. L'institution n'a pas entièrement perdu ce caractère, mais ce n'est plus son trait dominant. Elle doit être comprise dans le contexte de l'autoprotection et à la lumière de sa finalité première qui est la contrainte.<sup>90</sup>

However, he adopts a very elastic concept of the functions of reprisals, such functions varying according to the circumstances, notably to the timing of the injured State's reaction and the attitude of the offending State. Thus, if the injured State reacts to a continuing violation, the purpose of the measure will be to put a stop to the wrongful conduct and revert to compliance with the obligation that has been infringed, the measure will therefore be of a temporary or provisional character.<sup>91</sup> If instead the reaction is to a refusal to make reparation, the reprisal will have an executive or punitive purpose—and will acquire a final or definitive character. As regards their interaction with dispute settlement procedures, Dominicé seems to believe that, depending on the phase at which the settlement commitments come into play, reprisals may be aimed either at inducing implementation of the settlement procedure or at preserving, by interim measures, the chance to obtain the reparation provided for by the settlement which will eventually be achieved through the settlement procedure.

45. In the face of the distinctions proposed in the literature it will be necessary to analyse State practice in breadth and in depth. It will be necessary to try to establish whether and to what extent the legal regime of countermeasures is or should be diversified according to the function the countermeasures may be intended to perform. Though it remains to be verified, it is likely that diversification may be justified particularly with regard to the impact of the prior claim for reparation, *sommation*, compliance with peaceful settlement obligations, and proportionality.

## CHAPTER IV

### IV. THE ISSUE OF A PRIOR CLAIM FOR REPARATION

46. A question frequently raised but rarely dealt with adequately is whether and to what extent lawful resort to reprisals should be preceded by intimations such as protest, demand for cessation and/or reparation, *sommation* or any other form of

---

once their purpose has been attained (ibid., p. 54). De Guttry takes a similar view, op cit., pp. 266-268. Two authors who, less recently, particularly stressed temporariness as a condition for the legitimacy of measures adopted by way of reprisal are Strupp, “Das völkerrechtliche Delikt”, *Handbuch des Völkerrechts*, p. 568; and La Brière, loc. cit., p. 271.

<sup>88</sup> Op. cit., pp. 44-45.

<sup>89</sup> Loc. cit., pp. 34-35. For a similar approach, see Gianelli, op. cit., p. 42. The indication of at least three different purposes of countermeasures (coercive, conservative/cautionary, executive) appears to be present also in the fourth report of the former Special Rapporteur (*Yearbook ... 1983*, vol. II (Part One) (see footnote 35 above), pp. 19-20, paras. 102-106).

<sup>90</sup> Loc. cit., p. 55.

<sup>91</sup> Ibid., pp. 40 *et seq.*

communication to the offending State on the part of the aggrieved State or States.<sup>92</sup> Nevertheless, two main trends can be discerned, both related to the general theories on international responsibility.

47. A minority of legal writers, for whom reprisals are the primary and normal sanction for any internationally wrongful act—reparation being, in a sense, merely a possible “secondary” consequence<sup>93</sup>—take the view, though it is not unanimous, that lawful resort to reprisals is not subject to any intimation, claim or *sommation* of the kind indicated in the preceding paragraph. There is no need, as a matter of law, to address a demand for cessation or reparation to the offending State before reprisals are taken.<sup>94</sup>

48. A different position is clearly taken by those who espouse the classical theory of State responsibility whereby reparation and cessation are seen as the principal consequences of an internationally wrongful act while reprisals are seen essentially (although not exclusively) as a means of coercion for obtaining cessation and/or reparation.<sup>95</sup> According to this theory, it is natural to assume that an act of reprisal cannot, as a rule, be lawfully resorted to before a protest and demand made for cessation and/or reparation has first proved unsuccessful.<sup>96</sup>

49. The essence of the latter view is also held by those scholars who espouse a broader concept of both the substantive and the instrumental consequences of an internationally wrongful act. According to this principle, the consequences of an internationally wrongful act are not merely compensatory or reparatory but also retributive or punitive. The authors who so define the said consequences also share the conventional view that whatever their function (compensatory, retributive or both), reprisals may not lawfully be resorted to unless there has been a prior, unsuccessful demand for cessation and/or reparation.<sup>97</sup>

---

<sup>92</sup> An interesting doctoral thesis on the subject has been presented at Rome University by Gianelli (see footnote 32 above).

<sup>93</sup> Kelsen, loc. cit., pp. 481 *et seq.*, particularly pp. 571-573; and *Principles of International Law*, pp. 18 *et seq.* See also Morgenthau, “Théorie des sanctions internationales”, in *Revue de droit international et de législation comparée* (1935), pp. 474-503 and 809-836.

<sup>94</sup> Kelsen, loc. cit., pp. 571 *et seq.* This not so recent theory held that, since a demand for reparation or an injunction would not even be necessary in the most extreme cases, namely when the injured State decided to resort to war, this would *a fortiori* hold true in the case of measures short of war. While adhering to Kelsen’s theory, Guggenheim has subsequently maintained that the injured State would be under the obligation to *mettre le violateur en demeure avant de procéder à des représailles* (*Traité de droit international public* (1954), vol. II, p. 64, footnote 2 and p. 85, footnote 5).

<sup>95</sup> See, for an overall view of this subject, Anzilotti, *Corso di diritto internazionale*, part I (1928), pp. 416 *et seq.*, especially pp. 445 *et seq.*; and Schoen, “Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen”, *Zeitschrift für Völkerrecht*, pp. 141-142.

<sup>96</sup> In the same vein, in addition to the authors cited in the preceding note, see, *inter alia*, Strupp, loc. cit., pp. 117-118; Fauchille, *Traité de droit international public* (1926), p. 690; and Reitzer, *La réparation comme conséquence de l’acte illicite en droit international*, p. 36, who, however, allows for the existence of one derogation in the case of the so-called *exceptio non adimpleti contractus*: a measure the adoption of which would not require a previous demand for reparation (*ibid.*, pp. 91 *et seq.*).

<sup>97</sup> Oppenheim, op. cit., pp. 136 and 218; Ago, “Le délit international”, *Recueil des cours...*, 1939-11, pp. 527 *et seq.*; Morelli, op. cit., p. 363; Čepelka, *Les conséquences juridiques du délit en droit international contemporain*, pp. 42 *et seq.*; Skubiszewski, loc. cit., p. 753; Schachter, loc. cit., p. 170. It would not be right to overlook the conclusions reached recently on this matter by the American Law Institute in its *Restatement of the Law Third*. The comment to section 905, entitled “Unilateral Remedies”, states: “Countermeasures in response to a violation of an international obligation are

50. Contemporary scholarship of course elaborates upon the general trend in a variety of ways, especially with regard to the conditions under which this principle applies and to admissible exceptions. Wengler, for example, thinks that the aggrieved State could lawfully resort to reprisals without any preliminaries in the event of *dolus* on the part of the law-breaking State.<sup>98</sup> The view has also been expressed that no preliminaries are required for measures to be taken against a State responsible for an international crime.<sup>99</sup> Others see an exception in the case of an internationally wrongful act of a “continuing character”<sup>100</sup> (article 25 of part 1 of the draft articles),<sup>101</sup> or in the case of economic measures.<sup>102</sup> With regard to the latter it is assumed that no preconditions have to be met in the case of such (supposedly milder) forms of coercion. The rules proposed by the former Special Rapporteur envisage a special regime for the case of synallagmatic obligations. In fact, articles 8 to 10 of part 2 of the draft do not even envisage an obligation of prior resort to (available) settlement procedures in the case where the injured State resorts to a non-compliance measure “by way of reciprocity” instead of “by way of reprisal”.<sup>103</sup> More systematically, it has been suggested, in a recent contribution to the subject, that the question whether “a prior demand is a condition of lawful resort to reprisal depends upon the concrete circumstances of the violation and the nature of the obligation breached”.<sup>104</sup> The injured State would be relieved from the duty in question, for example, whenever the measures resorted to consisted in an application of the *inadimplenti non est adimplendum* principle and were taken by way of reaction to particularly serious violations.<sup>105</sup>

51. International practice should be a more reliable indicator with regard to the effective legal relevance of a prior demand for reparation. Only on such a basis would it be possible to determine to what an extent a provision which made such a demand a prerequisite for lawful resort to any measures would be the subject merely of codification or of a desirable progressive development of international law. In particular, a study of practice should be more eloquent than is the literature on the frequently mentioned question of *sommatio*: namely, as to whether it is a condition *sine qua non* of any measure, or a requirement for resort to *certain kinds* of measures, the lawfulness of other kinds of reactions being subject to less stringent conditions. In particular, it is to be hoped that the indications to be drawn from such an analysis would be less vague in identifying in respect of what kinds of measures the injured State would be exempt from the requirement of *sommatio*. This might make it easier

---

ordinarily justified only when the accused State wholly denies the violation or its responsibility for the violation; rejects or ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiations or third-party resolution” (op. cit., p. 381).

<sup>98</sup> *Völkerrecht*, vol. I. pp. 516-517.

<sup>99</sup> Graefrath, “Responsibility and damages caused: relationship between responsibility and damages”, *Collected Courses...*, 1984-II. p. 65 and p. 129, footnote 125.

<sup>100</sup> Pueyo Losa, “El derecho a las represalias en tiempo de paz: condiciones de ejercicio”, *Revista Española de Derecho Internacional* (January-June 1988), pp. 29-30.

<sup>101</sup> See *Yearbook ... 1980*. vol. II (Part Two), pp. 32-33.

<sup>102</sup> Zoller, loc. cit., p. 379.

<sup>103</sup> For the text of these articles, see *Yearbook ... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

<sup>104</sup> Lattanzi, loc. cit., p. 542.

<sup>105</sup> *Ibid.*, p. 544. This author develops in substance, within the framework of contemporary international law, the position formerly taken by Reitzer, who indicated as exceptions to the obligation of a previous demand for reparation cases of *non adimpleti contractus* and of *défense légitime* (op. cit., pp. 80 *et seq.*).

to determine whether *sommation* would be required for *any* relatively “bland” measures in general or for so-called reciprocal measures, or only for measures intended for interim protection; as well as whether the matter would depend totally or partially upon the degree of urgency of the remedy or the gravity of the wrongful act. Should practice indicate that this area is not covered satisfactorily *de lege lata*, improvements might have to be sought, more especially to ensure better protection of prospective weaker parties, as a matter of progressive development.

## CHAPTER V

### V. THE IMPACT OF DISPUTE SETTLEMENT OBLIGATIONS

52. Interrelated with the requirement for a prior demand for reparation (*sommation*) is the question of the impact of any existing obligations of the injured State with regard to dispute settlement procedures. To some extent, the existence of any such obligations—and the injured State’s prior compliance with them—could well condition the lawfulness of resort to all or some unilateral remedies. The legal duty of the injured State to resort to given means of settlement would then place another restriction on its *faculté* to resort to unilateral measures; and the recognition of such a restriction—*de lege lata* or *de lege ferenda*—would be a not insignificant step towards reducing the undesirable consequences of the unilateral determination and enforcement of the right to reparation, in a broad sense, in a milieu as inorganic as the “society of States”. Of course, hitherto efforts to that end have primarily been aimed at curbing arbitrary resort to armed force, whether to assert alleged rights (in legal disputes) or mere interests (in political disputes). Nevertheless, the matter has been rightly recognized as also being of great importance in legally controlling resort to non-forcible measures. Although less dramatic and harmful, such measures can be equally detrimental to the preservation of friendly relations and the development of cooperation among States.

53. It is unnecessary to recall here the various stages in the development of peaceful settlement procedures which have led to the present state of advancement of this vital area of international law. Suffice it to recall that the most important *general* step—probably embodied by now in a rule of general international law—is represented by the principle enshrined in Article 2, paragraph 3 (clearly interrelated with Article 2, paragraph 4) of the Charter of the United Nations and by the more specific, though still very general, provisions of Article 33 of that same instrument. It is in the main those provisions, combined of course with the concrete settlement obligations deriving from bilateral or multilateral commitments of a more specific nature (only the most advanced of which are those deriving from the Statute of ICJ and the various instruments connected with Article 36 thereof), that form the basis for such important reaffirmations of the Charter rules as the less than satisfactory formulation of the principle of peaceful settlement contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations<sup>106</sup> and the less

---

<sup>106</sup> General Assembly resolution 2625 (XXV), annex.



disappointing, although very general, Manila Declaration on the Peaceful Settlement of International Disputes.<sup>107</sup>

54. Some legal writers believe that those Charter principles and rules (as presumably reflected in general international law) make it unlawful for any injured State to resort to countermeasures prior to (a) the submission of appropriate demands to the allegedly law-breaking State, as considered above; and (b) bona fide recourse to the peaceful settlement procedures provided for under Article 33 of the Charter.<sup>108</sup> Other legal writers, however, interpret the second of those requirements as applying only to measures involving force, this in view of the fact that only measures of that kind would be likely to endanger international peace and security.<sup>109</sup> Measures short of force (force being mostly understood as military force) could thus lawfully be resorted to even without prior compliance with that requirement.

55. Whatever the impact of the general rules on peaceful settlement, the question becomes more complex in the presence of dispute settlement obligations which may exist between injured State and law-breaking State by virtue of subjectively and objectively specific instruments (bilateral or multilateral, inorganic or institutional) to which those States may be parties at the relevant time. This means not only the dispute settlement obligations and rights arising from instruments like special agreements (*compromis*), arbitration clauses, general arbitration or judicial settlement treaties or declarations of acceptance of the jurisdiction of ICJ under the so-called optional clause (Article 36, paragraph 2 of the Court's Statute) but also to the statutes of a number of international institutions and to the multilateral instruments covering specific areas. A number of writers believe that at least the commitments deriving from such more specific instruments do have a decisive impact—under given conditions—on the lawfulness of measures to be taken. In other words, in given cases, prior recourse to one or more of the procedures envisaged would be a condition of lawful resort to countermeasures.<sup>110</sup>

56. Article 5 of the International Law Institute's 1934 resolution according to which

---

<sup>107</sup> General Assembly resolution 37/10, annex.

<sup>108</sup> Opinions anticipating this view had already been expressed by a number of participants in the *travaux préparatoires* which led to the adoption of the 1934 resolution of the International Law Institute previously cited (see especially Politis, Barclay, and La Brière (*Annuaire de l'Institut de droit international, 1934* (footnote 43 above)), pp. 40-41, 90 and 95). In the more recent literature, see Žourek, loc. cit., p. 60; Bowett, "Economic coercion and reprisals by States", in *Virginia Journal of International Law* (1972), pp. 10-11; Cassese, *Il diritto internazionale nel mondo contemporaneo*, p. 270; Pueyo Losa, loc. cit., p. 21; and De Guttry, op. cit., pp. 227-237.

<sup>109</sup> Fislser Damrosch, loc. cit., pp. 805 *et seq.*; Zemanek, "The unilateral enforcement...", loc. cit., p. 37; Lattanzi, loc. cit., pp. 543-544; and less categorically Zoller, op. cit., pp. 120-121.

<sup>110</sup> Writers who have already expressed such an opinion are Reitzer, op. cit., pp. 4-35; Dumbauld, *Interim Measures of Protection in International Controversies*, pp. 182 *et seq.*; and, more recently, Bowett, loc. cit., p. 11 and "International law and economic coercion", *Virginia Journal of International Law* (1976), p. 248; Ago in his comment on article 30 of part 1 of the draft articles on State responsibility, *Yearbook... 1979*, vol. II (Part One), p. 43, document A/CN.4/318 and Add.1-4, p. 43, footnote 191; Malanczuk, "Zur Repräsentation..." loc. cit., p. 739; and Lattanzi, loc. cit., p. 544 (who excludes, however, the hypothesis of *inadimplenti non est adimplendum* and of measures against international crimes).

Les représailles même non armées sont interdites quand le respect du droit *peut être effectivement assuré\** par des procédures de règlement pacifique. En conséquence, elles doivent être considérées comme interdites notamment:

(1) Lorsqu'en vertu du droit en vigueur entre les parties, l'acte dénoncé comme illicite est de la compétence obligatoire de juges ou d'arbitres *ayant compétence aussi pour ordonner, avec la diligence voulue, des mesures provisoires ou conservatoires et que l'État défendeur ne cherche pas à éluder cette juridiction ou à en retarder le fonctionnement\**;

(2) Lorsqu'*une procédure de règlement pacifique est en cours\**, dans les conditions envisagées au (1), à moins que les représailles n'aient légitimement été prises auparavant, réserve faite de leur cessation décidée par l'autorité saisie.

...<sup>111</sup>

appears to be less restrictive of the injured State's discretion. Most of the writers who have dealt with the matter consider it an indispensable condition that the legally available procedure should be of such a nature as effectively to ensure respect for the injured State's rights.<sup>112</sup> Some writers, for example, believe, on the one hand, that the mere existence (in a general treaty or in an arbitration clause) of an obligation to go to arbitration by an ad hoc agreement (such an obligation being merely a *pactum de contrahendo*) would not be sufficient to preclude resort to measures. The reprisals resorted to, however, should either have a merely provisional function (interim measures) or be intended to coerce the allegedly law-breaking State to conclude the ad hoc agreement.<sup>113</sup> While believing, on the other hand, that the existence between the parties of a truly compulsory jurisdiction—namely a jurisdictional link allowing the allegedly injured State to start arbitral or judicial proceedings by unilateral application—would normally foreclose direct resort to measures, the same scholars think that no obstacle to resort to unilateral interim measures would exist even in such a case, except where the competent body had no power to issue an order for interim measures or where the allegedly law-breaking State failed to comply with such an order.<sup>114</sup>

57. According to some legal writers, in addition to the nature, availability and degree of effectiveness of a possibly relevant settlement procedure, account must also be taken of the aim of the measures envisaged or resorted to by the injured State, a matter recently explored by Dominicé,<sup>115</sup> who believes it is necessary to distinguish between reprisals aimed at securing reparation and reprisals which, by way of reaction to a continuing wrongful act, also aim, by cessation, at compliance with the obligation which is being infringed. Only in the former case would a prior *sommation*, together with an arbitration proposal, be a precondition for resort to reprisals. Resort to reprisals would be lawful in such a case only if the arbitration proposal—and, of course, *sommation*—had proved of no avail. Where the wrongful conduct was still in progress, interim measures or measures designed to induce cessation and/or arbitration could lawfully be resorted to immediately regardless of settlement

<sup>111</sup> *Annuaire de l'Institut de droit international* (footnote 43 above), p. 709.

<sup>112</sup> According to Elagab "... if it transpires that there is in reality a definite commitment to peaceful settlement between the parties concerned, resort to countermeasures by either party must be considered as *prima facie* unlawful. This general rule applies particularly where the treaty containing that rule establishes mechanisms for ensuring its implementation. There may, however, be situations in which the desired mechanisms prove inadequate. It is here that an aggrieved State could justifiably resort to countermeasures on the basis of customary law." (Op. cit., p. 183.)

<sup>113</sup> Dominicé, loc. cit., pp. 44 *et seq.*; Zoller, op. cit., pp. 120-124; Fislér Damrosch, loc. cit., pp. 805 *et seq.*; and De Guttry, op. cit., pp. 243-256.

<sup>114</sup> *Ibid.*

<sup>115</sup> Loc. cit., pp. 33 *et seq.*

procedure commitments. In any event, measures taken by the injured State following non-compliance by the law-breaking State with an arbitral decision, would also be lawful.<sup>116</sup>

58. In article 10 of part 2 of the draft proposed by the former Special Rapporteur,<sup>117</sup> particular attention is paid to the provisional, protective nature of the measures and to the effectiveness of the power of the competent bodies. According to paragraph 1 of that article no measure (other than a reciprocal measure of the kind contemplated in article 8) could be resorted to by the injured State “until it has exhausted the international procedures for peaceful settlement of the dispute available to it”. Paragraph 2, however, exempts from the prohibition

(a) interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection;

(b) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal.<sup>118</sup>

It remains to be seen whether this provision is wholly satisfactory.

59. Here too, a thorough study of international practice—starting from an articulate categorization of dispute settlement instruments from the viewpoint of their respective degrees of strictness and effectiveness— is indispensable before deciding on the best possible solution. Moreover, the matter should be researched with the dual purpose of precisely assessing *lex lata* and devising improvements that might reasonably be proposed to advance the law of unilateral countermeasures in the interest of justice (see para. 4 above).

60. It will certainly be difficult to get States to accept, in part 3 of the draft articles of the proposed convention on State responsibility as envisaged, really significant innovations on the interpretation and application of the rules with regard to the settlement of disputes. Given that the impact of such rules would extend to all areas of international law—namely to the violation of any of the primary norms or principles of written or unwritten international law and the consequences thereof—whatever

---

<sup>116</sup> In the same vein, see Pueyo Losa, *loc. cit.*, pp. 27 *et seq.* Elagab likewise has recently stressed the need to take account of the different motivations behind the measures taken (*op. cit.*, pp. 183 *et seq.*).

<sup>117</sup> See footnote 103 above.

<sup>118</sup> A further element of the present summary review of the positions taken by writers on the subject is the *Restatement of the Law Third*. The text of section 905 (Unilateral Remedies) does not, in fact, address itself expressly to the relationship between measures, on the one hand, and dispute settlement obligations, on the other (*op. cit.*, p. 380). The relevant comment, however, states that for resort to measures to be lawful it would be necessary, *inter alia*, that “the accused State ... rejects or ignores proposals for negotiation or third-party resolution”. Reference is made, on the other hand, not to possible bilateral settlement instruments in force between the parties but only to settlement procedures available within the framework of international organizations: “In a dispute between members of an international organization, there may be a requirement that the dispute be submitted to the dispute settlement procedures of the organization, and counter-measures are precluded before that procedure has been concluded or terminated without success” (*ibid.*, p. 381). In the “Reporters’ Notes” it also states that “Necessity” (and hence the lawfulness of counter-measures) “disappears, however, once the case has been submitted to an international tribunal, and the tribunal is in a position to decide on interim measures of protection” (*ibid.*, p. 387).

binding settlement commitments are eventually accepted by States under part 3 would affect the whole range of their relationships and may give rise to controversy. The paucity of binding settlement commitments envisaged in articles 1-5 of part 3 of the draft as proposed by the former Special Rapporteur<sup>119</sup> and the extreme caution manifested by the members of the Commission in the debate on those provisions clearly reflect the difficulties.<sup>120</sup>

61. While not excluding the possibility that more significant steps might be taken with regard to the content of part 3, the rules to be devised by the Commission with regard to the impact of dispute settlement commitments upon the lawfulness of unilateral reactions to internationally wrongful acts are another matter. In that respect, the view is taken in this report that, once the present status has been adequately assessed, more could and should be done, under appropriate rules, to protect any party in a State responsibility relationship which has accepted dispute settlement commitments and is ready to comply with them. Rules of that kind would simultaneously help to reduce arbitrary resort to measures by the arrogant and, together with the just solution of any controversy arising from any specific internationally wrongful act, to promote the conclusion by States of effective bilateral or multilateral instruments of dispute settlement in increasingly broader areas.

62. It is on the basis of such considerations that answers should be sought to questions such as whether under Article 2, paragraph 3, and the provisions of Article 33 of the Charter of the United Nations an injured State should refrain from taking measures until it has resorted to one or more of the means listed in the latter article; whether there are any measures an injured State would or should be entitled to take without having to wait until an attempt to use any such means of settlement has proved unsuccessful (for example, interim measures or measures intended to induce the counterpart to comply with any settlement obligations); whether and under what conditions the fact that a settlement or quasi-settlement procedure had progressed to a given stage would restrict the *faculté* to resort to certain measures.

## CHAPTER VI

### VI. THE PROBLEM OF PROPORTIONALITY

63. One of the most crucial aspects of countermeasures is the question of proportionality. In the period following the First World War, the proportionality rule certainly acquired a more stringent and preciser content: a development concomitant with the condemnation of the use of force. Nevertheless, the notion of proportionality was already in evidence more or less explicitly in 17th, 18th and 19th century writings. It was clearly implied in the doctrinal position taken by Grotius, Vattel and Phillimore, for example, that goods seized by way of reprisal were lawfully appropriated by the injured sovereign, "so far as is necessary to satisfy the original debt that caused, and the expenses incurred by the Reprisal; the residue is to be

---

<sup>119</sup> See *Yearbook ...1986*, vol. II (Part Two), p. 35, footnote 86.

<sup>120</sup> *Ibid.*, vol. I, 1952nd to 1956th meeting, pp. 56-85.

returned to the Government of the subjects against whom reprisals have been put in force”<sup>121</sup>

64. Most 20th century authors are of the opinion that a State resorting to reprisals should adhere to the principle of proportionality. Guggenheim agrees with Oppenheim, who holds that “[r]eprisals, be they positive or negative, must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation”.<sup>122</sup> Overcoming the doubts expressed by Anzilotti in the 1920s and by Strupp in the 1930s<sup>123</sup> the rest of the legal writers seem to be unanimous in considering proportionality as a hard and fast rule of international law. Among the distinguished authors who recognize the principle of proportionality as a general requirement for the legitimacy of reprisals, are Bourquin,<sup>124</sup> Kelsen,<sup>125</sup> Morelli,<sup>126</sup> Wengler,<sup>127</sup> Schachter,<sup>128</sup> Reuter,<sup>129</sup> Brownlie,<sup>130</sup> Tomuschat,<sup>131</sup> Skubiszewski,<sup>132</sup> Giuliano (with Scovazzi and Treves),<sup>133</sup> Graefrath (with Steiniger),<sup>134</sup> and Bowett.<sup>135</sup>

65. There is no uniformity, however, either in the practice or the scholarship as to the exact concept of proportionality. A difference can be detected, for example, between the doctrine based upon the well-known jurisprudential *dictum* on the Naulilaa case and the International Law Institute’s definition. The first held that

... 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 motivées.<sup>136</sup>

The International Law Institute takes an even stricter line apparently requiring that the measure should be *proportional* to the gravity of the offence and of the damage suffered.<sup>137</sup> A less strict concept seems to emerge from the *dictum* of the

<sup>121</sup> Phillimore, op. cit., p. 32; Grotius, op. cit., p. 629; and Vattel, op. cit., p. 283.

<sup>122</sup> Oppenheim, op. cit., p. 141.

<sup>123</sup> Anzilotti considered the rule of proportionality merely as a moral norm; Strupp did not believe in the existence of rules establishing proportions which had to be observed in the exercise of reprisals (loc. cit., pp. 568-569).

<sup>124</sup> Loc. cit., p. 223.

<sup>125</sup> Op. cit., p. 21.

<sup>126</sup> Op. cit., p. 262.

<sup>127</sup> Loc. cit., p. 21.

<sup>128</sup> Loc. cit., p. 178.

<sup>129</sup> Op. cit., p. 463.

<sup>130</sup> *International Law ...*, op. cit., p. 219.

<sup>131</sup> “Repressalie und Retorsion: Zu einige Aspekten ihrer innerstaatlichen Durchführung, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1973), pp. 179-222, and especially p. 192.

<sup>132</sup> Loc. cit., pp. 753-754.

<sup>133</sup> *Diritto internazionale*, vol. I, *La società internazionale e il diritto*, p. 597.

<sup>134</sup> “Kodifikation der völkerrechtlichen Verantwortlichkeit”, *Neue Justiz* (1973), pp. 225 *et seq.*, art. 9, second para., p. 228.

<sup>135</sup> “Economic coercion...” loc. cit., p. 10.

<sup>136</sup> See footnote 64 above. It will be recalled that Germany had destroyed on that occasion six Portuguese military posts in Angola in response to the killing of two German officers and an official in the Portuguese stronghold of Naulilaa. The tribunal rejected the German contention that its action had been justified as a reprisal, on the following grounds: first, the death of the German personnel could not be considered as an unlawful act of the Portuguese authorities; second, the German reaction had not been preceded by any *sommation préalable*; and finally, there had been no *proportion admissible entre l’offense alléguée et les représailles exercées*, p. 1028.

<sup>137</sup> According to article 6, paragraph 2, of the Institute’s 1934 resolution, the acting State must

scholars from whom emanated the *Air Service Agreement* award,<sup>138</sup> according to which “[i]t is generally agreed that all countermeasures must, in the first instance, have *some degree of equivalence\** with the alleged breach” and “[i]t has been observed, generally, that judging the ‘proportionality’ of countermeasures is not an easy task and can at best *be accomplished by approximation\**”. On this basis the arbitrators had concluded that “[t]he measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France”.<sup>139</sup>

66. According to the former Special Rapporteur’s formulation of article 9, paragraph 2, of part 2 of the draft articles, “the exercise of the right (of injured States) shall not, in its effects, be *manifestly disproportionate\** to the seriousness of the act”.<sup>140</sup> A similar concept seems to be set forth in section 905, paragraph 1 (b) of the *Restatement of the Law Third*, according to which an injured State “may resort to countermeasures that might otherwise be unlawful, if such measures ... are not *out of proportion\** to the violation and the injury suffered”.<sup>141</sup>

67. Another issue emerging from the literature is whether proportionality is required with reference to the wrongful act *per se*, to the effects thereof, to the specific—mediate or intermediate—aim of the measure, or to a combination of two or more of those elements. While proportionality is often referred to in relation to the violation (namely to the importance of the rule breached and the gravity of the breach),<sup>142</sup> there is also frequent reference to the damage or injury caused by the

---

“*Proportionner la contrainte employée à la gravité de l’acte dénoncé comme illicite et à l’importance du dommage subi*”.

(*Annuaire de l’Institut de droit international* (footnote 43 above), p. 709.)

<sup>138</sup> See footnote 49 above.

<sup>139</sup> *Ibid.*; see para. 83 of the award.

<sup>140</sup> See footnote 103 above. Although perhaps not entirely clearly, Riphagen distinguishes between qualitative and quantitative disproportion. Under the first, a measure would be justified only where the breach committed by way of countermeasure responds to an internationally wrongful act consisting in the violation of the same obligation, of an obligation of the same type, or of an obligation closely connected with the infringed obligation. According to him, this hypothesis would be characterized by the coming into play of the concept of “self-protection” and the nature of the wrongful act and of the rights of the offending State:

“Within the framework of qualitative proportionality, the admissibility of measures of self-help is obviously the most dubious, since such measures necessarily involve an infringement of rights of the author State. Accordingly, reprisals are generally considered as allowed only in limited forms and in limited cases. The nature of internationally wrongful acts and the nature of the rights of the author State infringed by the reprisal are relevant here.” (*Yearbook ...1983*, vol. II (Part One), p. 15, document A/CN.4/366 and Add.1, para. 80).

More simply, *quantitative* proportionality would be the proportionality of the damages (injuries) caused to the offending State by the measure to the damages (injuries) suffered by the acting State. According to Riphagen himself, however, the two kinds of proportionality would not be separable; they would be two sides, so to speak, of the same coin (*Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330, paras. 94-95).

<sup>141</sup> See footnote 53 above. Writers who seem to share the same opinion are Alland, *loc. cit.*, p. 184; Malanczuk, “Countermeasures...”, *loc. cit.*, p. 214; Conforti, *Diritto internazionale*, p. 360; Cassese, *op. cit.*, p. 271. In the present writer’s view, proportionality should be linked to the degree of fault (*dolus* or *culpa* in a narrow sense) by which the wrongful act is characterized.

<sup>142</sup> In this respect the arbitral award in the *Naulilaa* case has been of influence. In that award the notion of proportionality was linked to the act which motivated the reprisals (see footnotes 64 and 136 above). This view is espoused by a number of writers including Kelsen, *op. cit.*, p. 21; Kapoor, *A Textbook of International Law*, p. 625; and Sereni, *Diritto internazionale*, vol. III, *Relazione internazionale*, p. 1559.

breach.<sup>143</sup> Reference is also made in the literature to the aims pursued by the countermeasures. The question would be to ascertain whether or not the aims pursued by the injured State's measures are relevant and the nature and gravity of the breach and the effects thereof, for the purpose of determining if the principle of proportionality has been observed.<sup>144</sup> Indeed, some writers seem to link proportionality both to the injury suffered and the aim pursued while keeping the two elements separate. Skubiszewski, for example, asserts that reprisals must be "proportionate to the injury suffered" adding however that they must not involve "the application of compulsion in an amount that goes beyond what would be necessary to secure a settlement".<sup>145</sup> According to McDougal (who presumably had in mind, however, violent reprisals)

It may be suggested... that if reprisals are to signify something more than an adventitious "survival of *lex talionis*", they should be adapted and related not so much to the past illegality but rather and primarily to the future purpose sought. It is a common emphasis that the legitimate purpose of reprisals is not the infliction of retribution but the deterrence of future unlawfulness. From such emphasis, it would seem to follow that the kind and amount of permissible reprisal violence is that which is reasonably designed so to affect the enemy's expectation about the costs and gains of reiteration or continuation of its initial unlawful act as to induce the termination of and future abstention from such act. The quantum of permissible reprisal violence, so determined, may under certain circumstances, conceivably be greater than that inflicted in the enemy's original unlawful act.<sup>146</sup>

68. Such differences make it advisable to consider State practice and international jurisprudence with the utmost care in order to choose the most suitable formulation of the law. In particular, it must be determined if proportionality should be required not only for the measures qualifying as reprisals *stricto sensu*, but also for the so-called reciprocal measures; whether the latter are subject instead to stricter requirements such as identity or equivalence or whether they do not really differ from other reprisals except for the fact that they are more perfectly proportional, so to speak, to the gravity of the wrongful act and of the injury caused. It must also be determined, in the light of a thorough analysis of practice, whether the requirement of proportionality should be formulated in broader or stricter terms and in connection with what elements: injury suffered, importance of the rule infringed, aim of the measure resorted to, or any combination of two or more of those elements. More satisfactory and articulate formulations could perhaps be found than those noted under paragraphs 65 and 66 above.

---

<sup>143</sup> Among others, Venezia. loc. cit., p. 476; De Guttry, op. cit., p. 263; Elagab, op. cit., p. 94; Fisler Damrosch. loc. cit., p. 792; Zemanek, "The unilateral enforcement..." , loc. cit., p. 37; Ago (*Yearbook ... 1979*, vol. 11 (Part One) (see footnote 110 above), para. 82) and Riphagen in his draft article 9, paragraph 2 (see footnotes 103 and 140 above) refer to proportionality not only in relation to damage suffered. The 1934 resolution of the International Law Institute mentioned above, would appear to refer both to the breach and to the damage suffered.

<sup>144</sup> On the relevance of these aims, see De Guttry, op. cit., pp. 263-264; Dominicé, loc. cit., pp. 64-66; and Elagab, op. cit., pp. 86 *et seq.*

<sup>145</sup> Loc. cit., p. 753.

<sup>146</sup> McDougal and Feliciano, *Law and Minimum World Public Order*, pp. 682-683.

## CHAPTER VII

### VII. THE REGIME OF SUSPENSION AND TERMINATION OF TREATIES AS COUNTERMEASURES

69. It is a controversial matter to determine whether the legal regime of countermeasures—particularly with regard to prior demand for reparation, impact of dispute settlement obligations and proportionality—should be adapted where the measures resorted to consist in the termination or suspension of a treaty or of any portion thereof. However, before considering the distinctive features that some legal writers appear to identify in a regime of measures of this kind, a few general remarks must be made.

70. Suspension and termination are mainly dealt with by writers on international law as a part of the law of treaties drawing inspiration, implicitly or explicitly, from well-known national law rules on suspension and termination of contracts.<sup>147</sup> Within the framework of the law of treaties, suspension and termination are considered as vicissitudes in the life of a treaty,<sup>148</sup> which obviously include the consequences of non-compliance. It is within that context, around suspension and termination, that scholarship and jurisprudence have developed rules governing (a) the kinds of treaty breaches that could justify suspension or termination; (b) the conditions in the presence of which a treaty could be suspended or terminated totally or in part; and (c) the requirements with which the injured State has to comply in order lawfully to proceed to suspension or termination. By way of codification and/or progressive development of the rules of general international law covering such matters the Vienna Conference on the Law of Treaties adopted article 60 and the auxiliary provisions embodied in articles 65-67, 70 and 72 of the 1969 Convention.

71. The question arises, however, whether the rules of general international law concerning suspension and termination of treaties as unilateral measures are available to the injured State in response to any and every internationally wrongful act. This is a much broader subject, not prejudged by article 60 of the Vienna Convention (or by the above-mentioned auxiliary provisions), as stated explicitly in article 73 of that Convention.<sup>149</sup> It reaches not only beyond the vicissitudes of a given, single treaty (as

---

<sup>147</sup> In the literature and in the practice of private law, both remedies are envisaged as typifying legal relationships circumscribed within the sphere of a contract.

<sup>148</sup> In a manner fairly similar to that in which the more or less analogous vicissitudes of contracts are envisaged in private national law.

<sup>149</sup> Article 73 reads:

“The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States”.

Consideration should also be given, of course, to the reason for excluding State responsibility from the Vienna Convention regime as a whole as explained by the Commission itself prior to the adoption of article 73:

“The draft articles do not contain provisions concerning the question of the international responsibility of a State with respect to a failure to perform a treaty obligation. This question, the Commission noted in its 1964 report, would involve not only the general principles governing reparation to be made for a breach of a treaty, but also the grounds which may be invoked in



in the case of article 60 mentioned above) but beyond the sphere of treaty law altogether.<sup>150</sup>

72. Indeed, article 60, the only one that is of interest in the present context, contemplates suspension and termination of a given treaty, only as possible reactions on the part of the contracting States or any one of them, to a breach—and a material breach at that—of one or more rules of *that same treaty*. The legal regime of suspension and termination of treaties within the framework of the instrumental consequences of an internationally wrongful act instead covers or should cover (*de lege lata* or *de lege ferenda*) such cases as (a) suspension or termination of a treaty (or any rule or part thereof) in response to an infringement of one or more of the obligations deriving from the same treaty; (b) suspension or termination of a treaty (or any rule or part thereof) in response to a breach of *any other treaty or treaties* (this goes far beyond the area covered roughly by article 60); and (c) suspension or termination of a treaty (or any rule or part thereof) in response to a breach of a *rule of general international law*, whether an ordinary customary rule or principle or a rule of *jus cogens*.

73. It is well known that the interpretation of article 60 is not without controversy. There is also controversy whether and to what extent the content of that article is in line with the existing general law on suspension and termination of treaties.<sup>151</sup> Be that as it may, the provisions set forth in article 60 can in no way be considered as exhausting the legal regime of suspension and termination for the purposes of the general regime of State responsibility. More precisely, the provisions of article 60 do not encompass either (a) the regime of *all the measures* that can be resorted to in connection with a breach of a given treaty; or (b) the regime of the various measures (suspension and termination included) which may be resorted to in connection with the infringement of any obligation arising from *any rule* of international law, whether created by treaty or by custom.

74. It follows that the legal regime of suspension and termination of treaties must first of all be studied in the light of the rules and principles tentatively explored so far

---

justification for the non-performance of a treaty. As these matters form part of the general topic of the international responsibility of States, which is to be the subject of separate examination by the Commission, it decided to exclude them from its codification of the law of treaties and to take them up in connexion with its study of the international responsibility of States". (*Yearbook ... 1966*, vol. II, p. 177, para. 31.)

See on this point Rosenne, *Breach of Treaty*, pp. 3-5, and "Vienna Convention on the Law of Treaties", in *Encyclopedia of Public International Law* (1984), pp. 525-533.

<sup>150</sup> Accordingly, this interpretation of the relationship between the law of treaties and the law of State responsibility has recently been supported by the arbitral tribunal in the decision on the "Rainbow Warrior" case between New Zealand and France (United Nations, *Reports of International Arbitral Awards*, vol. XIX (Sales No. E/F.90.V.7)). See paras. 73 *et seq.* of the award and the comment by Palmisano, "Sulla decisione arbitrale relativa alla seconda fase del caso 'Rainbow Warrior'", *Rivista di diritto internazionale*, 1990, pp. 885-889. For a different interpretation of this relationship, see Bowett, "Treaties and State responsibility", in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*.

<sup>151</sup> The coincidence may result either from the fact that the content of article 60 constitutes a mere translation into written form of the existing general law on the matter or from the fact that the content of the relevant part of general international law came at some later stage to reflect (and then to conform to) the regime embodied in article 60. The matter (which remains open for the present time) is somewhat controversial.

with regard to countermeasures in general.<sup>152</sup> The rules include those concerning the substantive and procedural requirements, conditions, limitations and modalities of countermeasures, namely, the obligations or *on-era* to be satisfied by the injured State prior to resort to measures, and the requirement of proportionality. Notably, it must be determined whether the particular features of suspension and termination affect to any extent and, if so, in what sense, the conditions and requirements that have to be fulfilled for any other countermeasure to be lawfully taken, particularly as regards *sommatio* and dispute settlement obligations.

75. The very first question that arises is whether suspension and termination may be resorted to by way of reaction to any type—or only to a particular type—of internationally wrongful act. As is known, the law of treaties generally makes a distinction in this regard. While termination would be admissible only in the presence of a material breach of the (same) treaty,<sup>153</sup> suspension would be admissible, under general international law, in case of minor violations. Article 60 of the Vienna Convention is generally considered to have opted for a more restrictive regime of suspension and termination in order to safeguard the continuity and stability of the treaty,<sup>154</sup> requiring in both cases a material breach. Under the law of treaties, at least as set forth in article 60, minor violations should not bring about either termination or suspension.

76. A choice will have to be made at that point between two possible ways in which the restrictions might operate. The first possibility would be to envisage them as specific, particular rules applicable to the suspension and termination of treaties, within the wider perspective of the law of State responsibility. The second possibility would be to envisage them merely as the result of the operation, as far as suspension and termination are concerned, of the rules or principles governing countermeasures in general, regardless of the treaty framework within which those two remedies apply. The same problem arises for the issues of “qualitative proportionality” and

---

<sup>152</sup> Even when resorted to following a violation of treaty rights, suspension and termination are just two of the forms of remedial action available to the injured State. On this point, Cavaglieri has stated:

*Parmi les causes qui ne déterminent pas directement, ipso jure, l’extinction d’un traité, mais réalisent cet effet dans la mesure où l’État intéressé invoque son droit à l’abrogation du traité, il y a sans aucun doute, à notre avis, l’inexécution par une des parties d’une ou de plusieurs dispositions du traité même. Cette inexécution n’entraîne pas nécessairement, automatiquement, la disparition du traité. Celui-ci, malgré l’inexécution plus ou moins grave de la part de l’un des contractants, garde toute sa vigueur, produit tous ses effets. L’autre partie peut, en présence de cette infraction, choisir la voie qu’elle croit la plus conforme à son intérêt. Elle peut tolérer l’inexécution sans aucune réaction de sa part; ou exiger que le traité soit régulièrement exécuté et demander à l’État coupable la réparation des dommages soufferts; ou méconnaître à son tour, à titre de réciprocité, la règle violée. Mais l’inexécution du traité l’autorise également à se considérer comme dégagée de ses obligations, à déclarer qu’elle n’est plus liée par aucune clause de ce traité.* (“Règles générales du droit de la paix”. *Recueil des cours. ... 1929-I*, p. 534.)

See also Sereni, *op. cit.*, p. 1479; Sinha, *Unilateral Denunciation of Treaty because of Prior Violations of Obligations by Other Party*, p. 206; Guggenheim, *Traité...*, vol. I, *op. cit.*, pp. 219 *et seq.*; Morelli, *op. cit.*, p. 327; Jimenez de Aréchaga, “International law in the past third of a century”, *Collected Courses...*, 1978-I, p. 79; and Dominicé, *loc. cit.*, p. 28.

<sup>153</sup> See the opinion of PCIJ in the *Status of Eastern Carelia* case (*P.C.I.J., Series C, No. 3*, vol. II, pp. 150-151) and the opinion of the arbitrator in the *Tacna-Arica* case (*AJIL*, vol. 19 (1925), p. 415). For writings on the subject, see Hall, *A Treatise on International Law*, p. 409; McNatr, *The Law of Treaties*, p. 571; Simma, “Reflections...”, *loc. cit.*, p. 31; Guggenheim (*Traité...*, vol. I, *op. cit.*, p. 226); and Oppenheim, *op. cit.*, p. 947.

<sup>154</sup> Capotorti, “L’extinction et la suspension des traités”. *Collected Courses...*, 1971-III, p. 553.

“separability” of the provisions to be suspended or terminated, which are so familiar to those who study the international law of treaties.

77. It is precisely within the context of suspension or termination of a treaty in response to a violation of the same treaty that the question of “qualitative proportionality” arises. According to Simma, for instance, while qualitative proportionality—or proportionality “in kind”—would not be required by international law for what may be called common reprisals, it would be an essential feature for the lawfulness of suspension or termination within the framework of the law of treaties.<sup>155</sup> Forlati Picchio takes a similar line.<sup>156</sup> The concept of qualitative proportionality (or, what amounts to the same thing, namely the concept of suspension or termination by way of reciprocity) thus leads the majority of writers on the law of treaties to assert that whenever the part of the treaty infringed can be separated from the rest of the treaty, suspension or termination is admissible only in respect of that part of the treaty which is affected by the infringement. The injured State would be bound to honour the rest of the treaty.<sup>157</sup>

78. In connection with “contractual” or “treaty-based” countermeasures another particular problem arises with regard to requirements such as prior demand for cessation or reparation and prior resort to available settlement procedures. Although a prior demand for cessation or reparation seems generally to be a mandatory precondition for resort to unilateral remedial measures consisting in the violation of a general rule, that requirement does not seem to be equally stringent in the case of resort to suspension of compliance with a treaty obligation or to termination. According to some writers, suspension and termination would seem to be among the rare cases where lawful resort to measures would not be dependent on a prior demand for cessation or reparation. That is the line taken, *inter alia*, by Reitzer,<sup>158</sup> McNair,<sup>159</sup> and Lattanzi.<sup>160</sup>

79. Other legal writers instead seem to incline to the view that suspension and termination, like other forms of unilateral reaction, should also be preceded by a demand for compliance with the “primary” or “secondary” obligations. Guggenheim, for instance, thinks that the unilateral termination of a treaty for non-compliance should not take place until a *sommation*, accompanied by a reasonable deadline for the lawbreaker to comply with the injured State’s claim, has proved fruitless.<sup>161</sup> Simma considers that both practice and jurisprudence indicate that:

---

<sup>155</sup> “Reflections ...” loc. cit., pp. 21-22.

<sup>156</sup> According to Forlati Picchio, while the principle of proportionality governs “resort to suspension on the basis of the general principle of self-help (reprisals, self-help in a narrow sense and self-defence)”, in the cases of “termination or suspension under the principle *inadimplenti non est adimplendum*, proportionality is replaced by a more specific criterion, namely by the typically synallagmatic principle of *quid pro quo (corrispettivo)*” (op. cit., p. 92).

<sup>157</sup> Compare, for example, the comment to article 30 of the Harvard draft (Harvard Law School, *Research in International Law, III. Law of Treaties* (AJIL, vol. 29 (1935), Supplement No. 4), pp. 1134-1144); McNair, op. cit., pp. 570-573; Sinha, op. cit., p. 90. Likewise, article 60 of the Vienna Convention on the Law of Treaties, at least with regard to suspension, uses the expression “suspending [the] operation [of the treaty] in whole or in part”.

<sup>158</sup> Op. cit., pp. 80 *et seq.*

<sup>159</sup> Op. cit., p. 571.

<sup>160</sup> Loc. cit., pp. 542 and 544.

<sup>161</sup> *Traité...*, vol. I, op. cit., p. 228.

When a State esteems that it has been injured by a material breach of a treaty, it is not at liberty immediately to resort to unilateral termination, but has to follow a certain procedure. It will normally start with the registering of a reclamation for resumption of performance or for a reply to the claim of termination within a reasonable time. Only on those rather rare occasions where the defaulting State admits from the beginning that it has substantially violated the agreement concerned or where it does not reply at all to the reclamation, may the innocent State then proceed with the termination. In all cases, however, where the allegedly defaulting State denies either the fact of the violation or its character of being a material breach there will be a “difference”, a legal solution of which is only possible with the agreement of the parties. In any case, it is a difference highly suitable for settlement by reference to an international court or tribunal. Unilateral termination of the broken treaty is only permitted after the State injured by the breach has tried in vain to arrive at an agreement with the violator.<sup>162</sup>

Fitzmaurice in his reports to the Commission on the law of treaties also took that position. According to him, the parties intending to claim termination or invalidity of the treaty must notify and motivate their claim to the counterpart, and then, after the claim has been rejected or not satisfied within a reasonable time limit, offer to submit the question to the judgement of an arbitral tribunal or, failing acceptance of arbitration, to ICJ. Only if such an offer is not accepted within a reasonable time limit, may performance of the treaty be unilaterally suspended; and only after the lapse of six months without any acceptance of the settlement procedures proposal, may the treaty be terminated by unilateral decision.<sup>163</sup>

80. Once again, a study of international practice will show—*de lege lata* as well as *de lege ferenda*—whether resort to suspension or termination should be subject to any ad hoc regime, and whether such resort should be subject to different, presumably less strict, conditions and requirements than those applying to countermeasures taken outside of a treaty framework.

81. A point which is of relevance to the absolute limitations placed on unilateral measures in general but raises particular problems in connection with treaty suspension or termination relates to cases where resort to one or the other of such remedies would affect the rights of States other than the law-breaking State. The question here is whether and to what extent it may be lawful for a State to suspend or terminate a multilateral treaty, by way of countermeasure. Writers are notoriously at odds on this point. Fitzmaurice, for example, considering the range of obligations of various kinds deriving from a multilateral treaty, proposes a distinction. On one side he places reciprocal obligations, that is to say, “reciprocal” or “divisible” obligations. On the other, he places the obligations requiring integral compliance (that is to say, “indivisible” or “integral” obligations).<sup>164</sup> A suspension or termination measure could thus lawfully be taken by the injured State unilaterally under the generally applicable

---

<sup>162</sup> “Reflections...”, loc. cit., pp. 31-32. A similar position is taken by Pisillo Mazzeschi in *Risoluzione e sospensione dei trattati per inadempimento*, p. 339.

<sup>163</sup> See *Yearbook ... 1958*, vol. II, pp. 23 *et seq.*, document A/CN.4/115, articles 2, 3, 7-19, and 23; and *Yearbook ... 1959*, vol. II, pp. 44 and 50-51, document A/CN.4/120, articles 12 and 37-39.

<sup>164</sup> See *Yearbook ... 1957*, vol. II, p. 16, document A/CN.4/107, article 19 at p. 54. The comment to article 27 of the Harvard draft identifies among the kinds of obligations deriving from a multilateral treaty those the violation of which infringes directly and particularly the rights of only one of the parties (see footnote 157 above, pp. 1092-1093). Sereni, for his part, identifies the type of multilateral treaty where the violation of an obligation, even by one party, frustrates the object and the purpose of the whole treaty for all the parties (op. cit., pp. 1481-1482). Other writers, on the contrary, make no distinction between the various kinds of obligations deriving from a multilateral treaty, for the most part they hold the view, on the one hand, that termination would in principle be inadmissible when any participating States are in the position of “third” States (*vis-à-vis* the violation) which could be injured by the measure (termination) and, on the other hand, that suspension would be admissible (Guggenheim, *Traité...*, vol. I, op. cit., pp. 228-229; McNair, op. cit., p. 580; Morelli, op. cit., pp. 327-328; and Kelsen, op. cit., p. 358).

(relative or absolute) limitations or conditions, with respect to any “divisible” or “reciprocal” obligation binding the injured State *vis-à-vis* the wrongdoing State. On the contrary, no suspension or termination measure could lawfully be taken by the injured State unilaterally with regard to any “indivisible” or “integral” obligation (deriving from the multilateral treaty that has been infringed), non-compliance with which would constitute a violation of the treaty to the detriment of States parties to the treaty other than the wrongdoing State and would go beyond the mere legal injury inherent in the infringement of a treaty to which a State is a party.

82. Article 11, paragraph 1, of part 2 of the draft, as proposed by the former Special Rapporteur in 1984, reflects, in part, the views just recalled. It reads:

1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

(a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights or the performance of obligations of all other States parties to the treaty; or

(b) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty; or

(c) such obligations are stipulated for the protection of individual persons irrespective of their nationality.<sup>165</sup>

83. The question will be to see whether suspension and termination of multilateral treaties, or of certain kinds of multilateral treaties, should be dealt with separately in the draft or whether the problem should be looked at from the different, broader perspective of the violation, by way of countermeasure, of rules setting forth *erga omnes* obligations. It would thus be covered in a more general way, regardless of the contractual or customary nature of the rules involved.<sup>166</sup>

## CHAPTER VIII

### VIII. THE ISSUE OF SO-CALLED SELF-CONTAINED REGIMES

84. The question of the relationship between the general rules on State responsibility, on the one hand, and, on the other, of any ad hoc rules that a given treaty or set of treaties may establish to cover cases of violation, is linked to that of the possible “specificity” of measures consisting in the infringement of treaty rules. This problem seems to arise in the presence of those treaty-based systems or combinations of systems which tend to address, within their own contractual or special framework, the legal regime governing a considerable number of relationships among the States parties, including in particular the consequences of any breaches of the obligations of States parties under the system. Such consequences include, in some cases, special, sometimes institutionalized, measures against violations. It follows that such systems may, to some extent, affect, with varying degrees of explicitness, the *faculté* of States parties to resort to the remedial measures which are open to them under general international law. It would appear to be in situations of

<sup>165</sup> *Yearbook ... 1985*, vol. II (Part One) p. 12. document A/CN.4/389.

<sup>166</sup> See paras. 121 and 122 below.

this kind that some legal scholars refer, within the framework of the law of State responsibility, to “self-contained” regimes.<sup>167</sup>

85. The most typical—and perhaps the most likely—example of such regimes is probably the “system” set up by the treaties establishing the European Communities and the relations resulting therefrom.<sup>168</sup> Another example frequently evoked by writers, including the previous Special Rapporteur, would be the “conventional system created by human rights treaties.”<sup>169</sup> A self-contained regime consisting of a particularly obvious combination of customary as well as treaty rules would be, according to an ICJ *dictum*, “the law of diplomatic relations”.<sup>170</sup> The question arising with regard to these “regimes” is whether the existence of remedies—sometimes more advanced—for which they make specific provision, affects to any degree the possibility for legal recourse by States parties to the measures provided for, or otherwise lawful, under general international law.

86. It should immediately be added, however, that although a problem of “specificity” is generally seen as arising particularly in connection with the regime of countermeasures—and perhaps rightly so—it is not confined thereto. Any real or alleged self-contained regime may also concern other consequences of internationally wrongful acts, first of all the substantive consequences covered by draft articles 6 to 10, which are at present before the Drafting Committee.<sup>171</sup>

87. The problem concerns more or less the entire scope of part 2 of the draft. As such, it should not be dealt with in the section of part 2 that covers countermeasures, but more appropriately in the section or chapter of part 2 covering the general

---

<sup>167</sup> According to Riphagen, for example, the systems under consideration would constitute “subsystem(s)”, namely, “an ordered set of conduct rules, procedural rules and status provisions, which formed a closed legal circuit, for a particular field of factual relationships” (*Yearbook ... 1982*, vol. I, 1731st meeting, para. 16). Within any such system primary rules and secondary rules are closely intertwined and are inseparable. The concept is understood differently by Simma, who uses the expression “self-contained regime” in a narrow and more specific sense “to designate a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules. A ‘self-contained regime’ would then be a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party” (“Self-contained regimes”, *Netherlands Yearbook of International Law* (1985), pp. 115-116). In particular, according to Simma, the concept of “self-contained regime” would not be appropriate for those subsystems which provide that in case of failure of a special remedy built into the treaty, a more general remedy based upon another treaty (subsystem) or customary international law becomes (re-)applicable (*ibid.*, p. 117).

<sup>168</sup> Reuter and Combacau, *Institutions et relations internationales*, p. 386; Sørensen, “Eigene Rechtsordnungen—Skizze zu einige system-analytischen Betrachtungen über ein Problem der internationalen Organisation”, in *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, Festschrift zum 70. Geburtstag von H. Kutscher* (1981), p. 431; Riphagen, *Yearbook ... 1982*, vol. II (Part One), p. 33, document A/CN.4/354 and Add.1-2. paras. 72-73; and Simma, “Self-contained...”, *loc. cit.*, pp. 125 *et seq.*

<sup>169</sup> Riphagen, *Yearbook ... 1983*, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1; Simma, “Self-contained...”, *loc. cit.*, pp. 130 *et seq.*; and Meron, *Human Rights and Humanitarian Norms as Customary Law*, pp. 230 *et seq.*

<sup>170</sup> See on this problem Dominicé, “Représailles et droit diplomatique”, in *Recht als Prozess und Gefüge: Festschrift für Hans Huber*, pp. 541 *et seq.*; Simma, “Reflections ...” *loc. cit.*, pp. 120-122; Elagab, *op. cit.*, p. 120; and Sicilianos. *op. cit.*, pp. 346-351.

<sup>171</sup> For articles 6 and 7 as proposed by the Special Rapporteur, see *Yearbook ... 1988*, vol. II (Part One) (footnote 1 above); for articles 8 to 10, see *Yearbook ... 1989*, vol. II (Part One) (footnote 2 above).

principles of the content, forms and degrees of international responsibility. In particular, it is a matter in many ways close to the general problem covered by draft article 2 of that chapter. While not excluding the possibility of dealing with it provisionally in one of the final provisions of the chapter at present under consideration, it must be kept in mind that the relevant draft article will have to be inserted in its proper place during the second reading of the chapter entitled “General principles”.

88. To enter into a discussion here of the so-called self-contained regimes would therefore be premature, all the more so when the substantial volume of material collected so far on the subject raises the question whether and to what extent the concept of “self-contained” regimes is really relevant to the solution of the problems of State responsibility in connection with which it has been brought into the picture so far.

## CHAPTER IX

### IX. THE PROBLEM OF DIFFERENTLY INJURED STATES

89. A further problem is how to identify precisely the State or States which, in a particular case, are entitled—or in given instances obliged—to react to an internationally wrongful act. Together with the perception of the essentially inorganic nature of the legal relationships normally arising from internationally wrongful acts, the starting point of any consideration of the matter is obviously the concept of an injured State, a definition of which has in fact been envisaged as an essential element of part 2 of the draft. This is to be found in article 5 as proposed in 1984 and adopted on first reading by the Commission in 1985.<sup>172</sup> Whatever the merits of that definition—doubts about the appropriateness of which have been formulated within the Commission and beyond—it seems obvious that differences of degree of involvement surely exist amongst injured States from the viewpoint of the nature and extent of the injury suffered.

90. A number of qualifiers are thus being developed by scholars and in the Commission under the general notion or definition of an “injured State”. At one extreme are found terms such as “directly” injured, affected or involved State or States, or “specially” affected State or States, and—at the other extreme—“non-directly” or “indirectly” injured or affected or involved States, or “non-specially” affected or injured States. Between these two extremes are found concepts such as “more directly” or “less directly” affected or involved States. Another concept used is that of “third” State or States. Considering, however, that a State may be in a “third party” position either in relation to a primary obligation or in relation to a given breach (secondary obligation), the term “third” may be misleading. In the latter sense it would merely be a synonym for non-injured State, obviously in the position of “third” party in relation to the wrongful act, and, as such, not meeting any of the conditions of the definition embodied in draft article 5 of part 2, for example. However, while accepting that definition as a starting point for the time being, the

---

<sup>172</sup> *Yearbook ... 1985*, vol. II (Part Two), p. 25.

problem seems to be not so much to determine whether or not a State belongs to the general class of injured States, as to take account of the fact that that general class includes different categories of States from the point of view of the injury, and to determine what the consequences of that are for each State's position with regard to its rights, *facultés*, and possibly its duties.

91. The attention of scholars has been drawn to this problem—especially since the adoption of article 19 of part 1<sup>173</sup>—in connection with wrongful acts constituting violations of *erga omnes* obligations, more particularly with regard to the consequences of crimes. The problem related in particular to the possible response (against wrongful acts of this kind) by States other than the State which, as a victim of a gross violation, was the “directly” or “most directly” affected—such States acting, jointly or severally, possibly within the framework of an institutionalized regime.<sup>174</sup> It did not take long, however, for scholars and Commission members to realize that similar problems arise in the case of any other wrongful acts—notably delicts—which, in addition to the wrongdoer and one or more directly affected States, involve *other States*.<sup>175</sup> So far, the most frequently studied of these situations has been that of the violation of rules of multilateral treaties or of certain kinds of rules contained in such treaties, notably those which give rise to international or “integral” rights and obligations (peace treaties, disarmament treaties, treaties on the environment);<sup>176</sup> non-compliance with decisions of international judicial bodies;<sup>177</sup> non-compliance, not necessarily gross or on a mass scale, with human rights obligations;<sup>178</sup> violation of the freedom of the high seas;<sup>179</sup> abuse of natural resources of common interest;<sup>180</sup> and

<sup>173</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 32.

<sup>174</sup> This was indeed the main problem dealt with by Riphagen in the context of what he called the “third parameter”, that is “the position of third States in respect of the wrongful act” (*Yearbook ... 1980*, vol. II (Part One) (see footnote 140 above), p. 119, paras. 62 *et seq.*, especially 66 *et seq.*). On the *facultés*, rights and duties of States “non-directly” affected by a crime, see, *inter alia*, Dupuy, “Action publique et crime international de l'État. A propos de l'article 19 du projet de la Commission du droit international sur la responsabilité des États”, *Annuaire français de droit international*, 1979, p. 554, and “Le fait générateur de la responsabilité internationale des États”, *Collected Courses...*, 1984-V, p. 102; Zoller, *op. cit.*, p. 115; Alland, *loc. cit.*, pp. 198 *et seq.*; De Guttry, *op. cit.*, pp. 283 *et seq.*; Spinedi, *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, pp. 115 *et seq.*; Hutchinson, “Solidarity and breaches of multilateral treaties”, *British Year Book of International Law*, 1988, pp. 196 *et seq.*; and Sicilianos, *op. cit.*, pp. 135 *et seq.*

<sup>175</sup> *Yearbook ... 1980*, vol. II (Part One) (see footnote 140 above), pp. 114-115, paras. 37-42, and pp. 119-120, paras. 62-65; De Guttry, *op. cit.*, pp. 290-301; Sachariew, “State responsibility for multilateral treaty violations: Identifying the ‘injured State’ and its legal status”, *Netherlands International Law Review*, 1988, pp. 273 *et seq.*; Hutchinson, *loc. cit.*, pp. 164-196; Sicilianos, *op. cit.*, pp. 110-134.

<sup>176</sup> See footnote 164 above, Fitzmaurice, *Yearbook ... 1957*, vol. II, pp. 34 *et seq.* See also, Sachariew and Hutchinson, *loc. cit.*

<sup>177</sup> Akehurst, *loc. cit.*, p. 14; Schachter, “Enforcement of judicial and arbitral decisions”, *AJIL* (1960), pp. 11-12; Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, pp. 793 *et seq.*; and Sicilianos, *op. cit.*, pp. 103-107.

<sup>178</sup> See, *inter alia*, Rougier, “La théorie de l'intervention d'humanité”, *RGDIP* (1910), pp. 468 *et seq.*; Schindler, “Le principe de non-intervention dans les guerres civiles”, *Annuaire de l'Institut de droit international*, 1973, p. 481; Riphagen, *Yearbook ... 1985*, vol. II (Part One), p. 3, document A/CN.4/389, commentary to article 5 of part 2 of the draft articles, para. (22).

<sup>179</sup> Tunkin, *Droit international public: Problèmes théoriques*, p. 223; Oppenheim, *International Law: A Treatise*, vol. I, p. 308.

<sup>180</sup> Tunkin, *op. cit.*, p. 223; Riphagen, *Yearbook ... 1983*, vol. II (Part One) (see footnote 35 above), para. 90.



other situations.<sup>181</sup> The Commission has expressly considered the case of such other States by covering them in subparagraphs (e) (ii) and (iii) and (f) of paragraph 2 of the above-cited article 5. According to these provisions “injured State” means:

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

...

- (ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
- (iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

92. Once States which have “less-directly” suffered from a wrongful act are defined as “injured” in accordance with article 5, thus qualifying as parties in the responsibility relationship, the problem is to determine whether or not their rights and *facultés* (and possibly duties) stemming from the wrongful act fall under the same regime as those of the “directly” or “specially” affected State and, if not, under which regime.<sup>182</sup> The most difficult problem in that respect is precisely to know whether the so-called “indirectly injured” States are entitled to resort to countermeasures and, if so, whether such resort is subject to different, presumably stricter, limitations or conditions than those applying to the measures taken by the “specially affected” State.<sup>183</sup> The literature, which is not abundant on this point,<sup>184</sup> appears to be divided.

<sup>181</sup> The situation of “non-directly” or “less-directly” affected States is of course determined, in such instances, by the differing degrees of interest such injured States have, as a category or severally, in the compliance of others with their obligations, and mainly by the extent to which any such interest may be found to be legally protected. References and interesting examples may be found in Sachariew, loc. cit., especially pp. 278 *et seq.*; and Sicilianos, op. cit., pp. 100 *et seq.* The matter deserves further exploration.

<sup>182</sup> This problem was explicitly raised in the Commission by Riphagen, in whose view it seems clear “that there is a distinction to be made—for the purpose of determining the legal consequences of a wrongful act—between a State directly affected by a particular breach of an international obligation (the “injured State”) and other States, be they parties to the (multilateral) treaty creating the obligation or not. Within a *scala* of legal consequences, the new legal relationship created by the wrongful act of a State is primarily one between the guilty State and the State (or States) whose material interests are directly affected by that wrongful act” (*Yearbook ...1980*, vol. II (Part One) (see footnote 140 above), p. 115, para. 42).

<sup>183</sup> This is the kind of distinction envisaged, for example, in article 60 of the Vienna Convention on the Law of Treaties, where resort to suspension or termination of multilateral treaties is different for the “specially affected” State and for any other participating State. According to paragraph 2 of that article:

“2. A material breach of a multilateral treaty by one of the parties entitles:

“(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

“(i) in the relations between themselves and the defaulting State,

or

“(ii) as between all parties;

“(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

“(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character

Some authors deny the right of “non-directly injured” States to resort to measures.<sup>185</sup> Others, on the contrary, accept that possibility, at least in certain cases.<sup>186</sup>

93. It should be noted, however, that the matter discussed in this chapter concerns more than just counter-measures. Although largely neglected in the literature, there is also—and, in a sense, foremost—the question of determining whether the so-called non-directly injured States are entitled to claim compliance with the substantive obligations involved in the responsibility relationship,<sup>187</sup> namely cessation, restitution in kind, reparation by equivalent and satisfaction, including guarantees of non-repetition. According to Riphagen, for example, a “non-directly” injured State could “not claim damages *ex tunc*, since by definition there is no injury to its material interest. But a re-establishment *ex nunc* (to the direct benefit of the injured State) and a guarantee *ex ante* against further breaches may well be in the (non-material) interest of that State”.<sup>188</sup>

94. It is thus clear that the problems arising from the degree to which a State may be injured reach beyond the subject of countermeasures, because they also concern the substantive consequences; with respect to crimes, there are even greater complications, because they concern both substantive and instrumental consequences. For the time being, discussion of the latter will be deferred until the Commission takes up the subject of crimes; at the present juncture efforts should be concentrated on a more thorough analysis of practice and scholarship with regard to the position of the so-called non-directly injured States, the aim being to draft an ad hoc section for the part of the draft covering the consequences of delicts.

95. For this section, it is proposed to determine, in the light of the practice of States and international tribunals, whether, in addition to the differentiation among kinds of injured States made in draft article 5 as already adopted—though not without criticism<sup>189</sup>—mention should be made of the differences in legal status between “specially” affected States, on the one hand, and “non-directly” affected States, on the other. It must be determined in particular whether the so-called non-directly affected States (namely, the injured States envisaged in the provisions cited in paragraph 91 above), should enjoy the right to claim cessation, restitution in kind, reparation by equivalent, and/or satisfaction, including guarantees of non-repetition; the *faculté* to resort to counter-measures and, if so, whether such a *faculté* is or should be subject to conditions and restrictions identical to or different from those obtaining for the measures available to “specially” affected States. It is also necessary to determine whether further differentiation needs to be made within the general category of “non-directly” affected States or whether, contrary to the hypotheses formulated so far, no

---

that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.”

<sup>184</sup> Reference is made to the literature dealing specifically with the consequences of delicts, leaving aside for the time being writings concerning crimes, which will be considered at a later stage.

<sup>185</sup> Partsch, “Reprisals”, loc. cit., Graefrath, loc. cit., p. 86; and Hutchinson, loc. cit., p. 170.

<sup>186</sup> Oppenheim, *International Law...*, vol. I, op. cit., p. 308; Tunkin, op. cit., p. 223; Pisillo Mazzeschi, op. cit., pp. 216 *et seq.*, especially pp. 335 *et seq.*; Zoller, op. cit., pp. 115 *et seq.*; and De Guttry, op. cit., pp. 295-298.

<sup>187</sup> Interesting reflections on this issue can be found in the cited works by Sachariew (see footnote 175 above) and Hutchinson (see footnote 174 above).

<sup>188</sup> *Yearbook ... 1980*, vol. II (Part One) (see footnote 140 above), p. 114, para. 40.

<sup>189</sup> See the critical observations made by Sachariew, loc. cit., pp. 274-276; and Sicilianos, op. cit., pp. 116-119.

real differences exist or should exist with respect to the consequences of the wrongful acts currently under discussion, based on the different “position” of “directly” or “indirectly” affected States as “active parties” in the responsibility relationship. In a sense, this distinction may well be a false concept perhaps resulting from some imprecision in the approach to the problem of the determination of the active side of the responsibility relationship. Only after clarifying this point would it be possible to decide whether the rights and *facultés* (and possibly duties) of “non-directly” affected States should be covered in a separate section or chapter, or whether any differences in the position of the “non-directly” affected States should be covered by appropriate amendments to the draft articles dealing with the position of “directly” affected States. There is, of course, a third possibility, namely that neither separate articles nor an adaptation of general articles would really be required. It is possible, in other words, that the position of the “non-directly” injured State with regard to both substantive rights and countermeasures should be left to depend simply on the normal application of the general rules governing the substantive and instrumental consequences of internationally wrongful acts. This third possibility may be the most likely in view of the fact that the peculiarities of the position of “non-directly” affected States may well be just a matter of degree.

## CHAPTER X

### Substantive limitations issues

96. The most important aspect of the area now under review is, of course, the consideration of issues relating to the means injured States may lawfully employ—severally or jointly—in the exercise of their *faculté* of unilateral reaction to an internationally wrongful act. These issues are the following: (a) the unlawfulness of resort to force; (b) respect for human rights in the widest sense; (c) the inviolability of diplomatic and consular envoys; (d) compliance with imperative rules and *erga omnes* obligations. The nature of the difficulties are such that separate, albeit brief, assessments are required of each of the main issues involved.

#### A. The prohibition of the use of force

97. The main proposition advanced by legal writers—and confirmed by a number of authoritative pronouncements of international political and judicial bodies<sup>190</sup>—is of course the condemnation of any form of armed reprisals or countermeasures. More

---

<sup>190</sup> The main elements upon which the prohibition of armed reprisals is considered to rest include: the position taken by ICJ in the *Corfu Channel* case with respect to the minesweeping of the Corfu Channel by the British Navy (“Operation Retail”) (*ICJ Reports 1949*, p. 35, see also *Yearbook ... 1979*, vol. II (Part One) (footnote 110 above), p. 42, para. 89; Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964; paragraph 6 of the first principle of the Declaration (see footnote 106 above); para. 2, sect. II (c) of the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (General Assembly resolution 36/103, annex); and the ICJ judgment in the *Military and Paramilitary Activities in and against Nicaragua* case (see footnote 16 above), p. 127, paras. 248-249). The Final Act of the Conference on European Security and Cooperation (signed at Helsinki on 1 August 1975) also contains an explicit condemnation of forcible measures. Part of Principle II reads: “Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force” (Final Act, Lausanne, Imprimeries réunies, n.d.), p. 79.

precisely, the prevailing view is that such a condemnation is not just a matter of contractual law, in the form of the Charter of the United Nations, but that, together with the whole content of Article 2, paragraph 4, of the Charter, the prohibition of the use of force could be considered as part and parcel of general, unwritten international law.<sup>191</sup>

98. According to other views, based on the persistence of certain practices, there could be forms of unilateral (individual or collective) resort to force that have survived the sweeping prohibition of Article 2, paragraph 4, or been revived as a justifiable form of reaction, under the concept of forcible or armed reprisals or self-defence.<sup>192</sup> For some of the writers who hold that view—with varying degrees of conviction—“a total outlawry of armed reprisals ... presupposed a degree of community cohesiveness and, with it, a capacity for collective action to suppress any resort to unlawful force which has simply not been achieved”.<sup>193</sup> A further cause for resort to forcible measures would seem to be the enormous increase in guerrilla activities in recent decades. With respect to the law on armed reprisals these activities pose a special problem.<sup>194</sup> Analysing incidents in the Israeli-Palestinian context

---

<sup>191</sup> In the sense that the prohibition of armed reprisals has acquired the status of a general (“customary”) rule, the contemporary doctrine (in conformity with the 1986 ICJ judgment cited in footnote 190 above) is almost unanimous (see Brownlie, *International Law...*, op. cit., pp. 110 *et seq.*, in particular pp. 281-282; Reuter, op. cit., pp. 510 *et seq.*, in particular pp. 517-518; Cassese, op. cit., p. 160; Thierry and others, *Droit international public* (1986), pp. 192, 493 *et seq.*, particularly p. 508; Conforti, op. cit., p. 356; Dominicé, “Observations ...”, loc. cit., p. 62; Lattanzi, op. cit., pp. 273-279; Venezia, loc. cit., pp. 465 *et seq.*, in particular p. 494; Salmon, loc. cit., p. 186; Riphagen, *Yearbook ... 1983*, vol. II (Part One) (see footnote 140 above), p. 15, para. 81). The minority who doubt the customary nature of the prohibition are equally firm in recognizing the presence of a unanimous condemnation of armed reprisals in Article 2, paragraph 4, of the Charter as reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (see footnote 106 above), for example, Kunz, “Sanctions in international law”, *AJIL* (1960), pp. 325 *et seq.*; Morelli, op. cit., pp. 352 and 361 *et seq.*; Arangio-Ruiz, “The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations”, *Collected Courses...*, 1972-III, p. 536). It is also significant that the majority of the recent monographs on reprisals are expressly confined to “non-armed” or, perhaps less precisely, “non-forcible” reprisals or measures (reference is made, in particular, to the previously cited works by De Guttry, Zoller, and Elagab). These authors obviously assume that “the prohibition on resort to reprisals involving armed force had acquired the status of a rule of general international law” (De Guttry, op. cit., p. 11).

<sup>192</sup> Falk, “The Beirut raid and the international law of retaliation”, *AJIL* (1969), pp. 415-443; Bowett “Reprisals . . .”, loc. cit., pp. 1-36; Tucker, “Reprisals and self-defense: The customary law”, *AJIL* (1972), pp. 586-596; Lillich, “Forcible self-help under international law”, *United States Naval War College—International Law Studies* (vol. 62): *Readings in International Law from the Naval War College Review 1947-1977*, vol. II, *The Use of Force, Human Rights and General International Legal Issues*, p. 129; Levenfeld, “Israeli counter-fedayeen tactics in Lebanon: Self-defense and reprisal under modern international law”, *Columbia Journal of Transnational Law* (1982), p. 148; Dinstejn, op. cit., pp. 202 *et seq.* For a critical review of this literature, see Barsotti, “Armed reprisals”, in *The Current Legal Regulation of the Use of Force*, pp. 81 *et seq.*

<sup>193</sup> Bowett, “Reprisals...”, loc. cit., p. 2 (but similar considerations had been put forward earlier: see, for example, Colbert, *Retaliation in International Law*, and Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, especially pp. 92 *et seq.*). Bowett continues “[A]s States have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in doing so, they will not incur anything more than a formal censure from the Security Council”, p. 2.

<sup>194</sup> In this respect, Taulbee and Anderson have written:

brought before the Security Council, one writer concluded that the Security Council has never been able to stop the practice of reprisals and may now be moving towards a partial acceptance of “reasonable” reprisals.<sup>195</sup> He observed that if this trend continues, we shall achieve a position which, while reprisals remain illegal *de jure*, they become accepted *de facto*.<sup>196</sup> Another writer goes decidedly further when he observes that the use of armed coercion has in practice proved essential to protect the purposes of the Charter:

There is a need perhaps for some kind of reinstatement of reprisal—if not in the most classical sense, then in a more limited sense—as some kind of sanctioning instrument under international law.<sup>197</sup>

As regards the legal or quasi-legal responses proposed, three different lines of thought have been put forward in order to reduce the discrepancy between the law and the actual practice. One writer tries to develop a framework of criteria (of reasonableness); armed measures which met those criteria would not be condemned.<sup>198</sup>

---

“Guerrilla forces seeking to overthrow established governments often operate from safe havens located in adjoining States ... The State of refuge often pleads lack of competence or knowledge... leaving the target State no viable legal recourse beyond measures within its own borders.” (“Reprisal *redux*”. *Case Western Reserve Journal of International Law* (1984), pp. 309 *et seq.*, particularly p. 322).

<sup>195</sup> Bowett, “Reprisals ...”, *loc. cit.*, p. 21.

<sup>196</sup> *Ibid.*, pp. 10-11. Bowett and other authors stress that these realities of State practice cannot be ignored, especially since the United Nations Security Council on several occasions has appeared to condone forcible measures.

<sup>197</sup> Lillich, *loc. cit.*, p. 133.

<sup>198</sup> In his article on the Beirut raid and the international law of retaliation, Falk maintains that it is impossible, or at least unrealistic to hold on to the unqualified prohibition of armed reprisals. He suggests a framework embodying general guidelines or policies for States to restrain their resort to, and the intensity and duration of forcible measures in periods of peace:

“(1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries;

“(2) That the governmental user of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;

“(3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;

“(4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations;

“(5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution is taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;

“(6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel;

“(7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action;

“(8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constitutes the unacceptable provocation are clearly conveyed;

“(9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign State;

“(10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of its adversary;

“(11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations (1)-(10), and that a disposition to accord respect to the will of the international community be evident;

The result redefines the right of an individual State to use violence in a manner that minimizes the devolution from the generally agreed interpretations of Charter norms.<sup>199</sup>

Another writer suggests that the legal notion of self-defence should be interpreted in a broad sense so as to comprise forcible measures.<sup>200</sup> Yet another seems to attempt to combine both methods, while stressing the need for effective international fact-finding missions.<sup>201</sup>

99. The practice of States which has prompted such writings—though not very abundant and geographically limited—certainly raises questions. The main question is whether the absolute prohibition on the use of force contained in Article 2, paragraph 4, of the Charter of the United Nations applies even in cases of wrongful acts involving force but not qualifying as armed attacks (aggression) and therefore not justifying self-defence as strictly defined, or whether exceptions to that strict rule are admissible or tolerable and, if so, under what circumstances and what legal conditions. According to the writings in question, examples would presumably

---

“(12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terroristic enterprises.” (Loc. cit., pp. 440-442.)

<sup>199</sup> Taulbee and Anderson, loc. cit., p. 325.

<sup>200</sup> In 1972, Tucker argued that the right to have recourse to forcible reprisals formed part of the customary right to self-defence included in the broad interpretation of Article 51 of the Charter: “the substance of the measures forbidden by Article 2, paragraph 4, may, in effect, be permitted under the guise of self-defense by Article 51” (loc. cit., p. 594). “Indeed, so broad is the license afforded by the customary right of self-defense that it is difficult to see what forcible reprisals added of significance to the State’s right to use force in self-help that was not already implicit in self-defense” (ibid., p. 593). “While there is a difference in the conditions held to govern the exercise of forcible reprisals and self-defense [in case of forcible reprisals a State must first have sought to obtain redress for the alleged injury by peaceful means], (ibid., p. 590), “even this difference appears quite modest when applied to provocative unlawful behavior occurring within the context of a generally antagonistic relationship between States” (ibid., p. 593). Dinstein too recently tried to justify certain kinds of armed reprisals (namely those against acts of terrorism) extending the scope of the exception of self-defence provided for in Article 51 of the Charter. In particular, this author distinguishes between “offensive reprisals”, which would be prohibited under Article 2, paragraph 4, and “defensive reprisals”, which would be exempted from the prohibition by virtue of Article 51 (op. cit., pp. 201 *et seq.*).

<sup>201</sup> Although he also thought that the discrepancy between the law and actual practice would be reduced if “the Council took a broader view of self-defense”, contrary to Tucker, Bowett still held armed reprisals to be prohibited in international law.

The clear position is that the Council, as a matter of principle, condemns armed reprisals as illegal. The unclear position emerges from the Council’s failure to condemn in certain circumstances ... The principle as part of the broader prohibition of the use of force, is *jus cogens*, and *no spasmodic, inconsistent practice of one organ of the United Nations could change a norm of this character\** ... This is the more so because ... in the context of the General Assembly’s adoption of the Declaration on Principles of International Law ... in October, 1970, *the reiteration of the formal principle of the illegality of armed reprisals was quite categorical\** (“Reprisals...”, loc. cit., pp. 21-22).

Nonetheless, since States sometimes ignore this prohibition, and because one has to guard against a serious degeneration of the law. Bowett proposes a three-fold approach to the problem of restraining resort to forcible reprisals. He first endorses, with some qualification, Falk’s framework as “guides to moderation by decision makers ... so as to contain reprisals within limits of reasonableness” (ibid., p. 32). Secondly, he proposes: “the establishment of *appropriate and effective machinery for fact-finding and intermediate review by impartial agencies, with authority derived from competent international organs rather than the parties\**” (ibid.). Bowett’s last suggestion for the restraint of resort to forcible reprisals is the “application of constraint *in the form of sanctions by competent organs\** of final review such as the Security Council or, exceptionally, an appropriate regional body, designed to ensure compliance with authoritative censure of any policy of reprisals or illegal activities likely to give rise to reprisals” (ibid.).

include armed reaction to forms of indirect aggression and terrorism. It should not be overlooked, however, that the problem of lawfulness arises also in connection with forcible reprisals resorted to by way of reaction to particularly serious wrongful acts, although not involving armed force. We refer to cases of resort to force by way of reaction to “economic aggression”, to violations of self-determination,<sup>202</sup> or in order to safeguard the lives of nationals in a foreign State or in pursuit of other, non-national, humanitarian purposes.<sup>203</sup>

100. While reserving any conclusion as to resort to force by way of reaction to wrongful acts qualified as crimes of States under article 19 of part 1 of the draft, no definite conclusions can be reached with regard to the applicability of the positions taken by the legal writers in question to countermeasures against ordinary wrongful acts. It is only possible to indicate, subject to closer analysis, an inclination towards the view that they should have no place, even *de jure condito*, within the framework of the consequences of international delicts. It was not possible to envisage how the Commission could accept any derogation from the prohibition of armed reprisals as implied in Article 2, paragraph 4, of the Charter and emphasized in the relevant part of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.<sup>204</sup> The arguments on the necessity of altering current prohibitions in order to adapt them to the realities of State practice are not convincing.<sup>205</sup>

101. Another problem which has been raised in legal writings and practice with reference to the prohibition of the use of force, is its possible impact on the lawfulness of economic coercion (or certain kinds thereof) as a form of countermeasure. According to the most widely accepted interpretation of the prohibition of force, notably of Article 2, paragraph 4, of the Charter of the United Nations (and any “equivalent” rule of general international law), the term “force” means military force only. Any objectionable forms of economic coercion could only be condemned—as some of them are expressly in international instruments other than the Charter—as part of a separate rule prohibiting intervention or certain forms of intervention.<sup>206</sup> In

---

<sup>202</sup> On these issues, see Sicilianos, *op. cit.*, pp. 389-395 and pp. 427-455.

<sup>203</sup> See, *inter alia*, Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, and Bowett, “The use of force for the protection of nationals abroad”, in *The Current Legal Regulation ...*, *op. cit.*, pp. 39-55.

<sup>204</sup> See footnote 106 above.

<sup>205</sup> As Taulbee and Anderson have put it, “[t]hose arguments rest upon events and situations that are transitory or which are not amenable to control through legal means” (*loc. cit.*, p. 333). Such arguments are even less convincing because “the idea that the law should authorize what it cannot constrain is especially pernicious ... the prudent course is to tolerate certain practices when necessity demands rather than investing them with the sanctity of a legal rule. The seeming disorder of contemporary life should not diminish the vision of the Charter” (*ibid.*, pp. 333-334). Similarly, Barsotti observes that “from a *quantitative*\* point of view (that is, judging from the frequency of relevant actions) the divergence between the prohibition of armed reprisals embodied in the Charter and actual practice, is not so serious as to give grounds to the belief that there is a process of degeneration of the ban in question” (*loc. cit.*, p. 90).

<sup>206</sup> Waldock, *loc. cit.*, pp. 493-494; Oppenheim, *International Law ... vol. II*, *op. cit.*, p. 153; Bowett, “Economic coercion...”, *loc. cit.*, p. I; Lillich, “The status of economic coercion under international law: United Nations norms”, in *Conference on Transnational Economic Boycotts and Coercion*, pp. 116-117; Beirlaen, “Economic coercion and justifying circumstances”, *Belgian Review of International Law* (1984-85), p. 67; Virally, “Commentaire du paragraphe 4 de l’Article 2 de la Charte”, in *La Charte des Nations Unies*, pp. 120-121; Leben, *loc. cit.*, pp. 63-69; Malanczuk, “Countermeasures ...”, *loc. cit.*, p. 737; Elagab, *op. cit.*, p. 201; Seidl-Hohenveldern, “International

particular, economic coercive measures would be prohibited—by the OAS Charter,<sup>207</sup> General Assembly resolution 2625 (XXV), and other instruments, including Principle VI of the Final Act of the Conference on Security and Cooperation in Europe<sup>208</sup>—whenever they were resorted to against a State “in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind”.<sup>209</sup>

102. The opposite argument, according to which Article 2, paragraph 4, of the Charter of the United Nations would prohibit not only armed reprisals but also economic coercion, was found initially in official statements and legal writings from developing and socialist countries<sup>210</sup> but, following the Arab oil embargo of 1973, even some Western authors supported this position.<sup>211</sup> According to a different opinion, based *inter alia* on the absence from the Charter of the United Nations of any provision, other than Article 2, paragraph 4, condemning individual coercive measures, it would be more correct to think that whenever a measure of economic coercion assumed such features and dimensions as to give rise to consequences amounting to a “strangulation” of the target State, the form of violence it implies does not differ in aim or result from the exercise of a resort to armed force. It must be admitted, in the presence of such a possibility, that the term “force” means more than just armed force. Indeed, the prohibition contained in Article 2, paragraph 4, of the Charter should be logically understood to “embrace also measures of economic or political pressure applied *either* to such extent and with such intensity as to be an equivalent of an armed aggression *or*, in any case—failing such an extreme—in order to force the will of the victim State and secure undue advantages” for the acting State.<sup>212</sup> In view of the variety of opinions, a precise investigation of the practice of States is essential in order to determine whether resort to certain kinds of economic measures against a wrongdoing State constitute, under certain extreme conditions, an unlawful resort to force. If that were so, it would further have to be determined whether such a practice would be prohibited under the same (written and unwritten) rule prohibiting armed force or under the rule prohibiting given forms of intervention.

## B. Respect for human rights and other humanitarian values

---

economic law”, *Collected Courses...*, 1986-III, pp. 200-201, *Restatement of the Law Third*, op. cit., p. 383; and Sicilianos, op. cit., pp. 248-253.

<sup>207</sup> Signed at Bogota on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the “Buenos Aires Protocol” of 27 February 1967 (*ibid.*, vol. 721, p. 324).

<sup>208</sup> See footnote 190 above.

<sup>209</sup> For this interpretation, see Bowett, “Economic coercion...”, loc. cit., pp. 2-3; Blum, “Economic boycotts in international law, in *Conference on Transnational Economic Boycotts...*, op. cit., p. 96; Malanczuk, “Countermeasures...”, loc. cit., p. 737; Beirlaen, loc. cit., p. 67; Seidl-Hohenveldern, “The United Nations and economic coercion”, *Belgian Review of International Law* (1984-85), p. 11; and Salmon, loc. cit., p. 186. On this point, see also, Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques*, pp. 149-151.

<sup>210</sup> See, *inter alia*, the position of Žourek, “La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée?”, in *Mélanges offerts à Henri Rolin*, pp. 530 *et seq.*; and Obradovic, “Prohibition of the threat or use of force” in *Principles of International Law concerning Friendly Relations and Cooperation*, pp. 76 *et seq.*

<sup>211</sup> Paust and Blaustein. “The Arab oil weapon: A threat to international peace”, *AJIL* (1974), pp. 410 *et seq.*

<sup>212</sup> Arangio-Ruiz, “Human rights and non-intervention in the Helsinki Final Act”, in *Collected Courses...*, 1977-IV, p. 267. A similar position is taken by Cassese, op. cit., p. 163.



103. The need to set limits on reprisals in response to the “supreme dictates of civilization and humanity” seems initially to have manifested itself mainly in the regulation of belligerent reprisals. It was indeed principally in time of war that compliance with those dictates was most often sacrificed. However, the belief in the existence of inviolable ethical limits to the exercise of reprisals led to early recognition that the limits placed on reprisals in wartime should apply *a fortiori* in time of peace.<sup>213</sup> Again, a case in point is the principle applied in the *Portuguese Colonies* case (Naulilaa incident),<sup>214</sup> according to which, for a reprisal to be lawful it must be *limitée par les expériences de l’humanité et les règles de la bonne foi applicables dans les rapports d’État à État*.<sup>215</sup>

104. The “supreme dictates” in question (as applying in peacetime) affected in the first place the limits to be placed on reprisals so that they could not unlawfully cause injury to foreign nationals. Whatever the seriousness of the violation involved, the injured State could not take measures which trampled upon certain fundamental principles of humanity to the detriment of the offending State’s nationals present in its territory, for example, by violating their right to life or their right not to be subjected to physical or moral violence, notably to torture, slavery or any other indignity.<sup>216</sup>

105. In addition to the requirement to protect foreign nationals, the importance of the respect for fundamental humanitarian principles in general was also stressed early on. For example, in the course of the debates in the Assembly of the League of Nations on the implementation and amendment of Article 16 of the Covenant with regard to the economic measures to be applied in case of aggression, the concern was repeatedly voiced that in no event should humanitarian relations be endangered.<sup>217</sup> The 1934 resolution of the International Law Institute states in paragraph 4 of article 6 that in the exercise of reprisals 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*.<sup>218</sup>

106. The impact of the general principles in question has been strengthened and specified thanks to the relatively recent development of that substantial *corpus* of rules which constitutes the contemporary law of human rights. Leaving aside the

---

<sup>213</sup> See Lattanzi, *op. cit.*, pp. 293-302; and, in similar vein, De Guttry, *op. cit.*, pp. 268-271. After explaining that resort to one or other of the possible coercive measures depends on the choice of States, Anzilotti noted that States do not have absolute freedom of choice and, after listing a number of actions which were condemned by the laws of warfare although they amount to less than warfare itself, he concluded that *a fortiori* they were to be condemned in peacetime (*Corso di diritto internazionale*, 3rd ed., pp. 166-167).

<sup>214</sup> See footnote 64 above.

<sup>215</sup> *Ibid.*, p. 1026.

<sup>216</sup> As early as 1888, for example, following the violation by the United States of America of the 1880 treaty on the immigration of Chinese nationals (the “Chinese Exclusion Act”), China, while suspending performance of its treaty obligations towards the United States, decided nevertheless to respect, for reasons of humanity, the rights of United States nationals under Chinese jurisdiction (*Foreign Relations of the United States*, 1889, p. 132). Recently, in its comment to section 905, the *Restatement of the Law Third* affirms that “Self-help measures against the offending State may not include measures against the State’s nationals that are contrary to the principles governing human rights and the treatment of foreign nationals\*” (*op. cit.*, p. 381).

<sup>217</sup> League of Nations, *Reports and Resolutions on the subject of Article 16 of the Covenant, Memorandum and Collection of Reports, Resolutions and References prepared in Execution of the Council’s Resolution of December 8th, 1926*, Geneva, 13 June 1927 (League of Nations publication, *V.Legal*, 1927.V.14 (document A.14.1927.V)), p. 11.

<sup>218</sup> See *Annuaire de l’Institut de droit international* (footnote 43 above).

question whether and to what extent the treaty rules in the field of human rights have become or are close to becoming a part of general international law, there can be no doubt that this development brings about a further restriction of the liberty of States to resort to forms of reprisal likely to imperil the human interests for the protection of which such a development has taken place.<sup>219</sup>

107. Explicit indications to that effect are contained in provisions of international instruments on human rights. Article 4 of the International Covenant on Civil and Political Rights provides that States “may take measures derogating from their obligations under the present Covenant” only “in time of public emergency which threatens the life of the nation”; and even under circumstances of that kind States are not to take measures derogating from certain fundamental principles of humanity. It has been inferred that the rights contemplated in the Covenant cannot be infringed by measures taken by way of reaction to an internationally wrongful act.<sup>220</sup> Article 60, paragraph 5, of the Vienna Convention on the Law of Treaties according to which suspension or termination—in whole or in part—of a treaty in case of a material breach shall in no case be resorted to with regard “to provisions relating to the protection of the human person contained in treaties of a humanitarian character”<sup>221</sup> is also relevant. Schachter is of the opinion that “treaties covered by this paragraph clearly include the Geneva Conventions for the protection of victims of war, the various human rights treaties, and conventions on the status of refugees, genocide and slavery”.<sup>222</sup>

108. It remains, of course, to be seen to what extent rules such as those in which no explicit mention is made of measures of reaction to an internationally wrongful act condition the choices of injured States with regard to measures under general international law. In particular, the question may be asked whether and to what extent the choices might be limited by the International Covenant on Economic, Social and Cultural Rights.

109. The rules evoked in the preceding paragraphs are interpreted quite extensively by some authors. They affirm, for example, that limitations cannot only be derived from treaties and general rules on human rights (or from the humanitarian law of armed conflicts) but from any rules intended in any way to safeguard the moral and material interests of the human person. An injured State could thus not react by

---

<sup>219</sup> In this regard, see, *inter alia*, Morelli, op. cit., p. 362; Reuter, op. cit., p. 463; Riphagen, *Yearbook ... 1983*, vol. II (Part One) (footnote 35 above), p. 17, paras. 88-89; Dominicé, “Observations...” loc. cit., p. 62; Zoller, loc. cit., p. 376; and Schachter, “Self-help in international law: U.S. action in the Iranian hostages crisis”, *Journal of International Affairs* (1983-1984), pp. 231-233.

<sup>220</sup> De Guttry, op. cit., p. 271.

<sup>221</sup> On the inapplicability of the principle of reciprocity in case of violations of human rights treaty obligations, see Lattanzi, op. cit., pp. 302 *et seq.*; and Sicilianos, op. cit., pp. 352-358. On the same lines, article 11, paragraph 1, of part 2 of the draft articles proposed by Riphagen states that:

“1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

“(a) ...

“(b) ...

“(c) such obligations are stipulated for the protection of individual persons irrespective of their nationality.” (See footnote 103 above).

<sup>222</sup> Schachter, loc. cit., p. 181. The inviolability of these rules (by way of reprisal) is also maintained by Zemanek, “Responsibility of States...”, loc. cit., p. 371.

terminating (or even suspending) a treaty<sup>223</sup> providing forms of economic assistance to the offending State intended to better the conditions of a part of the latter's population. This should safeguard, for example, the obligations of injured States in the area of international cooperation for development as envisaged within the framework of the New International Economic Order.<sup>224</sup> Others, such as Conforti,<sup>225</sup> take the contrary view.

110. The difficulty of establishing the threshold beyond which countermeasures are or should be condemned as infringing humanitarian obligations in a broad sense lies in the precise definition of the human rights and interests the violation of which would not be permitted even in reaction to a State's unlawful act. It is certain that not all human rights or individual interests could reasonably qualify.

111. An obvious instance is the question whether the *faculté* to resort to reprisals is in any way limited by the rules protecting the property of nationals abroad, particularly business assets. A variety of trends may be identified among legal writers. According to some writers, reprisals against the private property of nationals of the offending State would be unlawful in that ownership would qualify among the wider category of human rights covered by the rules considered in the preceding paragraphs.<sup>226</sup> Other writers believe that, *a fortiori* in peacetime, the *jus in bello* prohibition on the taking of private property should be applied: "The taking by a State of the property of foreigners in the pursuit even of actual hostilities against their home-country is not justified under general international law. It will therefore be justified even less as a mere measure of reprisal".<sup>227</sup> Schachter believes, however, that this opinion is not confirmed by the prevailing practice:

Blocking and confiscation of private property of nationals of an enemy State have been common in time of war and generally condoned as wartime measures. However, the seizure of private property as countermeasure against an offending State in time of peace has been characterized as illegal by some jurists but nonetheless carried out by States in recent years.<sup>228</sup>

112. Some commentators on the use of measures involving foreign private property propose a distinction between definitive confiscation of property, on the one hand, and temporary measures such as seizure, blocking, freezing, and the like, on the other hand, the first being generally considered unlawful while the second would not be

---

<sup>223</sup> Cassese, *op. cit.*, p. 271. In the same vein, see Boisson de Chazournes, *op. cit.*, p. 153.

<sup>224</sup> Similarly, Elagab (*op. cit.*, p. 194) is of the opinion that cases of economic coercion of particular severity should be identified, for instance, by applying the "concept of dependence and reliance", that is, by examining whether and to what extent measures have as their object commodities or services that are vital to the well-being of the State against which the measures are directed. This consideration would be of particular importance in case of measures directed against developing countries.

<sup>225</sup> *Op. cit.*, p. 360.

<sup>226</sup> Higgins, "The taking of property by the State: Recent developments in international law", *Collected Courses...*, 1982-11, p. 355.

<sup>227</sup> Seidl-Hohenveldern, "Reprisals and the taking of private property", in *Netherlands International Law Review, De Conflictu Legum: Essays presented to Roeland Ditto Kollewijn and Johannes Offerhaus*, p. 475. See also the other authors quoted by De Guttry, *op. cit.*, p. 277, footnote 121.

<sup>228</sup> *Loc. cit.*, p. 181; see also, Borchard, "Reprisals on private property", *AJIL* (1936), pp. 108-113. The admissibility of violations of property rights as a form of countermeasure has also recently been maintained by Boisson de Chazournes (*op. cit.*, p. 156), who underlines, however, the need for *respect du principe du règlement pacifique de différends et [du] respect de la condition de la proportionnalité*.

prohibited.<sup>229</sup> In Schachter's view, the inadmissibility of the first type of measure stems from the criterion of reasonableness rather than from incompatibility with the *raison d'être* of reprisals. It would be on grounds of reasonableness, in particular, that the injured State should exercise relative restraint.<sup>230</sup> According to De Guttry, there is increasingly a feeling that it is unjust to sacrifice the private property of individuals who normally have no part whatsoever in the wrongful conduct of the offending States: this would gradually lead—albeit not without contradictions—to confining reprisals of this kind to extreme cases.<sup>231</sup> More than half a century ago, the International Law Institute took a similar line in its resolution relating to the regime of reprisals in peacetime, containing a suggestion to:

Limiter les effets des représailles à l'État contre qui elles sont dirigées, *en respectant, dans toute la mesure du possible\**, tant *les droits des particuliers\** que ceux des États tiers.<sup>232</sup>

113. Although the most obvious issue is to determine how far countermeasures may go before they encounter the barrier of the right to private property, more thought should be given to other areas of humanitarian interests where similar problems arise. Examples are the property of cultural institutions, works of art, pharmaceutical industries, and public health facilities.

---

<sup>229</sup> Among recent commentators, this is the view taken, for example, by Zoller, *op. cit.*, pp. 73-74; Elagab, *op. cit.*, p. 11; and Malanczuk, "Countermeasures...", *loc. cit.*, p. 225, based on the irreversible nature of definitive confiscation and the reversible nature of the temporary measures.

<sup>230</sup> *Loc. cit.*, p. 182.

<sup>231</sup> De Guttry, *op. cit.*, p. 280. Similarly, Sicilianos, *op. cit.*, p. 360.

<sup>232</sup> Article 6, paragraph 3 (see footnote 43 above).

### C. Inviolability of specially protected persons

114. Among authors there is a widespread notion that acts of reprisal would be unlawful if taken in violation of international obligations aimed at the protection of diplomatic envoys and heads of State. Oppenheim states that:

... individuals enjoying the privilege of extra-territoriality while abroad such as heads of States and diplomatic envoys, may not be made the object of reprisals, although this has occasionally been done in practice.<sup>233</sup>

Only a few authors, it seems, question the existence of a rule of general international law condemning acts of coercion, though not otherwise unlawful, when directed against diplomatic envoys.<sup>234</sup>

115. Some of the writers who discuss the rationale for the limitation in question seem to believe that it derives from the primary—and peremptory—rules concerning the protection of diplomatic envoys.<sup>235</sup> Other writers argue the matter on the ground of the “self-contained” nature or peculiarities of the law of diplomatic relations.<sup>236</sup> Among them is the former Special Rapporteur, according to whom the limitation in question would be a case “which does not lend itself to generalization within the context of the inadmissibility of specific reprisals. Indeed, the case seems rather to fall within the scope of a deviation from the general rules concerning the legal consequences of internationally wrongful acts, implicitly provided for at the time the primary relationship is established”.<sup>237</sup>

---

<sup>233</sup> Oppenheim, *International Law...*, vol. II, op. cit., p. 140. This opinion was expressed by Grotius, op. cit. According to Twiss, diplomatic agents “cannot be the subjects of reprisals, either in their persons or in their property, on the part of the Nation which has received them in character of envoys (*legati*), for they have entrusted themselves and their property in good faith to its protection” (Twiss, *The Law of Nations (considered as Independent Political Communities)*, p. 39). See also Cahier, *Le droit diplomatique contemporain*, p. 22; Tomuschat, loc. cit., pp. 179 *et seq.*, and especially p. 187; and Dominicé, “Représailles...”, loc. cit., p. 547.

<sup>234</sup> Anzilotti, op. cit., 3rd ed., p. 167. See also Conforti, op. cit., pp. 360-361.

<sup>235</sup> According to Röling, who recalls the ICJ judgment in the *United States Diplomatic and Consular Staff in Tehran* case (see footnote 50 above):

“It would have been a good thing if the Court had had or taken the opportunity to make a clear statement that those involved were persons against whom reprisals are forbidden in all circumstances, according to unwritten and written law—even if the wrong against which a State wished to react consisted of the seizure of its diplomats! The provisions of the Convention are so formulated that ‘reprisals in kind’ are also inadmissible. It is possible to dispute the wisdom of this legal situation, but the arguments in favour of the current law—total immunity of diplomats because of the great importance attached to unhindered international communication—prevail.” (“Aspects of the case concerning United States diplomats and consular staff in Tehran”, *Netherlands Yearbook of International Law* (1980), p. 147).

The same opinion is held by Dominicé, who wonders; *Que deviendraient les relations diplomatiques, en effet, si l’État qui, fût-ce à juste titre, prétend être victime d’un fait illicite, pouvait séquestrer un agent diplomatique ou pénétrer dans les locaux d’une mission en s’appuyant sur la doctrine des représailles?* (“Observations...”, loc. cit., p. 63).

<sup>236</sup> Lattanzi, op. cit., pp. 317-318; and Elagab, op. cit., pp. 116 *et seq.*

<sup>237</sup> *Yearbook ... 1983*, vol. II (Part One) (see footnote 35 above), p. 17, para. 91. It has to be recalled that article 12 (a) of part 2 of the draft articles (see footnote 103 above), providing that reprisals and reciprocity do not apply “to the suspension of obligations ... of the receiving State regarding the immunities to be accorded to diplomatic and consular mission and staff”, met with some

116. A more articulate position is taken by others. One of them, for example, wonders which of the obligations among those intended for the protection of diplomatic envoys, would be inviolable by way of reprisals. According to this writer, international practice indicates that not all the forms of reprisal against diplomats are considered unlawful. It would be difficult, for example, to categorize as such measures enacted to restrict the freedom of movement of diplomatic envoys.<sup>238</sup> It would consequently be possible, according to this writer, to affirm that the unlawfulness of reprisals against diplomatic envoys encompasses essentially those measures directed against the physical person of diplomats and consisting mainly, but not exclusively, in a breach of the rule of inviolability of the person. The rationale for the restriction would, of course, reside in the need to safeguard, in all circumstances, the special protection which is reserved to diplomatic envoys in view of the particular functions they perform.<sup>239</sup>

117. An adequate analysis of the practice should make it possible to adopt the most appropriate solution, *de lege lata* and from the viewpoint of progressive development. Here as elsewhere it should be considered that any restrictions inevitably reduce the possibility of reaction in even more sensitive areas than that of diplomatic relations. These concern areas of more general humanitarian interest, including vital economic relations.

#### D. The relevance of *jus cogens* and *erga omnes* obligations

118. In addition to the absolute limits considered so far (as deriving from specific rules or principles of general international law), the fact that reprisals may be subject to further restrictions should also be considered, in particular, those which may derive from *jus cogens*.<sup>240</sup>

119. Restrictions on the right of reprisal deriving from *jus cogens* are generally not mentioned by legal writers prior to the Second World War. More recently Reuter,<sup>241</sup> Riphagen,<sup>242</sup> Zemanek,<sup>243</sup> Lattanzi,<sup>244</sup> Gaja,<sup>245</sup> Alland,<sup>246</sup> Elagab,<sup>247</sup> and Sicilianos<sup>248</sup>

---

reservations among the members of the Commission (Reuter, *Yearbook ... 1984*, vol. I, 1858th meeting, para. 30; Sinclair, *ibid.*, para. 27; and Arangio-Ruiz, *Yearbook ... 1985*, vol. I, 1900th meeting, para. 21) and representatives in the Sixth Committee (Qatar (A/C.6/40/SR.23, para. 106); Czechoslovakia (A/C.6/40/SR.29, para. 18); and United Kingdom (A/C.6/40/SR.32, para. 26)).

<sup>238</sup> De Guttry, *op. cit.*, p. 282.

<sup>239</sup> *Ibid.*, p. 283. See similar reasoning on the part of Sicilianos, according to whom *il y a certainement un noyau irréductible du droit diplomatique ayant un caractère impératif—l’inviolabilité de la personne des agents diplomatiques, l’inviolabilité des locaux et des archives—qui est de ce fait réfractaire aux contre-mesures. Il y a en revanche d’autres obligations qui ne semblent pas s’imposer forcément en toute hypothèse et qui pourraient, certes avec toute la précaution voulue, faire l’objet de contre-mesures proportionnées* (*op. cit.*, p. 351).

<sup>240</sup> On these problems, see Lattanzi, *op. cit.*, p. 306.

<sup>241</sup> *Op. cit.*, p. 463.

<sup>242</sup> Riphagen covered the point under his article 12 (*b*) (see footnote 103 above), according to which countermeasures and reciprocity would not be applied with respect to the obligations incumbent upon a State “by virtue of a preemptory norm of general international law”.

<sup>243</sup> “La responsabilité des États pour faits internationalement illicites ainsi que pour faits internationalement licites”, in *Responsabilité internationale*, p. 84.

<sup>244</sup> *Op. cit.*, pp. 306 *et seq.*

<sup>245</sup> “*Jus cogens* beyond the Vienna Convention”, *Collected Courses...*, 1981-III, p. 297.

refer to *jus cogens* as a general limitation. Although *jus cogens* was originally considered (in the Vienna Convention on the Law of Treaties) in connection with the inadmissibility of conventional derogation from fundamental general rules,

It would be illogical... at the same time [to] admit that the breach of an obligation imposed by a peremptory norm is justified only because another State had previously violated an international obligation. The same applies when the previous violation also concerns an obligation imposed by a peremptory norm; the very existence of such a category of norms implies that there is a general interest in international society that they should be respected.<sup>249</sup>

120. Indeed, some writers lament the absence from the text of article 30 of part 1 of the draft articles<sup>250</sup> of a clear reference to contrast it with *jus cogens* rules as an exception to the exclusion of unlawfulness of measures taken by way of reaction to an internationally wrongful act. However, Gaja's comment that such an exception is implied in the expression "measure legitimate under international law" appearing in article 30<sup>251</sup> is correct. By its implied reference to the regime of reprisals, that expression would exclude the lawfulness of measures involving a violation of a peremptory rule. Such an interpretation is also supported by the express inclusion of the restriction in Riphagen's draft article 12 (b).

121. The restriction presently under discussion is extended by Lattanzi (from *jus cogens* rules) to any rule creating *erga omnes* rights and obligations. According to him:

... there can be no doubt that the lawfulness of a reprisal consisting in a violation of *erga omnes* rules is excluded precisely by the fact that the violation of an obligation to the detriment of one State in such a case simultaneously represents a violation of the same obligation to the detriment of all those to whom the rule applies. It would be inadmissible for the sanction imposed on one State to constitute the violation of an obligation towards another State.<sup>252</sup>

In Lattanzi's view, *erga omnes* rules are so structured that, on the one hand, any State party can claim compliance and, on the other hand, no State party may lawfully react to the breach of those rules by another breach.<sup>253</sup> The same point is made by Gaja when he states:

... one of the cases in which international law cannot allow counter-measures ... is when the obligation which is violated operates in specific cases towards all other States: the rights of innocent States would then necessarily be infringed.<sup>254</sup>

122. It will not be overlooked that a problem largely similar to that of *erga omnes* obligations has already been touched upon with regard to suspension and termination of treaties.<sup>255</sup> In formulating the draft articles it will therefore be necessary to give careful thought, always in the light of practice, to the absolute limitations traditionally recognized with regard to the admissibility of countermeasures (force, human rights, diplomatic envoys) to see whether they need to be supplemented by the prohibition

---

<sup>246</sup> Loc. cit., p. 185.

<sup>247</sup> Op. cit., p. 99.

<sup>248</sup> Op. cit., pp. 340-344.

<sup>249</sup> Gaja, loc. cit., p. 297.

<sup>250</sup> See footnote 22 above.

<sup>251</sup> Loc. cit., p. 297.

<sup>252</sup> Op. cit., p. 314.

<sup>253</sup> Ibid.

<sup>254</sup> Loc. cit., p. 297.

<sup>255</sup> See paras. 81-83 above.

not only of countermeasures taken in contravention of *jus cogens* rules, but also of measures in breach of the rules setting forth *erga omnes* obligations.